

COMMISSION IMPLEMENTING DECISION (EU) 2021/85**of 27 January 2021****on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission****(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 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 decisions 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 substantive 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 such equivalence assessment is therefore to verify whether the legal and supervisory arrangements of the third country concerned 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) The assessment whether the legal and supervisory arrangements of the United States of America (USA) are equivalent to those of the Union should therefore not only be based on a comparative analysis of the legally binding requirements applicable to CCPs in the USA, 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.
- (4) In accordance with Article 25(6) of Regulation (EU) No 648/2012, three conditions need to be fulfilled 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.

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

- (6) The U.S. Securities and Exchange Commission (the 'SEC') is the competent authority for the authorisation and supervision of CCPs in relation to transactions in securities and derivative contracts that are based on a single security, loan or a narrow-based group or index of securities ('security-based derivatives'). The derivative contracts falling under the competence of the SEC therefore correspond to a subset of the derivative contracts covered by the provisions on CCPs set out in Regulation (EU) No 648/2012. Other derivatives contracts fall under the competence of the U.S. Commodity Futures Trading Commission (the 'CFTC'), in relation to which the Commission has already adopted Commission Implementing Decision (EU) 2016/377^(?). The current assessment thus relates to the equivalence of the legal and supervisory arrangements applicable in the USA to CCPs supervised by the SEC, and not to the legal and supervisory arrangements for CCPs which provide clearing services falling under the competence of the CFTC. Where a CCP is supervised by both the SEC and the CFTC, this Decision should therefore only concern that CCP in so far as it provides clearing services falling under the competence of the SEC.
- (7) The legally binding requirements applicable in the USA to CCPs supervised by the SEC are set out in the rules applicable to 'clearing agencies' contained in the Securities Exchange Act of 1934^(?) ('the Exchange Act'), the Dodd-Frank Wall Street Reform and Consumer Protection Act^(?) ('the Dodd-Frank Act') and the regulations adopted by the SEC thereunder. Moreover, the rules, policies and procedures of CCPs that have been registered by the SEC are legally binding upon the CCP. On 1 October 2020, the SEC issued a Staff Report describing the applicable rules and how they apply to CCPs supervised by the SEC^(?).
- (8) 'CCPs' are defined by the SEC as clearing agencies that interpose themselves between counterparties, acting as the buyer to every seller and the seller to every buyer. The term 'clearing agency' is defined in Section 23(A) of the Securities Exchange Act of 1934 as any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities.
- (9) The SEC may designate clearing agencies as clearing agencies with a more complex risk profile. A CCP clearing security-based swaps is always considered to have a more complex risk profile. Moreover, the Financial Stability Oversight Council may designate a CCP as systemically important pursuant to the Dodd-Frank Act. Such CCPs with a more complex risk profile or that are systemically important are considered to be 'covered clearing agencies'. The enhanced framework laid down in SEC Rule 17Ad-22(d) and (e) apply to such CCPs. This Decision only concerns the equivalence of the US legally binding requirements applicable to CCPs which have to comply with those enhanced rules.
- (10) According to the Exchange Act, the Dodd-Frank Act and the SEC's regulations, a CCP clearing securities or security-based derivatives, referred to in that act as security-based swaps, is required to register with the SEC or to seek exemption from registration.
- (11) The Exchange Act does not prescribe specific tools or arrangements on how to achieve the requirements laid down in it. While a CCP may consider its unique characteristics and circumstances when laying down its rules and procedures, such as its ownership and governance structures, effects on direct and indirect participants, its membership base, the markets served and the risks inherent in products cleared, its internal rules and procedures must provide prescriptive detail on the way in which it will meet the requirements laid down in the Exchange Act. Once registered by the SEC, the rules, policies and procedures approved by the SEC become legally binding on the CCP.

^(?) Commission Implementing Decision (EU) 2016/377 of 15 March 2016 on the equivalence of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the Commodity Futures Trading Commission to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council (OJ L 70, 16.3.2016, p. 32).

^(?) Section 3(a)(23) and 17A.

^(?) Titles VII and VIII.

