

Annex: Jurisdictions’ authority and process for exercising deference in relation to OTC derivatives regulation

Part A: With respect to the **authorisation and supervision of:** OTC derivatives market participants; TRs; CCPs; and exchanges or electronic trading platforms:

<p>A.1 What legal capacity, if any, do authorities in your jurisdiction have to defer to another jurisdiction's regulatory framework and/or authorities? Which authorities can exercise this capacity? Please also indicate if/when ‘partial’ or ‘conditional’ deference decisions can be made.</p>	
<p>The Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and TRs (EMIR) and the 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 (MIFIR) and 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 (MIFID) empower the European Commission to adopt implementing (legal) acts determining the relevant aspects of the derivatives regime of a third country to be ‘equivalent’ to the relevant regimes of the European Union. These implementing acts form the basis for deference to the regime of the third country and its supervisors by the National Competent Authorities of each EU Member State and by the European Securities Markets Authority (ESMA).</p> <p>You will find below an outline of the relevant areas in which equivalence may be determined and any additional conditions for deference follow.</p> <p><u>Trade repositories (TRs)</u></p> <p>TRs established in a third country that intend to provide services and activities to entities established in the European Union must be recognized by ESMA.</p> <p>Such recognition requires previously an implementing act of the Commission under Article 75(1) of EMIR determining that:</p> <ul style="list-style-type: none"> - the legal and supervisory regime in the third country in which the TR is established comply with legally binding requirements that are equivalent to the one laid down in EMIR; - that those TRs are subject to effective on-going supervision and enforcement in the third country; and - that guarantees of professional secrecy exist that are at least equivalent to those of EMIR. <p>Further, EMIR requires that the Commission execute agreements with third country regulators ensuring access to data in the recognised TR. ESMA must establish agreements with the relevant third country authorities regarding exchange of information and coordinated supervision.</p> <p>Once recognised, the TR is required only to comply with the rules of its home jurisdiction. EU authorities do not apply any direct oversight over third country TRs.</p> <p><u>CCPs</u></p> <p>A CCP established outside the EU may provide clearing services to EU clearing members where it has been recognised by the ESMA.</p> <p>Such recognition requires previously an implementing act of the Commission under Article 25(5) of EMIR determining that:</p>	

- the legal and supervisory regime in the third country in which the CCP is established comply with legally binding requirements that are equivalent to the one laid down in EMIR;
- that those CCPs are subject to effective on-going supervision and enforcement in the third country, and
- that the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.

The main conditions to the recognition of a non-EU CCPs by ESMA are:

- (i) the European Commission has adopted a positive equivalence decision with regard to the regulatory framework applicable to CCPs in the third country (see previous point);
- (ii) the central counterparty is authorised and subject to effective supervision and enforcement in its home country;
- (iii) the CCP is established or authorised in a third country that is considered as having equivalent systems for anti-money-laundering and combating the financing of terrorism to those of the Union in accordance with the criteria set out in the common understanding between Member States on third-country equivalence under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
- (iv) cooperation arrangements have been established between ESMA and the relevant third country supervisory authorities covering supervisory arrangements and the sharing/notification of information.

Once recognised, the CCP is required only to comply with the rules of its home jurisdiction. EU authorities do not apply any direct oversight over third country CCPs.

Trading venues

MIFIR provides that sufficiently liquid derivatives which are subject to the clearing obligation must be traded on authorized and supervised trading venues (i.e. be subject to a “trading obligation”). Furthermore, such transactions shall also be cleared by a CCP. For the purposes of this obligation, EU firms may use third country trading venues provided that:

- (i) The EU Commission has adopted an equivalence decision determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements for the EU trading venues and which are subject to effective supervision and enforcement in that third country; and
- (ii) The third country provides for an effective equivalent system for the recognition of EU trading venues to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis.

