

**COMMISSION IMPLEMENTING DECISION (EU) 2017/2318****of 13 December 2017****on the equivalence of the legal and supervisory framework in Australia applicable to financial markets in accordance with Directive 2014/65/EU 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 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 <sup>(1)</sup>, and in particular Article 25(4)(a) thereof,

Whereas:

- (1) Article 23(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council <sup>(2)</sup> requires investment firms to ensure that the trades they undertake in shares admitted to trading on regulated markets, or traded on trading venues should take place on regulated markets, multilateral trading facilities (MTFs) or systematic internalisers, or third-country trading venues assessed by the Commission as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU.
- (2) Article 23(1) of Regulation (EU) No 600/2014 only applies a trading obligation in respect of shares. The trading obligation does not comprise other equity instruments, such as depositary receipts, ETFs, certificates and other similar financial instruments.
- (3) The equivalence procedure for trading venues established in third countries set out in Article 25(4)(a) of Directive 2014/65/EU aims to allow investment firms to undertake trades in shares that are subject to the trading obligation in the Union, on third-country trading venues recognised as equivalent. The Commission should assess whether the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements resulting from Regulation (EU) No 596/2014 of the European Parliament and of the Council <sup>(3)</sup>, from Title III of Directive 2014/65/EU, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC of the European Parliament and of the Council <sup>(4)</sup>, and which are subject to effective supervision and enforcement in that third country. This should be read in the light of the objectives pursued by that act, in particular its contribution to the establishment and functioning of the internal market, market integrity, investor protection and ultimately, but no less importantly, financial stability.
- (4) In accordance with the fourth subparagraph Article 25(4)(a) of Directive 2014/65/EU, a third-country legal and supervisory framework may be considered equivalent where that framework fulfils at least the conditions that (a) the markets are subject to authorisation and to effective supervision and enforcement on an ongoing basis, (b) the markets have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable, (c) security issuers should be subject to periodic and ongoing information requirements ensuring a high level of investor protection, and (d) market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation.

<sup>(1)</sup> OJ L 173, 12.6.2014, p. 349.

<sup>(2)</sup> 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).

<sup>(3)</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

<sup>(4)</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

- (5) The purpose of this equivalence assessment is to assess, inter alia, whether the legally binding requirements which are applicable in Australia to financial markets established and authorised as securities exchanges therein under the supervision of the Australian Securities and Investments Commission (ASIC) are equivalent to the requirements resulting from Regulation (EU) No 596/2014, from Title III of Directive 2014/65/EU, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC, which are subject to effective supervision and enforcement in that third country.
- (6) The Corporations Act 2001 (Corporations Act) defines a financial market as a facility through which offers to acquire or dispose of financial products are regularly made or accepted. The financial market must operate a multilateral system in accordance with non-discretionary rules. It does not enjoy discretion over how it executes trades and is not allowed to trade on its own account or engage into matched principal trading. Furthermore, a financial market 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. To this effect, operating rules of a financial market must have reasonable and non-discriminatory standards for access and eligibility requirements. These rules are reviewed by ASIC.
- (7) The four conditions set out in the fourth subparagraph of Article 25(4)(a) of Directive 2014/65/EU must be fulfilled in order to determine that the legal and supervisory arrangements of a third country regarding the exchanges authorised therein are equivalent to those laid down in Directive 2014/65/EU.
- (8) According to the first condition, third-country trading venues must be subject to authorisation and to effective supervision and enforcement on an ongoing basis.
- (9) A person is required to hold an Australian Market Licence (AML) to operate a financial market. Under the Corporations Act, the power to grant an AML is vested in the Minister. Under Section 795A of the Corporations Act, an application for an AML must be lodged with the ASIC, who provides advice to the Minister on the application. Authorisation is only granted, inter alia, if the Minister is satisfied that the applicant has adequate arrangements to meet applicable requirements and that the applicant can adequately supervise the market, monitor participants' conduct and enforce compliance with the market's operating rules (Section 795B of the Corporations Act). Once licensed, financial markets are required to comply on an ongoing basis with the conditions of the license and maintain adequate arrangements for operating the market, including arrangements for monitoring and enforcing compliance with the operating rules (Section 792A of the Corporations Act).
- (10) ASIC is a public authority established under the Australian Securities and Investments Commission Act 2001 (the ASIC Act) and is responsible for administering and enforcing the law concerning Australian financial markets. The supervisory and enforcement powers of ASIC include investigation of suspected breaches of the law, issuance of infringement notices and seeking civil penalties from the courts. ASIC can commence criminal prosecutions for the obligations under the Corporations Act that are enforceable as criminal breaches. Furthermore, ASIC has the power to inspect financial markets without prior notice. This includes the power to inspect registers, records and documents. Furthermore, the Minister for Financial Services may give written directions to a financial market operator to take specified measures to ensure compliance with its obligations as a financial market licensee where the Minister is of the opinion that those obligations are not being met (s. 794A of the Corporations Act). If the financial market does not comply with that direction, ASIC may apply to the court for an order requiring compliance (s. 794A of the Corporations Act). ASIC also has the power to give a direction to an entity (including market operators and participants of licensed markets), where it is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or classes of financial products (s. 798J of the Corporations Act). In addition, ASIC may seek orders and refer matters for proceedings to enforce its regulatory and investigative measures. ASIC may apply to a court for an order requiring compliance with ASIC's measures taken on the basis of its regulatory and investigatory powers (s. 70 of the ASIC Act). Furthermore, where an entity fails to comply with a direction issued under the Corporations Act, ASIC may make an application to the court for an order requiring compliance with that direction. Finally, the Corporations Act also requires financial markets to be able to enforce compliance by their members with the provisions of the Corporations Act, the rules and regulations thereunder, and their market operating rules (section 792A of the Act). It is also incumbent on a licensed exchange to address any potential violations of the market's operating rules or the Corporations Act by its members and report such potential violations to the ASIC.
- (11) It can therefore be concluded that securities exchanges in Australia are subject to authorisation and to effective supervision and enforcement on an ongoing basis

