

**COMMISSION IMPLEMENTING DECISION (EU) 2021/1103****of 5 July 2021****on the recognition of the legal, supervisory and enforcement arrangements of Brazil for derivatives transactions entered into by Brazilian institutions under the regulation of the Central Bank of Brazil 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 <sup>(1)</sup>, and in particular Article 13(2) thereof,

Whereas:

- (1) Article 13 of Regulation (EU) No 648/2012 provides for a mechanism under which the Commission is empowered to adopt equivalence decisions whereby the legal, supervisory and enforcement arrangements of a third country are declared equivalent to the requirements laid down in Article 11 of Regulation (EU) No 648/2012 so that counterparties which enter 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. The declaration of equivalence contributes to the achievement of the overarching aim of Regulation (EU) No 648/2012 namely to reduce systemic risk and increase the transparency of derivatives markets by ensuring an internationally consistent application of the principles agreed with third countries and laid down in that Regulation.
- (2) Article 11(1), (2) and (3) of Regulation (EU) No 648/2012 which is supplemented by Commission Delegated Regulation (EU) No 149/2013 <sup>(2)</sup> and Commission Delegated Regulation (EU) 2016/2251 <sup>(3)</sup>, establish the Union's legal requirements concerning the timely confirmation of the terms of an OTC derivative contract, the conduct of a portfolio compression exercise and the arrangements under which portfolios are reconciled in relation to OTC derivative contracts not cleared by a central counterparty ('CCP'). In addition, those provisions lay down 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's legal, supervisory and enforcement regime to be considered equivalent to the 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 under Article 11 of Regulation (EU) No 648/2012, ensure protection of professional secrecy that is equivalent to the protection provided for in Article 83 of that Regulation. Furthermore, equivalent legal, supervisory and enforcement arrangements must be effectively applied in an equitable and non-distortive manner in that third

<sup>(1)</sup> OJ L 201, 27.7.2012, p. 1.

<sup>(2)</sup> Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11).

<sup>(3)</sup> 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).

country. The assessment of equivalence therefore encompasses a verification whether the legal, supervisory and enforcement arrangements of a third country 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 and consequently do not pose unacceptable levels of systemic risk in the Union.

- (4) This Decision is not only based on a comparative analysis of the legal, supervisory and enforcement requirements applicable in Brazil, but also on an assessment of the outcome of those requirements and their adequacy in order to mitigate the risks arising from OTC derivative contracts not cleared by a CCP in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012.
- (5) The legal, supervisory and enforcement arrangements applicable in Brazil for OTC derivative contracts are laid out in laws as well as circulars, resolutions and instructions issued by Banco Central do Brasil ('BCB'), Comissão de Valores Mobiliários ('CVM') and Conselho Monetário Nacional ('CMN'). In particular, Law 6.385/76 regulates the securities market of Brazil; Instruction CVM 461/07 governs regulated securities markets, which comprise organized stock exchanges, organized OTC market and non-organized OTC market; Circular BCB 3.082/02 sets out the criteria for accounting treatment of derivatives owned by financial institutions and other institutions supervised by the BCB; Resolução CMN 3.505/07 regulates OTC derivatives contracts made in Brazil by Brazilian financial institutions and other institutions supervised by the BCB; Resolução CMN 4.277/13 establishes mark-to-market and mark-to-model requirements of derivatives contracts entered into by financial institutions and other institutions supervised by the BCB; Instrução CVM 438/06 establishes mark-to-market requirements for certain types of mutual funds; Resolução 4.662/18 frames bilateral margin requirements; Resolução BCB 3.263/05 covers portfolio compression; Resolução CMN 4.373/14 lays down requirements for non-resident investors that enter into OTC derivatives transactions in Brazil and, finally, Laws 4.595/64, 6.385/76, 10.214/01, 12.810/13 govern professional secrecy, supervision and enforcement.
- (6) Resolução BCB 3.263/05 does not set any obligations to perform portfolio compression nor does it frame any recommendation to do so. It does however make it possible for financial institutions and other institutions supervised by the BCB to enter into an agreement allowing it. There is no specific legislation regarding dispute resolution processes. Dispute resolution rules are determined by the trade repositories. Therefore, Brazilian arrangements may not be deemed equivalent to Union requirements in respect to portfolio compression and dispute resolution.
- (7) OTC derivatives transactions have to be reported to a trade repository established and regulated in Brazil by any Brazilian entity entering one. According to Law 6.385/76, the validity of a transaction is conditional on its reporting to a trade repository. In accordance with Resolução CMN 4.373/14, non-resident investors that enter into OTC derivatives transactions in Brazil must be registered with CVM and must abide by legally binding confirmations of their transactions. As the transaction needs to be reported by both parties, there is no legal requirement other than the rules of the trade repository for the confirmation of the transactions, the reconciliation of bilateral portfolios or the resolution of disputes. Confirmation is simultaneous and contingent to reporting. Reporting must take place as soon as possible and usually happens on the same day that the transaction is entered into. Similarly, as the transactions are reported by both parties and confirmed concurrently by the trade repositories, there is no requirement to conduct portfolio reconciliation as, by construction, there cannot be any discrepancy between the counterparties' portfolios. The Brazilian arrangements for timely confirmation and portfolio reconciliation should therefore be deemed equivalent to the corresponding Union requirements.
- (8) Under Resolução CMN 3.505/07 and Resolução CMN 4.277/13, valuation, either through mark-to-market or mark-to-model, is mandated daily for dealer banks, local branches of foreign banks, local subsidiaries of foreign banks as well as funds and asset managers, all regulated by the BCB. The obligation does not apply to cooperatives, insurers, reinsurers, pension funds and other non-financial corporate counterparties which are only obliged to conduct a