^(?) Staff Report on the Regulation of Clearing Agencies by Division of Trading and Markets Office of Compliance Inspections and Examinations, <https://www.sec.gov/files/regulation-clearing-agencies-100120.pdf>

- (12) Upon registration by the SEC, the CCP becomes a 'self-regulatory organization' under Section 3(a)26 of the Exchange Act and must, as such, file any rule change with the SEC for approval. The SEC will verify that the proposed rule change is consistent with the standards laid down in the Exchange Act and in the SEC's regulations.
- (13) The legally binding requirements in the USA with respect to CCPs qualified as covered clearing agencies comprise a two-tiered structure. The first tier consists of the primary rules and requirements laid down in Section 3a(23) and 17A of the Exchange Act, Titles VII and VIII of the Dodd-Frank Act, and in the SEC's regulations, in particular Rule 17Ad-22 ('primary rules'). The second tier consists of the internal rules and procedures of such CCPs, which are legally binding on the CCPs upon their registration by the SEC and, therefore, form part of the rules the compliance with which is supervised by the SEC. When assessing whether CCPs qualified as covered clearing agencies comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012, the Commission has to consider the legally binding requirements laid down in the internal rules and procedures of those CCPs alongside the requirements laid down in the Exchange Act and the Dodd-Frank Act and the SEC's regulations.
- (14) To be registered by the SEC, a CCP qualified as a covered clearing agency, and its internal rules, must meet the high-level standards set out in the primary rules. Those requirements, complemented by the internal rules and procedures of the CCP, deliver substantive outcomes equivalent to the effects of the rules laid down in Title IV of Regulation (EU) No 648/2012. In particular, a CCP qualified as a covered clearing agency must fulfil requirements with respect to its organisational structure and rules to ensure the prompt and accurate clearing and settlement, as well as the safeguard of securities and funds under its control, and to ensure the protection of investors and the public interest, including requirements such as those relating to senior management, risk management and internal control mechanisms, record-keeping, qualifying holdings, information transmitted to the competent authority, conflicts of interest, business continuity, outsourcing, conduct of business and segregation, as well as liquidity risk, collateral, investment policy, and settlement risk. Other requirements relate to the conditions for participation and fees, and rules for disciplining violations of the CCP's rules by participants.
- (15) Nevertheless, the legally binding requirements applicable to CCPs qualified as covered clearing agencies differ in some aspects from the rules in Title IV of Regulation (EU) No 648/2012.
- (16) Firstly, the primary rules with respect to liquidity risks do not require CCPs qualified as covered clearing agencies to maintain eligible liquidity resources to meet the 'cover 2 principle' laid down in Article 44 of Regulation (EU) No 648/2012, that is, liquid resources to at least cover the default of the two clearing members to which it has the largest exposures. In the USA, CCPs qualified as covered clearing agencies are nevertheless required to set up procedures to cover any uncovered liquidity shortfall, ensuring that committed resources are available where losses exceed the default of the clearing member to which it has the largest exposure. Additionally, the primary rules require CCPs qualified as covered clearing agencies to apply the 'cover 2 principle' where they clear security-based derivatives. Although this is a different approach to the 'cover 2 principle' laid down in 42, 43 and 44 of Regulation (EU) No 648/2012, the primary rules together with the CCPs' internal rules and procedures deliver substantive outcomes equivalent to the effects of the 'cover 2 principle' laid down in Union rules.
- (17) Secondly, the primary rules do not provide for a minimum liquidation period. However, all CCPs qualified as covered clearing agencies apply minimum liquidation periods of 2 to 5 days in accordance with their internal rules and procedures. Union rules set out minimum liquidation periods of 2 days for non-OTC derivative contracts and 5 days for OTC derivative contracts, typically with margin collected on a net basis. Therefore, the CCPs' internal rules and procedures deliver substantive outcomes equivalent to the effects of the Union rules on liquidation periods.
- (18) Thirdly, Union law requires the application of at least one of three anti-procyclicality measures to ensure that initial margins do not fall too low in stable economic times and do not increase precipitously in times of stress. In doing so, such measures deliver stable and conservative margins. The primary rules contain no such specific requirement. CCPs qualified as covered clearing agencies, however, do have in place internal rules and procedures with anti-procyclical effects. Therefore, the CCPs' internal rules and procedures deliver substantive outcomes equivalent to the effects of the Union rules on anti-procyclicality.