In this regard, the following specific standards apply:

The legal and supervisory framework of a third country is considered to have equivalent effect where that framework fulfils all the following conditions:

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) trading venues have clear and transparent rules regarding admission of financial instruments to trading so that such financial instruments are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
- (c) issuers of financial instruments are subject to periodic and ongoing information requirements ensuring a high level of investor protection;
- (d) it ensures market transparency and integrity via rules addressing market abuse in the form of insider dealing and market manipulation;

A decision of the Commission may be limited to a category or categories of trading venues.

It should additionally be noted that the EC is in the process of assessing equivalence for a number of third countries under the existing MIFID 1 legislation in accordance with which the Commission publishes a list of third country markets considered equivalent to EU regulated markets (Article 19(6) MiFID 1). The European Commission is happy to provide additional information on this special exercise to the extent that it is considered by the FSB to be of relevance to this survey.

Investment firms

MIFIR sets out an equivalence framework with regard to authorization and supervision of investment firms. The Commission may adopt a decision in relation to a third country stating that

(i) the legal and supervisory framework of a third country ensures that firms authorised in that third country comply with legally binding prudential and conduct of business requirements which have equivalent effect to MIFIR and MIFID and

(ii) the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third-country legal regimes.

The consequence of such decision of equivalence is that, at the end of a transitional period of three years, a third-country firm may provide investment services or perform investment activities, including in relation to derivatives, to eligible counterparties and to professional clients established throughout the EU without the obligation to establish a branch (central registration with ESMA).

The prudential and business conduct framework of a third country may be considered to have equivalent effect where the following conditions are fulfilled:

(a) firms providing investment services or performing investment activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(b) firms providing investment services or performing investment activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of management bodies;

(c) firms providing investment services or performing investment activities are subject to adequate organisational requirements in the area of internal control functions;

(d) firms providing investment services or performing investment activities are subject to appropriate conduct of business rules;

(e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

A.2 Please provide a brief description of the standards that need to be met in coming to a decision as to whether to exercise any such deference, and the criteria/inputs used in assessing whether these standards have been met (e.g. whether “similar outcomes” is the standard used; whether an analysis of enforcement regimes or authority is included as part of the assessment; whether reference is made to implementation of international standards; etc.).

The purpose of equivalence decisions under EMIR and MiFIR is to verify that the supervisory framework applicable to infrastructures and investment firms respectively in a third-country jurisdiction delivers (i) equivalent results and that (ii) the relevant third country provides for an effective equivalent system for the recognition of infrastructures and investment firms. This assessment is not aimed at checking that rules identical to EU rules applicable to TRs, CCPs and trading venues are in place in the third-country. The assessment is ‘outcome-focused’ and takes as much as possible account of the specificities of the regulatory context in the third-country, including the nature of the relevant markets.

In order to do so, the exercise involves the authorities of the third country which supervisory framework is

	<p>assessed during all the process, in order to understand both the functioning and the specificities of the local markets and in order to understand not only the substance of these framework but the overall outcomes of it.</p> <p>Under MiFIR, IOSCO objectives and principles should be considered by the Commission when carrying out the equivalence assessments.</p>
<p>A.3 Please provide a brief description of the process by which a decision to defer to another jurisdiction is taken, including any action that needs to be initiated to begin the process (e.g. an application from a jurisdiction or an entity), the general time frame for coming to a decision, any processes in place for reviewing a decision, and whether any other agreements or conditions need to be met in order for an affirmative decision to be taken (e.g. confidentiality agreements, supervisory cooperation, or reciprocal arrangements).</p>	<p>The European Commission begins the process by undertaking an assessment of the third country's rules in order to determine whether a determination of equivalence can be made. In the case of infrastructures, the trigger for this process is – in practice - the application for recognition by a given infrastructure. However, there is no limitation on the European Commission's ability to commence the process where no application has been received.</p> <p>Once the European Commission's staff has drafted the equivalence decisions, in close cooperation with the third countries' authorities, the draft decisions are sent to other services of the European Commission (including the legal services) for consultation ("intra-service consultation"). Those services provide comments on the draft decisions.</p> <p>This consultation process takes several weeks.</p> <p>At the end of this consultation, the Member States are consulted via the European Securities Committee (ESC).</p> <p>After these consultations, and since the equivalence decisions are Delegated Acts of the Commission, they have to be translated in the official languages of the 28 Member States of the European Union and adopted by the College of Commissioners. After that, they will be published in the Official Journal of the European Union.</p> <p>The overall process is expected to take a few months.</p> <p>In the case of the third country regime for investment firms set out in MiFIR, the Commission initiates the equivalence assessment on its own initiatives. Member States may indicate their interest that a certain third-country is subject to the assessment without such indication being binding on the Commission.</p> <p>The Commission should monitor any significant changes to the regulatory and supervisory framework of the third country and review the equivalence decisions where appropriate.</p> <p>Cooperation arrangements between ESMA and third-countries are also necessary in order to ensure the exchange of information and procedures concerning</p>