daily valuation when they belong to a financial conglomerate that also includes a multiple, commercial, investment, exchange or savings bank. The Brazilian arrangements may accordingly be deemed equivalent for to the corresponding Union requirements to the extent this decision is limited to transactions entered into with counterparties regulated by the BCB.

- (9) Taking into account the obligation to report OTC derivatives transactions to trade repositories regulated in Brazil and the legal consequences of such obligation, a two-tier approach can therefore be considered in the case of Brazil and allow to conclude that with regard to timely confirmation and portfolio reconciliation, the requirements applicable in Brazil can be considered equivalent in outcome to those set out in Delegated Regulation (EU) No 149/2013. Moreover, the rules applicable in Brazil to daily valuation are equivalent to those set out in Delegated Regulation (EU) No 149/2013 to the extent the transactions are conducted with dealer banks, local branches of foreign branches, local subsidiaries of foreign banks, funds and asset managers as well as cooperatives, insurers and reinsurers, pension funds and other non-financial corporate counterparties which belong to a financial conglomerate that also includes a multiple, commercial, investment, exchange or savings bank. Taking into account the fact that the majority of cross-border OTC derivatives transactions are conducted by counterparties regulated by the BCB, this decision should therefore be limited to transactions conducted between counterparties regulated by the BCB and counterparties established in the Union and subject to the corresponding requirement under Delegated Regulation (EU) No 149/2013.
- (10) Concerning the margins for OTC derivative contracts not cleared by a CCP, the legally binding requirements of Brazil consist of Resolução CMN 4.662/18 and Circular BCB 3.902/18 (the margin rules of Brazil).
- (11) As laid down in the margin rules of Brazil, in-scope counterparties are all financial institutions or other institutions under the regulation of the BCB which have an operational group average aggregate notional of in-scope transactions above BRL 25 billion. In-scope transactions cover a set of OTC derivatives transactions equivalent to that of Regulation (EU) No 648/2012, with the exception of physically settled commodity derivatives, but including gold derivatives which are considered in-scope transactions, which are covered by the margin rules of the Union but not by the margin rules of Brazil; and equity options, which are covered by the margin rules of Brazil but benefit from a temporary exemption under Delegated Regulation (EU) 2016/2251. Additionally, and similarly to the applicable framework in the Union, intragroup transactions, physically settled FX forwards and swaps and transactions with instruments which definition is similar to that of covered bonds in the Union, are excluded from the set of in-scope transactions. They should however be counted when determining the operational group average aggregate notional amount. This decision should therefore not apply to physically settled commodity derivatives, with the exception of gold derivatives.
- (12) In-scope counterparties must post and collect variation margin from 1 September 2019. In-scope counterparties with an operational group average aggregate notional of in-scope transactions above BRL 2,250 billion must post and collect initial margin from 1 September 2019 while in-scope counterparties below that threshold must post and collect initial margin from 1 September 2020. This decision shall therefore be limited to transactions between counterparties subject to Article 11(3) of Regulation (EU) No 648/2012 and in-scope counterparties subject to the requirement to post and collect variation and initial margin under the margin rules of Brazil.
- (13) The margin rules of Brazil allow for a combined minimum transfer amount of initial and variation margins of BRL 1,5 million, whereas the threshold in Article 25 of Delegated Regulation (EU) 2016/2251 is EUR 500 000. The margin rules of Brazil also allow that initial margin is reduced by an amount of up to BRL 150 million. In-scope counterparties with a combined amount of initial margin below that threshold are not required to exchange initial margin. Article 29 of Delegated Regulation (EU) 2016/2251 provides for a similar relief, setting the threshold at EUR 50 million. Taking into account the marginal difference in the value of those currencies, those amounts should be considered equivalent.