- (19) Lastly, with regard to segregation and portability of positions and collateral of clients of clearing members, Rule 17Ad-22(e)(14) requires that the rules, policies and procedures of CCPs qualified as covered clearing agencies enable the segregation and portability of positions of a clearing member's client and the related collateral, and to effectively protect such positions and collateral from the default or insolvency of that clearing member where those CCPs clear security-based derivatives or have a more complex risk profile and, thus, follows a similar approach to the rules contained in Title IV of Regulation (EU) No 648/2012. For cash securities and listed options, however, the primary rules rely on the rules applicable to the clearing members. In those markets, the rules applicable to clearing members already ensure the appropriate level of segregation and portability and, therefore, adequately protect client positions and collateral. Although following a different approach to segregation and portability at the level of the clearing members, and not that of the CCP, with regard to those markets, both approaches result in similar outcomes with regard to client protection.
- (20) The legal and supervisory arrangements of the USA applicable to CCPs qualified as covered clearing agencies should therefore be deemed equivalent, provided that the internal rules and procedures of a CCP applying for recognition meets certain requirements with respect to risk management. In particular, a CCP should apply a 2-day liquidation period with respect to non-OTC derivative contracts and a 5-day liquidation period with respect to OTC derivative contracts, both on a net basis. Moreover, the CCP should apply measures designed to limit pro-cyclicality that are equivalent in delivering stable and conservative margins to any of the three measures set out under Regulation (EU) No 648/2012.
- (21) The Commission concludes that the legal and supervisory arrangements of the SEC applying to CCPs qualified as covered clearing agencies and comprising the requirements laid down in the Exchange Act, the Dodd-Frank Act and the SEC's regulations, and in the internal rules and procedures of registered CCPs qualified as covered clearing agencies, should be considered as legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012, to the extent that they meet the standards set out in this Decision with respect to risk management.
- (22) Only CCPs that comply with the rules applicable to covered clearing agencies and with legally binding requirements meeting the risk management standards set out in this Decision may be eligible for recognition by the European Securities and Markets Authority (ESMA). ESMA should verify, in accordance with Article 25(2)(b) of Regulation (EU) No 648/2012, that those risk management standards are part of the internal rules and procedures of any CCP that is supervised by the SEC and is applying for recognition in the Union. In particular, ESMA should check that the CCP applies a 2-day liquidation period with respect to non-OTC derivative contracts and a 5-day liquidation period with respect to OTC derivative contracts, both on a net basis, and that the CCP applies measures designed to limit procyclicality that are equivalent in delivering stable and conservative margins to any of the three measures set out under Regulation (EU) No 648/2012.
- (23) According to Article 25(6), point (b), of Regulation (EU) No 648/2012, the legal and supervisory arrangements in respect of CCPs established in a third country must also provide for effective supervision and enforcement of CCPs in that jurisdiction on an ongoing basis.
- (24) The SEC conducts ongoing monitoring of CCPs' under its supervision. In addition to its power to review and approve rule changes filed by a registered CCP, the SEC has wide powers to request copies of CCPs' books and records and to examine and conduct on-site inspections to assess existing and emerging risks, to monitor compliance by the CCP with rules applicable to it, as well as the CCP's oversight of compliance by its participants with its internal rules and procedures. The SEC has the power to ask for changes in rules and procedures and may institute civil actions seeking injunctive and other remedies, or administrative proceedings in case of infringement of the applicable rules. The SEC's examination may result in the revocation of the registration where deficiencies are not addressed. Those powers apply also to CCPs qualified as covered clearing agencies.

- (25) The Commission therefore concludes that the legal and supervisory arrangements in respect of CCPs, including those that are qualified as covered clearing agencies, provide for effective supervision and enforcement on an ongoing basis.
- (26) According to Article 25(6), point (c), of Regulation (EU) No 648/2012, the legal and supervisory arrangements of a third country must include an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes ('third-country CCPs').
- (27) Non-US CCPs may apply to the SEC for registration as a 'clearing agency'. So far, the SEC has required such registration, or an exemption from registration, for clearing services in relation to US securities provided to US persons or in relation to security-based swaps.
- (28) Non-US CCPs registered with the SEC must comply with the relevant requirements of the USA, including SEC regulations applicable to registered clearing agencies qualified as covered clearing agencies. The Exchange Act, however, grants the SEC broad exemptive authority. Under Section 17A(b)(1) of the Exchange Act, the SEC may provide exemptive relief from regulatory requirements if it is consistent with the public interest, the protection of investors, and the purposes of Section 17A of the Exchange Act, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. Under Section 36 of that Act, the SEC may, conditionally or unconditionally, exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from provisions of the Exchange Act or rules or regulations thereunder, to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. In addition, under Section 17A(k) of the Exchange Act, the SEC may grant an exemption, conditionally or unconditionally, from clearing agency registration for the clearing of security-based swaps if the SEC determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the appropriate government authorities in the home country of the clearing agency.
- (29) The SEC has issued a policy statement and guidance ⁽⁶⁾ addressed to CCPs authorised in the Union. The policy statement provides a high-level summary of the legal framework that applies to SEC-registered CCPs and explains the process for applying for registration and exemptions. It also provides examples of how the SEC has applied its exemptive powers to avoid to impose requirements that are unnecessary, duplicative, or inconsistent relative to requirements applicable to a CCP in a home jurisdiction, where the framework of that jurisdiction is generally consistent with the Principles of Financial Market Infrastructures (PFMIs) issued by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions. Moreover, the policy statement and guidance sets out the factors that the SEC will consider when assessing requests for exemptions and explains that the SEC will consider the extent to which a CCP is subject to appropriate supervision and enforcement by the national competent authority supervising the CCP or other relevant authorities in its home jurisdiction. On that basis, and subject to the SEC's assessment and determination that the exemption is consistent with the Exchange Act, the SEC may grant a CCP established outside the USA an exemption to avoid the application of an SEC requirement that is unnecessary, duplicative, or inconsistent relative to the requirements laid down in rules and regulations applicable to the CCP in its home jurisdiction in a way comparable to the equivalent system for the recognition of third-country CCPs laid down in Regulation (EU) No 648/2012.
- (30) The Commission therefore concludes that the legal and supervisory arrangements of the SEC provide for an effective equivalent system for the recognition of third-country CCPs.

