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COMMISSION IMPLEMENTING DECISION (EU) .../...

of 8.2.2022

determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council

(Text with EEA relevance)

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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 repositories¹ and in particular Article 25(6) thereof,

Whereas:

- (1) On 29 March 2017, the United Kingdom of Great Britain and Northern Ireland (the ‘United Kingdom’) submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. On 17 October 2019, the Union and the United Kingdom reached an agreement on the Withdrawal Agreement², with a revised Protocol on Ireland and Northern Ireland and a revised Political Declaration³. Pursuant to that agreement and following its ratification by the House of Commons in the United Kingdom, its adoption by the European Parliament and its conclusion by the Council, the United Kingdom became a third country on 1 February 2020 and Union law ceased to apply to and in the United Kingdom on 31 December 2020.
- (2) Central clearing increases market transparency, mitigates credit risk and reduces the risk of contagion in the event of the default of one or more participants in a central counterparty (‘CCP’). The provision of such services is therefore critical for safeguarding financial stability. Moreover, financial instruments cleared by CCPs are also essential for financial intermediaries and their clients, for example, to hedge interest rate risks, with implications for the functioning of the real economy of the Union.
- (3) As of 31 December 2020, according to the Bank for International Settlements the outstanding notional amount of OTC derivatives was about EUR 477 trillion worldwide, of which interest rate derivatives represent about 80 % and foreign exchange derivatives almost 17 %. More than 30 % of all OTC derivatives are denominated in euro and other Union currencies. The market for central clearing of OTC derivatives is highly concentrated, in particular the market for central clearing of

¹ OJ L 201, 27.7.2012, p. 1.

² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C 384I, 12.11.2019, p. 1).

³ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (OJ C 384I, 12.11.2019, p. 178).

euro-denominated OTC interest rate derivatives, of which more than 90 % are cleared in one single CCP established in the United Kingdom ('UK CCP').

- (4) In the context where such a significant volume of financial transactions denominated in Union currencies is cleared through UK CCPs, the withdrawal of the United Kingdom from the internal market and from the associated Union framework of regulation, supervision and enforcement in the financial sector created major challenges for Union and Member States' authorities in safeguarding financial stability.
- (5) In order to address the possible risks to financial stability that could arise as a consequence of an abrupt disruption in the provision of clearing of derivatives by UK CCPs to Union clearing members and clients, the Commission adopted Implementing Decision (EU) 2020/1308⁴ on 21 September 2020. That Decision determines that the regulatory framework applicable to UK CCPs is considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012. That Decision applies only for a limited period and is to expire on 30 June 2022.
- (6) The impact of the withdrawal of the United Kingdom from the Union has been the subject of several communications from the Commission to the European Parliament, the Council and the European Central Bank, including a Communication on fostering openness, strength and resilience⁵. In that Communication, there was a clear expectation that Union clearing members would reduce their exposures and reliance on UK CCPs that are systemically important for the Union, in particular OTC derivative exposures that are denominated in euro and other Union currencies.
- (7) Following that Communication, in early 2021, the Commission established a Working Group on the opportunities and challenges related to transferring the clearing of derivatives from the United Kingdom to the Union. The Working Group focused on how to reduce the Union's excessive reliance on clearing services provided by the CCPs established in the United Kingdom, identifying possible impediments to reducing exposures in UK CCPs, finding ways to overcome such impediments and incentives to move clearing services to CCPs established in the Union.
- (8) The discussions of the Working Group concluded that some transactions cleared in UK CCPs simply cannot be cleared elsewhere at this point in time and that a combination of different measures will be needed to develop the Union's own clearing

⁴ Commission Implementing Decision (EU) 2020/1308 of 21 September 2020 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council ([OJ L 306, 21.9.2020, p. 1](#))

⁵ Communication from the Commission to the European Parliament, the Council and the European Central Bank of 4 May 2017, 'Responding to challenges for critical financial market infrastructures and further developing the Capital Markets Union' (COM (2017) 225 final), Communication from the Commission to the European Parliament, the European Council, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 19 July 2018, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019' (COM(2018) 556 final) and Communication from the Commission to the European Parliament, the European Council, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 13 November 2018, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan' (COM(2018) 880 final), Communication from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of the Regions of 19 January 2021, 'The European economic and financial system: fostering openness, strength and resilience' (COM(2021) 32 final).

capacity and reduce Union market participants' excessive exposures to systematically important UK CCPs in the years to come. In light of those discussions, the expiry date of Implementing Decision (EU) 2020/1308 is too soon in order to develop the Union's clearing capacity to an adequate level. As the rationale for adopting that Decision has not changed, that is to avoid potential risks to financial stability in the event of an abrupt disruption in access of Union clearing members to UK CCPs, it is therefore necessary to adopt this Decision, which prolongs, for a limited period of time, the recognition that the regulatory framework applicable to central counterparties in the United Kingdom is equivalent to the framework established by Regulation (EU) No 648/2012.