- (14) In a similar manner to the standardised method for the calculation of the initial margin set out in Annex IV to Delegated Regulation (EU) 2016/2251, the margin rules of Brazil allow for the use of a standardised model equivalent to the one laid out in the aforementioned annex. However, the margin rules of Brazil do not allow for the use of internal or third party models to calculate the initial margin. Even though the requirements in the margin rules of Brazil for the calculation of initial margin are therefore more restrictive than the requirements set out in Regulation (EU) No 648/2012 and Delegated Regulation (EU) 2016/2251 they should however be considered equivalent for the purpose of this decision.
- (15) The requirements in the margin rules of Brazil on eligible collateral, its valuation, and on how collateral is held and segregated, are equivalent to those set out in Delegated Regulation (EU) 2016/2251. The margin rules of Brazil contain an equivalent list of eligible collateral but does not require counterparties to reasonably diversify the collateral collected, including by limiting securities with low liquidity in order to avoid concentration of collateral, in a way similar to Article 8 of Delegated Regulation (EU) 2016/2251. However, since these concentration requirements under Article 8 apply to Union counterparties it can be concluded that the collateral requirements under the application of margin rules of Brazil result in an equivalent outcome to that of Delegated Regulation (EU) 2016/2251. The margin rules of Brazil 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 Brazil, Laws 4.595, of 1964, 6.385, of 1976, 10.214, of 2001, and 12.810, of 2013, empower BCB and CVM to request any data concerning derivatives transactions from trade repositories. Also, Complementary Law 105 of 2001 (LC 105) specifies that all data must be handled as confidential. In this context, if any other domestic or foreign authority needs data from Brazilian trade repositories, it should formally submit its request to BCB and/or CVM, which will conduct their analysis, considering, among other things, the restrictions imposed by LC 105, and the necessity for a formal agreement would be analysed on a case by case basis. Therefore together, these laws should be considered as providing an equivalent level of protection as regards professional secrecy as that provided in Regulation (EU) No 648/2012.
- (17) CMN is the highest authority within the national financial system in Brazil, and responsible for formulating monetary and credit policies in general. The BCB is subordinate to CMN and is responsible for monetary policy, managing international reserves, banking supervision and overseeing foreign capital and credit. The BCB enforces prudential regulations and also acts as a monetary authority, and as such is responsible for ensuring systemic stability. In order to curb irregular practices, implement educative measures and confront situations that may jeopardize the national financial system, the BCB may issue administrative penalties, adopt precautionary or provisional measures, issue commitment letter and impose suspensions or restrictions. The CVM is subordinate to CMN and is responsible for regulating and overseeing the capital markets, including securities issuers, exchanges and OTC markets, and the institutions that are part of the system for distributing securities. The CVM aims to keep the market efficient and foster development, and also strives to protect investors and maintain equitable practices in the securities market, enforcing the rules regarding information disclosure and transparency. The measures available to the BCB and the CVM should be considered as providing for the effective application of the relevant legal, regulatory and enforcement arrangements under the OTC derivatives rules of Brazil in an equitable and non-distortive manner to ensure effective supervision and enforcement.
- (18) This Decision recognises equivalence of binding requirements set out in Brazilian law relating to OTC derivative contracts applicable at the time of adoption of this Decision. The Commission, in cooperation with ESMA, will monitor on a regular basis the evolution of the legal, supervisory and enforcement arrangements for these OTC derivative contracts and their consistent and effective implementation, regarding the timely confirmation, portfolio compression and reconciliation, valuation, dispute resolution and margin requirements applicable to OTC derivative contracts, not cleared by a CCP with respect to which this Decision has been taken. As part of its monitoring efforts the Commission may request the BCB and the CVM to provide information on regulatory and supervisory developments. The Commission may undertake a specific review at any time, where relevant developments make it necessary for the Commission to re-assess the declaration of equivalence granted by this Decision. Such re-assessment may lead to the repeal of this Decision, which would as a consequence make counterparties automatically subject again to all requirements laid down in Regulation (EU) No 648/2012.

- (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 Brazil for timely confirmation, daily valuation and portfolio reconciliation that are applied to transactions regulated as OTC derivatives by the Banco Central do Brasil ('BCB') and the Comissão de Valores Mobiliários ('CVM') and that are not centrally cleared by a CCP shall be considered as equivalent to the corresponding 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 an in-scope counterparty for the purpose of the margin rules of Brazil.

*Article 2*

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of Brazil for the exchange of collateral that are applied to transactions regulated as OTC derivatives by the BCB and the CVM, to the exception of physically settled commodity derivatives but not including gold derivatives, and that are not cleared by a CCP shall be considered as equivalent to the requirements of paragraph 3 of Article 11 of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is an in-scope counterparty for the purpose of the margin rules of Brazil.

*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, 5 July 2021.

*For the Commission*  
*The President*  
Ursula VON DER LEYEN

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