- (12) According to the second condition, third-country trading venues must have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable.
- (13) There are overarching obligations that require the operator of financial markets to consider whether securities admitted to trading on the market they operate can be traded in a fair, orderly and transparent way. Section 793A of the Corporations Act includes legally binding requirements to have operating rules governing admission of securities. The operating rules of financial markets set out conditions that must be met for the shares of a listed entity to be quoted on the market. The entity must apply for admission to trading where its securities will be traded and apply for and be granted permission for quotation of all securities in its main class of securities to the financial market's official list. The list of entities admitted to trading is published by the market operator and updated after every trading day. ASIC reviews whether the financial markets have adequate rules, systems and processes to address whether a financial product meets the financial markets' and statutory criteria for being admitted to trading on the market, including ensuring there are no undue restrictions on trading of securities. All securities traded on licensed exchanges must meet certain listing rules, which are submitted to the ASIC for review. The Securities must be freely negotiable and meet certain criteria regarding the distribution of securities to the public and the issuer needed to value the security. A licensed exchange cannot list securities for which information about the issued securities and the issuer is not publicly available. Finally, to secure orderly trading of securities on licensed exchanges, the ASIC and the Minister can suspend trading in a financial product or class of financial products.
- (14) The legally binding obligation in the Corporations Act for 'fair, orderly and transparent' trading requires financial markets to make information about transactions, bids and offers publicly available. In addition there is an obligation that a participant must not enter into a transaction unless the transaction is entered into by matching of a pre-trade transparent order on an order book. There are exemptions for certain trades, such as block trades or trade with price improvement. If a market participant relies on one of these exceptions, it is required to keep records demonstrating that the transaction met the criteria for the exception relied on. The Competition Market Integrity Rules require financial markets to immediately make available pre-trade information received during trading hours, continuously and in real-time, on reasonable commercial terms and on a non-discriminatory basis. For information received after trading hours, the market operator is required to make pre-trade information available by no later than the trading hours next resume. The Australian regulatory framework also includes requirements for providing continuously and in real-time post-trade information. Financial markets are required to make available post-trade trading information on a publically available website, without charge, and with a delay of no more than 20 minutes.
- (15) It can therefore be concluded that securities exchanges in Australia have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner and are freely negotiable.
- (16) According to the third condition, security issuers must be subject to periodic and ongoing information requirements ensuring a high level of investor protection.
- (17) The Australian regulatory framework has clear, comprehensive and specific disclosure requirements applying to annual and interim reports. Issuers whose securities are admitted to trading on an Australian securities exchange are required to publish annual and interim (half-year) financial reports (Sections 292 and 302). The reports must comply with accounting standards (Sections 296 and 304 of the Corporations Act) and present a true and fair view of the financial position and performance of the entity (Section 297 and 305 of the Corporations Act). Further, annual financial reports are required to be audited and an auditor's report must be obtained (Section 301 of the Corporations Act). ASIC maintains a record of information about the company including the prospectus and annual financial statements of the company. The disclosure of comprehensive and timely information about security issuers allows investors to assess the business performance of issuers and ensures appropriate transparency for investors through a regular flow of information.
- (18) It can therefore be concluded that issuers whose securities are admitted to trading on exchanges licensed by the ASIC in Australia are subject to periodic and ongoing information requirements ensuring a high level of investor protection.

