

COMMISSION IMPLEMENTING DECISION (EU) 2017/1857**of 13 October 2017****on the recognition of the legal, supervisory and enforcement arrangements of the United States of America for derivatives transactions supervised by the Commodity Futures Trading Commission as equivalent to certain requirements of Article 11 of Regulation (EU) No 648/2012 of the European Parliament and 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 ⁽¹⁾, and in particular Article 13(2) thereof,

Whereas:

- (1) Article 13 of Regulation (EU) No 648/2012 provides for a mechanism intended to establish solutions that ensure consistency between the legal requirements established by the Union and those of third countries in the field covered by that Regulation. Amongst those solutions, the Commission is empowered to adopt decisions declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the requirements laid down in Articles 4, 9, 10 and 11 of Regulation (EU) No 648/2012 so that counterparties entering 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. That declaration of equivalence allows avoiding the application of duplicative or conflicting rules and therefore contributes to the achievement of the overarching aim of Regulation (EU) No 648/2012 to reduce systemic risk and increase the transparency of derivatives markets by ensuring an internationally consistent application of the principles agreed with the Union's international partners and laid down in that Regulation.
- (2) Paragraphs 1, 2 and 3 of Article 11 of Regulation (EU) No 648/2012, as specified by the technical standards adopted pursuant to Article 11(14)(a) and (b) and Article 11(15) of that Regulation, establish the Union's legal requirements concerning the timely confirmation, portfolio compression and reconciliation applicable to OTC derivative contracts not cleared by a CCP, 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 legal regime to be considered equivalent to the legal 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 in respect of the regulatory objectives they achieve. The purpose of this equivalence assessment is therefore to verify that the legal, supervisory and enforcement arrangements of the United States of America (USA) 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 than those markets could be exposed to by that type of derivative contracts entered into by counterparties established in the Union and, consequently, do not pose unacceptable levels of systemic risk in the Union.
- (4) On 1 September 2013, the Commission received the technical advice of the European Markets Supervisory Authority (ESMA) on the legal, supervisory and enforcement arrangements in the USA ⁽²⁾ regarding, among

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.⁽²⁾ ESMA/2013/BS/1157, Technical advice on third country regulatory equivalence under EMIR — US, Final report, European Securities and Markets Authority, 1 September 2013.

others, the operational risk mitigation techniques applicable to OTC derivative contracts not cleared by a CCP. In its technical advice, ESMA found that the legally binding requirements on timely confirmation, portfolio reconciliation and portfolio compression in the USA were equivalent to the legally binding requirements applicable under Regulation (EU) No 648/2012. ESMA considered that at the moment of its assessment, however, the USA regime for dispute resolution was not equivalent with that of Article 11(1) of Regulation (EU) No 648/2012. ESMA also observed that the equivalence between regimes for bilateral margins could not be assessed at the time, as the technical standards specifying the rules on bilateral margins in the Union had not yet been developed.