- (9) In accordance with Article 25(6) of Regulation (EU) No 648/2012, three conditions are to be fulfilled in order 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.
- (10) First, the legal and supervisory arrangements of a third country are to ensure that CCPs in that third country comply with legally binding requirements, which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012. The United Kingdom incorporated the relevant provisions of Regulation (EU) No 648/2012 into its domestic law with effect from the date of the United Kingdom's withdrawal from the Union⁶ and therefore United Kingdom domestic law can be considered equivalent to the requirements laid out in Title IV of Regulation (EU) No 648/2012.
- (11) Second, the legal and supervisory arrangements of the third country are to ensure that CCPs established in that third country are subject to effective supervision and enforcement on an ongoing basis. Until 31 December 2020, UK CCPs were under the supervision of the Bank of England, as determined by United Kingdom domestic law in accordance with Regulation (EU) No 648/2012⁷. As part of the incorporation of Regulation (EU) No 648/2012 into United Kingdom domestic law, the Bank of England remains responsible for the supervision of CCPs after that date and no significant changes to that supervision are foreseen.
- (12) Third, the legal framework of the third country must provide for an effective equivalent system for the recognition of CCPs authorised under that third country's legal regime. The United Kingdom has incorporated the key elements of the equivalence system in Article 25 of Regulation (EU) No 648/2012 into United Kingdom domestic law. However, the United Kingdom has introduced a Temporary Recognition Regime, which suspends key amendments to Regulation (EU) No 648/2012 for a period of at least 3 years. That Temporary Recognition Regime also gives the Bank of England wide discretionary powers to withdraw the "temporary deemed recognition", which creates legal uncertainty for CCPs recognised under this regime. Notwithstanding that uncertainty, the third condition can be considered as fulfilled at this point in time.

⁶ After the end of the transition period, several pieces of United Kingdom legislation provide the regulatory and supervisory framework covering clearing services in the United Kingdom. This includes, but is not limited to, the European Union (Withdrawal) Act 2018, The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2020, the Financial Services (Consequential Amendments) Regulations 2020 and the Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019.

⁷ Part 5 of The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013.

- (13) As the three conditions are considered to be fulfilled, the legal and supervisory arrangements of the United Kingdom, which are applicable to UK CCPs that were already established and authorised on 31 December 2020, should be considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012.
- (14) This Decision is based on the information currently available to the Commission on the legal and supervisory arrangements applicable to UK CCPs. Those arrangements should be considered equivalent only insofar as the requirements applicable to CCPs in United Kingdom domestic law are maintained, applied and enforced. The recognition of equivalence can only be maintained if any future changes to the United Kingdom regulatory and supervisory framework do not negatively affect equivalence in terms of regulation or supervision, leading to an un-level playing field between UK CCPs and CCPs established in the Union ('Union CCPs') or to risks to financial stability of the Union. As the Commission may decide to amend, suspend, review or revoke this Decision at any time, notably if developments occur which affect the equivalence determination, an effective exchange of information and coordination of supervisory activities between the European Securities Markets Authority (ESMA) and the Bank of England is a prerequisite for maintaining the recognition of equivalence up until the expiry date of this Decision.
- (15) The exchange of information between the ESMA and the Bank of England requires the conclusion of comprehensive and effective cooperation arrangements in accordance with Article 25(7) of Regulation (EU) No 648/2012. Those cooperation arrangements are to ensure the pro-active sharing of all relevant information with the authorities referred to in Article 25(3) of Regulation (EU) No 648/2012, including the ECB and the other members of the European System of Central Banks, for the purpose of consulting those authorities about the recognised status of UK CCPs or where that information is necessary for those authorities to carry out their supervisory tasks.
- (16) The cooperation arrangements established pursuant to Article 25(7) of Regulation (EU) No 648/2012 are to ensure that the ESMA has immediate and ongoing access to all information, including information allowing for the assessment of any material risks posed by UK CCPs to the Union or its Member States, either directly or indirectly. The cooperation arrangements are to specify the mechanisms and procedures for the prompt exchange of information related to the clearing activities of UK CCPs with respect to financial instruments denominated in Union currencies, trading venues, clearing participants as well as subsidiaries of Union credit institutions and investment firms; to interoperability arrangements with other CCPs; to own resources; to default funds composition and calibration, to margins, liquid resources and collateral portfolios including haircut calibrations and to stress tests. They are also to specify the mechanisms and procedures for the prompt notification of any change affecting UK CCPs or the United Kingdom legal and supervisory arrangements applicable to UK CCPs and for the prompt notification of the ESMA of any developments with regard to UK CCPs that could affect monetary policy in the Union. The Bank of England is also to cooperate closely with Union authorities in accordance with Article 25(7). In particular, it is important that there are effective cooperation arrangements between the ESMA and the responsible United Kingdom authorities regarding the coordination of their supervisory activities, including, in particular, procedures to deal with any emergency situations related to the recognised UK CCPs which have or may have an adverse effect on market liquidity or the stability of the financial system of the Union.