⁽⁶⁾ Statement on Central Counterparties Authorized under the European Markets Infrastructure Regulation Seeking to Register as a Clearing Agency or to Request Exemptions from Certain Requirements Under the Securities Exchange Act of 1934, [Release No. 34-90492], issued on 30 November 2020.

- (31) The conditions laid down in Article 25(6) of Regulation (EU) No 648/2012 are therefore considered to be met by the legal and supervisory arrangements applicable in the USA to CCPs which must comply with the rules applicable to covered clearing agencies and which are registered and supervised by the SEC, and those legal and supervisory arrangements should be considered equivalent to the requirements laid down in Regulation (EU) No 648/2012.
- (32) This Decision is based on the legally binding requirements in the USA relating to CCPs which must comply with the rules applicable to covered clearing agencies at the time of the adoption of this Decision. The Commission, in cooperation with ESMA, should monitor on a regular basis the evolution of the legal and supervisory framework applicable in the USA to such CCPs and the fulfilment of the conditions on the basis of which this Decision has been taken.
- (33) At least every 3 years, the Commission should undertake a review of the grounds on the basis of which this Decision was adopted, including the legal and supervisory arrangements applicable in the USA to CCPs which must comply with the rules applicable to covered clearing agencies and which are registered and supervised by the SEC. Such regular reviews are without prejudice to the Commission's power to undertake a specific review at any time where relevant developments make it necessary for the Commission to re-assess the determination made by this Decision. Based on the findings arising from a regular or specific review, the Commission may decide to amend or repeal this Decision at any time, in particular where developments affect the conditions on the basis of which this Decision is adopted.
- (34) 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 the United States of America for central counterparties (CCPs) which must comply with the rules applicable to covered clearing agencies laid down in Sections 3(a)(23) and 17A of the Securities Exchange Act of 1934, in Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and in regulations adopted by the U.S. Securities and Exchange Commission thereunder, shall be considered equivalent to the requirements laid down in Regulation (EU) No 648/2012 where the internal rules and procedures of such a CCP include specific risk management measures ensuring that initial margins are calculated and collected on the basis of the following parameters:

- (a) in the case of derivative contracts executed on regulated markets, a liquidation period of 2 days calculated on a net basis;
- (b) in the case of OTC derivative contracts, a liquidation period of 5 days calculated on a net basis;
- (c) in the case of all derivative contracts, measures designed to limit procyclicality equivalent to at least one of the following:
- (i) measures applying a margin buffer at least equal to 25 % of the calculated margins which the central counterparty allows to be temporarily exhausted in periods where calculated margin requirements are rising significantly;
- (ii) measures assigning at least 25 % weight to stressed observations in the look-back period;
- (iii) measures ensuring that margin requirements are not lower than those that would be calculated using volatility estimated over a 10 year historical look-back period.

Article 2

No later than 3 years after the date of entry into force of this Decision and then no later than every 3 years after each previous review under this Article, the Commission shall undertake a review of the grounds on which the determination under Article 1 was made.

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, 27 January 2021.

For the Commission
The President
Ursula VON DER LEYEN