- (5) The Commission has considered ESMA's advice in carrying out its assessment, together with the regulatory developments that have taken place since then. This Decision is not only based, however, on a comparative analysis of the legal, supervisory and enforcement requirements applicable in the USA, but also on an assessment of the outcome of those requirements, and their adequacy to mitigate the risks arising from those contracts 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 the USA for OTC derivative contracts are laid down in title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act') and in the specific implementing rules adopted by the Commodity Futures Trading Commission ('CFTC Regulations'). The Dodd-Frank Act, which entered into force in July 2010, established a new regulatory framework for certain OTC derivatives defined as swaps in section 1a(47) of the Commodity Exchange Act ('CEA'), aiming at reducing systemic risk, increasing transparency and promoting market integrity within the financial system. The CFTC has jurisdiction over swaps and most of the operative provisions of title VII of the Dodd-Frank Act became applicable in 2011.
- (7) The operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP, as added in a new section 4s(i) to the CEA by section 731 of the Dodd-Frank Act, apply to swap dealers and major swap participants, as defined in the CEA. This Decision should therefore cover the legal, supervisory and enforcement arrangements regarding timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations, as well as margin requirements applicable to swap dealers and major swap participants established in the USA that are authorised and supervised in accordance with the CFTC Regulations. This Decision should however not cover USA legal, supervisory and enforcement arrangements applicable to persons that are registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).
- (8) CFTC Regulations on operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP contain similar obligations to those provided for in paragraphs 1 and 2 of Article 11 of Regulation (EU) No 648/2012. In particular, Subpart I of Part 23 of the CFTC Regulations contains specific detailed requirements regarding timely confirmation, portfolio compression, portfolio reconciliation, transaction valuation and dispute resolution applicable to OTC derivative contracts not cleared by a CCP. In all following respects, the requirements set out in the CFTC Regulations are equivalent to the relevant requirements of Regulation (EU) No 648/2012: (i) the frequency and thresholds for portfolio reconciliation match; (ii) the deadlines for timely confirmation match; (iii) requirements for portfolio compression on a 'comply or explain' basis; (iv) requirements for daily valuation of non-cleared transactions. Taking into account the limited impact due to the difference in scope of the requirements for agreements on how disputes are resolved, those requirements should also be considered equivalent to the requirements of Regulation (EU) No 648/2012 on dispute resolution.
- (9) On the basis of the above, in relation to swaps that are under the jurisdiction of the CFTC, as defined in section 1a(47) of the CEA, the CFTC's legal, supervisory and enforcement arrangements applicable to swap dealers and major swap participants should be considered as equivalent to the requirements set out in Regulation (EU) No 648/2012 in respect of the timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations applicable to OTC derivative contracts not cleared by a CCP, as laid down in Article 11(1) and Article 11(2) of that Regulation.

- (10) Concerning the margins for OTC derivative contracts not cleared by a CCP, the legally binding requirements of the CFTC consist of the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants published in January 2016 ('final margin rule') and the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross Border Application of the Margin Requirements ('cross-border margin rule') published in August 2016.
- (11) While the CFTC Regulations on operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP apply to all swap dealers and major swap participants, the CFTC Regulations on margins for those OTC derivative contracts only apply to swap dealers and major swap participants that are not subject to a prudential regulator. The CEA definition of 'prudential regulator' includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency.
- (12) CFTC Regulations applicable to margins for OTC derivative contracts not cleared by a CCP only require the exchange of initial margin with a 'covered counterparty' as defined in section 23.151 of the CFTC Regulations. A covered counterparty is a counterparty that is a financial end user with material swaps exposure or a swap entity that enters into a swap with a covered swap entity. According to section 23.150 of the CFTC Regulations, the material swaps exposure is an average daily notional value of non-cleared OTC derivatives that exceeds USD 8 billion (8 000 million), whereas the analogous threshold set out in Article 28 of Commission Delegated Regulation (EU) 2016/2251⁽¹⁾ is EUR 8 billion (8 000 million). In the Union, the requirement to exchange variation margin does not have a materiality threshold, and applies to all counterparties subject to Article 11(3) of Regulation (EU) No 648/2012. The CFTC Regulations for combined minimum transfer amount of initial and variation margin in the final margin rule is USD 500 000, whereas the related requirement set out in Article 25 of Delegated Regulation (EU) 2016/2251 is EUR 500 000. Taking into account the limited impact due to the difference in currencies, these amounts should be considered equivalent.
- (13) The requirements of the final margin rule apply to swaps, which encompass almost all contracts defined as OTC derivatives in Regulation (EU) No 648/2012 with the exception of foreign exchange forwards and foreign exchange swaps, for which the final margin rule sets no requirements. In addition, CFTC Regulations do not contain any specific treatment for structured products including covered bonds and securitisations. In the Union, foreign exchange swaps and foreign exchange forwards are exempted from the initial margins requirements, and derivatives associated with covered bonds for hedging purposes may also be exempted from initial margin requirements. This Decision should therefore only apply to OTC derivatives that are subject to margins under both the Union law and the CFTC Regulations.
- (14) The requirements in the CFTC Regulations for the calculation of initial margin are equivalent to the requirements set out in Regulation (EU) No 648/2012. Like Annex IV to Delegated Regulation (EU) 2016/2251, the CFTC Regulations allow the use of a standardised model. Alternatively, internal or third party models may be used for that calculation where those models contain certain specific parameters, including minimum confidence intervals and margin periods of risk, and certain historical data, including stressed periods. Those models must be approved by the CFTC or a registered futures association.
- (15) The requirements in the CFTC Regulations on eligible collateral and on how that collateral is held and segregated are equivalent to those set out in Article 4 of Delegated Regulation (EU) 2016/2251. The CFTC Regulations contain an equivalent list of eligible collateral, and the preamble to the final margin rule states that swap dealers