- (17) The United Kingdom authorities are expected to inform the Union about all changes to the United Kingdom's regulatory or supervisory framework affecting the provision of clearing services in the United Kingdom. The Commission, in cooperation with the ESMA, will monitor any changes introduced in the legal and supervisory arrangements affecting the provision of clearing services in the United Kingdom, market developments as well as the effectiveness of supervisory cooperation, including prompt information exchange between the ESMA and the Bank of England. The Commission may undertake a review at any time where relevant developments make it necessary to re-assess the equivalence granted by this Decision, including where the United Kingdom authorities do not effectively cooperate, do not allow for an effective assessment of the risk that UK CCPs pose to the Union or its Member States or the actions taken by UK CCPs or the Bank of England promote undue and unfair competition.
- (18) The current over-reliance of Union clearing members on services provided by UK CCPs still presents risks for the financial stability of the Union and for the transmission and conduct of the Union's monetary policy, especially in the event of stress. This was confirmed by the assessment of the ESMA in December 2021.⁸ That assessment identified three clearing services provided by UK CCPs as being of substantial systemic importance to the Union or to one or more Member States. While that assessment concluded that, at this point in time, the costs of derecognising those clearing services would outweigh the benefits, it nonetheless identified important risks and vulnerabilities in connection with a continued recognition of those clearing services, in particular, in times of stress in the market.
- (19) Consequently, and as stressed in the Communication on 'fostering openness, strength and resilience'⁹, exposures to UK CCPs that are systemically important for the Union, in particular OTC derivative exposures that are denominated in euro and other Union currencies, should continue to be reduced.
- (20) The duration of this Decision should therefore give enough time for the development of the clearing capacity of Union CCPs, exploring ways to enhance liquidity in those CCPs and to expand the range of clearing solutions on offer from Union infrastructures, including via the adoption of regulatory measures facilitating that process, in order to allow for a significant reduction of Union clearing members' exposures to UK CCPs. This Decision should also give sufficient time for the review of the Union's supervisory framework for CCPs. Accordingly, it is appropriate that this Decision expires 3 years after its date of application.
- (21) This Decision should enter into force as a matter of urgency in order to ensure legal certainty for clearing members and trading venues established in the Union ahead of the expiry of Commission Implementing Decision (EU) 2020/1308. In order to avoid any disruption in the recognition of UK CCPs by the ESMA, it should apply from the day following that on which Implementing Decision (EU) 2020/1308 expires.
- (22) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,

⁸ ESMA, Assessment Report under Article 25(2c) of EMIR, <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-results-its-assessment-systemically-important-uk-central>.

⁹ Communication from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of the Regions of 19 January 2021, 'The European economic and financial system: fostering openness, strength and resilience' (COM(2021) 32 final).

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 Kingdom of Great Britain and Northern Ireland applicable to central counterparties already established and authorised in the United Kingdom of Great Britain and Northern Ireland on 31 December 2020 shall be considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012.

Article 2

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

It shall apply from 1 July 2022.

It shall expire on 30 June 2025.

Done at Brussels, 8.2.2022

For the Commission
The President
Ursula VON DER LEYEN