

COMMISSION IMPLEMENTING DECISION (EU) 2016/2271**of 15 December 2016****on the equivalence of financial instrument exchanges and commodity exchanges in Japan in accordance with Regulation (EU) No 648/2012 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 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 2a thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 lays down clearing and bilateral risk-management requirements for over-the-counter ("OTC") derivative contracts as well as reporting requirements for such contracts. Point (7) of Article 2 of Regulation (EU) No 648/2012 defines OTC derivatives as derivative contracts the execution of which does not take place on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council ⁽²⁾ or on a third country market considered as equivalent to a regulated market in accordance with Article 2a of Regulation (EU) No 648/2012. Therefore, any derivative contract the execution of which takes place on a third-country market not deemed equivalent to regulated markets are classified as OTC for the purposes of Regulation (EU) No 648/2012.
- (2) In accordance with Article 2a of Regulation (EU) No 648/2012, a third-country market is considered equivalent to a regulated market where it complies with legally binding requirements which are equivalent to the requirements laid down in Title III of Directive 2004/39/EC and is subject to effective supervision and enforcement in that third country on an ongoing basis.
- (3) In order for a third-country market to be considered equivalent to a regulated market within the meaning of Directive 2004/39/EC, the substantive outcome of the applicable legally binding requirements and 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 legally binding requirements which apply to financial instruments exchanges (FIEs) and commodity exchanges in Japan are equivalent to the requirements laid down in Title III of Directive 2004/39/EC, and that those markets are subject to effective supervision and enforcement on an ongoing basis. Markets which are authorised as FIEs or commodity exchanges on the date of adoption of this Decision should be therefore identified as markets considered equivalent to a regulated market within the meaning of Directive 2004/39/EC.
- (4) The legal framework of Japan for FIEs and commodity exchanges comprises the Financial Instruments and Exchange Act 2006 (FIEA), which establishes the regulatory framework for FIEs, and the Commodity Derivatives Act 2009 (CDA), which provides for the regulatory and supervisory framework for commodities exchanges. Derivatives contracts with a commodity as an underlying are listed on a commodity exchange and derivatives based on financial instruments are listed on the FIEs. Rules for the FIEs are further developed in the Order for Enforcement of the Financial Instruments and Exchange Act and the Cabinet Office Ordinance on Financial Instruments Exchanges whereas rules for commodities exchanges are further detailed in the Order for Enforcement of the Commodity Derivatives Act and the Ordinance for Enforcement of the Commodity Derivatives Act. In addition, both the commodities exchange and the FIEs enjoy relatively wide self-regulatory power with regard to certain requirements. The self-regulatory power of the FIE includes, in particular, business rules related to listing and delisting of financial instruments, trading arrangements and membership requirements.

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

The operational rules must be submitted to the Prime Minister of Japan for approval (Article 81 of the FIEA). The self-regulatory power of the commodity exchange is exercised by its Self-Regulatory Committee or Self-Regulatory Department. The market rules of the commodity exchange set out trading rules and membership requirements, all which must be submitted to the Ministry of Agriculture, Forestry and Fishery (MAFF) and the Ministry of Economy, Trade and Industry (METI) for approval. The self-regulatory rules are legally binding upon exchanges.

- (5) The legally binding requirements applicable to exchanges authorised in Japan deliver results equivalent to those of the requirements laid down in Title III of Directive 2004/39/EC in the following areas: authorisation process, definitional requirements, access to the exchange, organisational requirements, requirements for senior management, admission of financial instruments to trading, suspension and removal of instruments from trading, monitoring of compliance and access to clearing and settlement arrangements.
- (6) Under Directive 2004/39/EC, pre- and post-trade transparency requirements apply only to shares admitted to trading on regulated markets. Despite shares can be admitted to trading on FIEs, the Commission considers that the assessment of those requirements is however not relevant for the purposes of this Decision given that its objective is to verify the equivalence of the legally binding requirements applicable to third-country markets in respect of derivatives contracts that are executed on those markets.
- (7) It should therefore be concluded that the legally binding requirements for FIEs and commodity exchanges in Japan deliver results equivalent to those of the requirements laid down in Title III of Directive 2004/39/EC.
- (8) The commodity exchanges operate under the supervision of the METI and the MAFF. The CDA provides a framework for supervisory powers of the METI and the MAFF. In particular, the METI and the MAFF approve the market rules, brokerage contract rules, dispute resolution rules or market transactions surveillance committee rules of a commodity exchange and any changes thereto. Furthermore, in order to ensure fair trading and investor protection, the METI and the MAFF may require a commodity exchange to change its articles of incorporation, other rules or its business methods or take any other measures to improve the operation of its business. If a commodity exchange fails to properly exercise its self-regulatory power and does not take necessary measures to ensure fair trading and investor protection, the METI and the MAFF may withdraw the licence or suspend the whole or a part of the exchange's business. The FIEs are subject to supervision of the Prime Minister of Japan, whose power is delegated to the Commissioner of the Japan Financial Services Agency (JFSA). Section 5 of Chapter V of the FIEA lays down the supervisory measures available to the JFSA. In particular, when the FIE violates laws and regulations, the JFSA may withdraw the licence or issue an order of suspension of all or part of the FIE's business. Furthermore, the JFSA may require the FIE to change its articles of incorporation, operational rules, brokerage contract rules or any other rules or trade practice or to take other necessary measures for supervision. The FIE's articles of incorporations must include sanctions for violation of its business rules by the members. If the FIE fails to perform effectively the market surveillance, the JFSA may take enforcement actions, including licence withdrawal or business suspension.
- (9) It should therefore be concluded that FIEs and commodity exchanges are subject to effective supervision and enforcement in Japan on an ongoing basis.
- (10) The conditions laid down in Article 2a of Regulation (EU) No 648/2012 should therefore be considered to be satisfied with respect to FIEs and commodity exchanges authorised in Japan.
- (11) This Decision is based on the legally binding requirements relating to FIEs and commodity exchanges applicable in Japan 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 these markets and the fulfilment of the conditions on the basis of which this Decision has been taken. In particular, the Commission should review this Decision in light of the entry into application of Regulation (EU) No 600/2014 of the European Parliament and of the Council ⁽¹⁾ and Directive 2014/65/EU of the European Parliament and of the Council ⁽²⁾.

⁽¹⁾ 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).

⁽²⁾ 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 (OJ L 173, 12.6.2014, p. 349).

- (12) The regular review of the legal and supervisory arrangements applicable to FIEs and commodity exchanges in Japan 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 reassess the equivalence granted by this Decision. Such re-assessment could lead to the repeal of this Decision.
- (13) 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 point (7) of Article 2 of Regulation (EU) No 648/2012 authorised financial instrument exchanges and commodity exchanges in Japan and set out in the Annex shall be considered as equivalent to regulated markets as defined in point (14) of Article 4(1) of Directive 2004/39/EC.

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, 15 December 2016.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Financial instrument exchanges and commodity exchanges in Japan referred to in Article 1:

- (a) Tokyo Stock Exchange, Inc.;
 - (b) Osaka Exchange, Inc.;
 - (c) Nagoya Stock Exchange, Inc.;
 - (d) Fukuoka Stock Exchange;
 - (e) Sapporo Securities Exchange;
 - (f) Tokyo Financial Exchange Inc.;
 - (g) Osaka Dojima Commodity Exchange;
 - (h) Tokyo Commodity Exchange, Inc.
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