	<p>coordination of supervisory activities.</p> <p>Please see A.1 for the conditions to be met for recognition.</p>
A.4 Please provide copies of, or weblinks to, any documentation or forms that have been developed for sharing with jurisdictions or entities as part of the comparability or equivalence assessment.	Questionnaires designed by EC staff to gather information relevant to rules on CCPs and trading venues are attached as an annex. <u>Please treat as confidential.</u>
A.5 Please provide a list of jurisdictions that you have already determined to be comparable or equivalent, if any (and for what regulatory purposes), and please note any jurisdictions for which a determination is pending.	

Determinations of equivalence have been proposed for the following jurisdictions in respect of CCP requirements and are pending adoption:

Japan
Australia
Hong-Kong
India
Singapore

The EC is also in the process of assessing the rules of the following jurisdictions in order to determine whether implementing acts of equivalence may be adopted:

CCPs	TRs	Trading Venues under pre-existing MIFID 1 regime
US CFTC Regime	Japan	US CFTC Regime
US SEC Regime	Australia	Switzerland
Switzerland	Hong-Kong	Japan
South Korea	Singapore	Singapore
Brazil	US CFTC Regime	Canada
Canada	US SEC Regime	
Mexico		
South Africa		
Dubai		
Malaysia		
New Zealand		

Part B: With respect to **requirements on market participants** related to: reporting to TRs; clearing transactions through CCPs; capital, margin and/or other risk mitigation requirements; and executing transactions on exchanges or electronic platforms:

<p>B.1 What legal capacity, if any, do authorities in your jurisdiction have to defer to another jurisdiction's regulatory framework and/or authorities? Which authorities can exercise this capacity? Please also indicate if/when 'partial' or 'conditional' deference decisions can be made.</p>	<p>Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and TRs (EMIR) and 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 (MIFIR) empower the European Commission to adopt implementing (legal) acts determining the derivatives regime of a third country to be 'equivalent' to the relevant regimes of the European Union. These implementing acts form the basis for deference to the regime of the third country and its supervisors.</p> <p>An outline of the relevant areas in which equivalence may be determined and any additional conditions for deference follow:</p> <p><u>Clearing, Margin, Reporting</u></p> <p>In accordance with Article 13 of EMIR, the Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country:</p> <ul style="list-style-type: none"> - are equivalent to the respective requirements in EMIR, - ensure an equivalent protection of professional secrecy, and - are being applied in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country. <p>Where the Commission has determined that the rules of a third country in those areas are equivalent to those under EMIR, an EU entity is deemed to have fulfilled the relevant obligations of EMIR when facing a counterparty established in that jurisdiction.</p> <p><u>Trading Obligation</u></p> <p>Where the Commission has determined that the legal and supervisory framework of a third country is considered to have equivalent effect in, a trading venue in that jurisdiction is then considered eligible for the compliance with the trading obligation. This means that counterparties entering into a transaction subject to the trading obligation shall be deemed to have fulfilled this obligation where at least one of the counterparties is established in that third country and the counterparties are in compliance with those legal, supervisory and enforcement arrangements of the</p>
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	<p>relevant third country.</p> <p><u>Investment firms</u> Where the Commission has determined that the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to MIFIR and MIFID a third-country firm from that jurisdiction may provide investment services or perform investment activities, including in relation to derivatives, to eligible counterparties and to professional clients established throughout the EU without the establishment of a branch (central registration with ESMA).</p>
<p>B.2 Please provide a brief description of the standards that need to be met in coming to a decision as to whether to exercise any such deference, and the criteria/inputs used in assessing whether these standards have been met (e.g. whether “similar outcomes” is the standard used; whether an analysis of enforcement regimes or authority is included as part of the assessment; whether reference is made to implementation of international standards; etc.).</p>	<p>The purpose of equivalence decisions is to verify that the supervisory framework applicable to market participants in a third-country jurisdiction delivers equivalent results. This assessment is not aimed at checking that rules identical to EU rules applicable to trading, clearing, margin requirements and reporting are in place in the third country. The assessment is ‘outcome-focused’ and takes as much as possible account of the specificities of the regulatory context in the third country and including the nature of the relevant markets.</p> <p>This exercise involves the authorities of the third country which supervisory framework is assessed during all the process, in order to understand both the functioning and the specificities of the local markets and in order to understand not only the substance of this framework but the overall outcomes of it.</p>
<p>B.3 Please provide a brief description of the process by which a decision to defer to another jurisdiction is taken, including any action that needs to be initiated to begin the process (e.g. an application from a jurisdiction or an entity), the general time frame for coming to a decision, any processes in place for reviewing a decision, and whether any other agreements or conditions need to be met in order for an affirmative decision to be taken (e.g. confidentiality agreements, supervisory cooperation, or reciprocal arrangements).</p>	<p><u>Clearing, Margin, Reporting</u></p> <p>The basis for a determination of equivalence under Article 13 of EMIR is the need to avoid conflicting or duplicative requirements.</p> <p>The European Commission will therefore undertake assessments of a third country’s rules where it has reason to understand that duplication or conflicts may arise under cross-border transactions between EU market participants and market participants in the third country jurisdiction.</p> <p>During the entire drafting process, the authorities of that said third country are involved and consulted.</p> <p>Once the European Commission's staff has drafted the draft equivalence decisions, they are sent to other services of the European Commission (including the legal services) for consultation ("intra-service consultation"). Those services provide comments on the draft decisions.</p>

	<p>This consultation process takes several weeks.</p> <p>At the end of this consultation, the Member States are consulted via the European Securities Committee (ESC).</p> <p>After these consultations, and since the equivalence decisions are Delegated Acts of the Commission, they have to be translated in the official languages of the 28 Member States of the European Union and adopted by the College of Commissioners. After that, they will be published in the Official Journal of the European Union.</p> <p>The overall process is expected to take a few months.</p> <p><u>Trading obligation/Investment firm</u></p> <p>Please refer to reply to question B.1</p>								
<p>B.4 Please provide copies of, or weblinks to, any documentation or forms that have been developed for sharing with jurisdictions or entities as part of the comparability or equivalence assessment.</p>	<p>n/a</p>								
<p>B.5 Please provide a list of jurisdictions that you have already determined to be comparable or equivalent, if any (and for what regulatory purposes), and please note any jurisdictions for which a determination is pending.</p>	<p><u>Clearing, Margin, Reporting</u></p> <p>The EC is in the process of assessing the rules of the following jurisdictions in order to determine whether implementing acts of equivalence may be adopted:</p> <table border="1" data-bbox="767 1205 1404 1485"> <tr><td>US CFTC Regime</td></tr> <tr><td>US SEC Regime</td></tr> <tr><td>Switzerland</td></tr> <tr><td>Japan</td></tr> <tr><td>Australia</td></tr> <tr><td>Hong-Kong</td></tr> <tr><td>Singapore</td></tr> <tr><td>Canada</td></tr> </table> <p><u>Trading obligation/Investment firms</u></p> <p>MIFIR and MIFID enter into application on 3 January 2017. The EC will launch equivalence assessments in due course.</p>	US CFTC Regime	US SEC Regime	Switzerland	Japan	Australia	Hong-Kong	Singapore	Canada
US CFTC Regime									
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