- (19) According to the fourth condition, the third-country legal and supervisory framework must ensure market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
- (20) The Australian securities laws establish a comprehensive regulatory and supervisory framework to ensure market integrity, prohibit fraudulent or deceptive conduct on licensed exchanges and dissemination of false or misleading information regarding securities or issuers, as well as to prevent insider trading and market manipulation. The market abuse provisions are set out under Part 7.10 of the Corporations Act. Some of the prohibitions are also set out under the Market Integrity Rules ('MIRs') created under Subsection 798G(1) of the Corporations Act that apply to regulated financial markets and the market participants on those markets. Under Sections 1041E and 1041F of the Corporations Act, making false or misleading statements about financial products, and inducing others to deal in financial products using false or misleading information, as well as engaging in dishonest conduct in relation to a financial product and/or as a financial services licensee (Sections 1041G and 1041H), is prohibited. Division 2 of Part 7.10 of the Corporations Act contains a number of prohibitions of market manipulation. Furthermore, Division 3 of Part 7.10 of the Corporations Act explicitly prohibits insider trading. ASIC enforces those rules by utilising its extensive powers to investigate suspicious market activity and prosecute cases deemed to be in violation of the rules.
- (21) It can therefore be concluded that the Australian legal and supervisory framework ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
- (22) It can therefore further be concluded that the legal and supervisory framework governing financial markets and operated in Australia under the supervision of the ASIC comply with the four conditions for legal and supervisory arrangements and hence should be considered to provide for an equivalent system to the requirements for trading venues laid down in Directive 2014/65/EU, Regulations (EU) No 600/2014 and (EU) No 596/2014 and Directive 2004/109/EC.
- (23) Given that a significant number of shares that are issued and admitted to trading in Australia are also traded on trading venues in the EU, this decision is necessary to ensure that all investment firms subject to the trading obligation as set out in Article 23(1) of Regulation (EU) No 600/2014 preserve the ability to undertake trades in shares admitted to trading on the Australian exchanges. As significant alternative liquidity pools in those shares are available on the Australian exchanges, it is necessary to recognise the legal and supervisory framework of Australia, especially in order to enable investment firms to fulfil their best execution obligation towards their clients.
- (24) This decision is based on data that demonstrates that overall EU trading in a number of shares admitted on the Australian exchanges is of such frequency that MiFID firms could not avail themselves of the exception set out in Article 23(1)(a) of Regulation (EU) No 600/2014. This implies that the trading obligation set out in Article 23(1) of Regulation (EU) No 600/2014 would apply to a significant number of shares admitted to trading in Australia.
- (25) The Decision will be complemented by cooperation arrangements to ensure the effective exchange of information and coordination of supervisory activities between the national competent authorities and ASIC.
- (26) This Decision is based on the legally binding requirements relating to financial markets applicable in Australia 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 regulated markets, the effectiveness of supervisory cooperation in relation to monitoring and enforcement and the fulfilment of the conditions on the basis of which this Decision has been taken.
- (27) The Commission should conduct regular review of the legal and supervisory arrangements applicable to financial markets in Australia. This 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 re-assess the equivalence granted by this Decision. Any re-assessment could lead to the repeal of this Decision.
- (28) Considering that Regulation (EU) No 600/2014 and Directive 2014/65/EU apply from 3 January 2018, it is necessary that this decision enters into force on the day following the day of publication in the *Official Journal of the European Union*.

- (29) 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 23(1) of Regulation (EU) No 600/2014, the legal and supervisory framework in Australia applicable to financial markets authorised therein and set out in the Annex to this Decision shall be considered to be equivalent to the requirements resulting from Directive 2014/65/EU, Regulations (EU) No 600/2014 and (EU) No 596/2014 and Directive 2004/109/EC and to be subject to effective supervision and enforcement.

*Article 2*

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 13 December 2017.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

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## ANNEX

Financial markets:

- (a) ASX Limited
  - (b) Chi-X Australia Pty Ltd
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