

COMMISSION IMPLEMENTING DECISION (EU) 2016/2272**of 15 December 2016****on the equivalence of financial markets in Australia 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(2) 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 the 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 markets in Australia 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 financial markets in Australia 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 Corporations Act 2001 (Corporations Act) is the primary legislation which establishes legally enforceable regimes for financial markets under the Australian market licencing (AML) regime and the Market Integrity Rules (MIRs) regime. The operation of a financial market in Australia requires a licence. The Corporations Act establishes a rule-making regime allowing the Australian Securities and Investments Commission (ASIC) to adopt MIRs which apply to market operators, market participants, other prescribed entities and financial products traded on financial markets. Further requirements are specified in secondary or delegated instruments adopted under the Corporations Act including the Corporations Regulations 2001 (Corporations Regulations). Finally, ASIC issues regulatory guidance, which further explains how licensees may comply with the relevant provisions of the Corporations Act, including obligations for AML holders to maintain adequate arrangements for operating the markets, to ensure a fair, orderly and transparent market, and other requirements that are amongst the criteria to be assessed. Failure to comply with regulatory guidance leads to an enforcement action carried out by ASIC.

⁽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).

- (5) The legally binding requirements set out in legislation, MIRs and regulatory guidance of financial markets authorised in Australia 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 recognised exchange, organisational requirements, requirements for senior management, admission of financial instruments to trading, suspension and removal of instruments from trading, monitoring of compliance with the rules of the financial market 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 financial markets in Australia, 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 financial markets authorised in Australia deliver substantive results equivalent to those of the requirements laid down in Title III of Directive 2004/39/EC.
- (8) 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 regulatory and enforcement powers of ASIC include investigation of suspected breaches of the law, issuance of infringement notices, seeking civil penalties from the courts and commencing prosecutions. 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, ASIC has entered into protocols for cooperation and the sharing of information with each relevant market operator in order to facilitate the supervision of the market and participants under the MIRs.
- (9) It should therefore be concluded that financial markets are subject to effective supervision and enforcement in Australia 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 financial markets authorised in Australia.
- (11) This Decision is based on the legally binding requirements relating to financial markets 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 financial 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⁾.
- (12) The regular review of the legal and supervisory arrangements applicable to financial markets in Australia 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.

⁽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).

- (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, the financial markets authorised in Australia and set out in the Annex shall be considered 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 markets in Australia referred to in Article 1

- (a) ASX
- (b) ASX24
- (c) Chi-X