⁽¹⁾ 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).

and major swap participants that are not subject to a prudential regulator should take collateral concentration into account. The CFTC requirements on margins for OTC derivative contracts not cleared by a CCP should therefore be considered equivalent to those provided for under Article 11(3) of Regulation (EU) No 648/2012.

- (16) With regard to the equivalent level of protection of professional secrecy, in the USA, information held by the CFTC, as well as other federal regulators, is subject to the Privacy Act and the Freedom of Information Act (FOIA). Under the FOIA, in many cases, steps must be taken by an individual or an organization to secure confidential treatment of submitted information. Therefore, the Privacy Act and the FOIA provide guarantees of professional secrecy, including the protection of business secrets shared by the authorities with third parties, equivalent to those set out in Title VIII of Regulation (EU) No 648/2012. The USA requirements should be considered to provide an equivalent level of protection of professional secrecy as guaranteed in Regulation (EU) No 648/2012.
- (17) Finally, with regard to the effective supervision and enforcement of the legal arrangements in the USA, the CFTC has broad investigative and surveillance powers to assess compliance with the timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations applicable to OTC derivative contracts not cleared by a CCP. The CFTC can take a wide range of supervisory measures to stop any breach of the applicable requirements. Moreover, the USA legal framework provides for civil penalties, including temporary or permanent restraining orders or injunctions, and fines, as well as criminal penalties, for breaches 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 Dodd-Frank Act, CEA and CFTC Regulations in an equitable and non-distortive manner so as to ensure effective supervision and enforcement.
- (18) The Commission, in cooperation with ESMA, should continue monitoring on a regular basis the evolution and the effective implementation of the legal, supervisory and enforcement arrangements in the USA for OTC derivative contracts regarding the timely confirmation, portfolio compression and reconciliation, valuation, dispute resolution and margin requirements applicable to OTC derivative contracts not cleared by a CCP on the basis of which this Decision has been taken. This should be 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 re-assess the equivalence granted by this Decision. Such re-assessment could lead to the repeal of this Decision.
- (19) 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 the United States of America (USA) for operational risk-mitigation techniques that are applied to transactions regulated as 'swaps' by the Commodity Futures Trading Commission (CFTC) in accordance with section 721(a)(21) of the Dodd-Frank Act and that are not cleared by a CCP shall be considered as equivalent to the requirements set out in paragraphs 1 and 2 of Article 11 of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in the USA and registered with the CFTC as a swap dealer or major swap participant.

Article 2

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of the USA for the exchange of collateral that are applied to transactions regulated as 'swaps' by the Commodity Futures Trading Commission (CFTC) in accordance with section 721(a)(21) of the Dodd-Frank Act and that

are not cleared by a CCP shall be considered as equivalent to the requirements of Article 11(3) of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in the USA and registered with the CFTC as a swap dealer or major swap participant, and that counterparty is subject to the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants and the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross Border Application of the Margin Requirements.

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, 13 October 2017.

For the Commission

The President

Jean-Claude JUNCKER
