

Financial Regulatory Alert

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On 27 January 2021, the European Commission adopted an equivalence decision¹ determining that the legal and supervisory arrangements applicable to US central counterparties (CCPs) registered with the Securities and Exchange Commission (SEC) as “covered clearing agencies” (CCAs), are equivalent to the requirements in Title IV of the European Market Infrastructure Regulation (EMIR).² The equivalence decision applies in relation to transactions in securities and derivative contracts that are based on a single security, loan or a narrow-based group or index of securities (“security-based derivatives” or “security-based swaps”) falling under the competence of the SEC.³

Under Article 25(1) of EMIR, a CCP established in a third country may only provide clearing services to clearing members or trading venues established in the EU where that CCP has been recognised by the European Securities and Markets Authority (ESMA). Following the equivalence decision, SEC-registered CCPs may now apply to ESMA for recognition to provide clearing services in the EU.⁴ Once recognised, the third country CCP may be used by counterparties to comply with the clearing obligation of Article 4 of EMIR. However, given the limited number of types of OTC derivatives currently subject to the clearing obligation under EMIR,⁵ the equivalence decision with respect to SEC CCAs will not be relevant for such purpose.

The equivalence decision complements the EU’s first equivalence decision with respect to US CCPs of 16 March 2016 (“Implementing Decision”) in relation to CCPs registered with and supervised by the Commodity Futures Trading Commission (CFTC).⁶ The responsibility for the supervision of CCPs in the United States is shared between the SEC and the CFTC. The 2016 Implementing Decision related solely to the equivalence of the legal and supervisory arrangements for US CCPs that are “derivative clearing organisations” (DCOs) authorised and regulated by the CFTC, and did not include derivative contracts falling under the competence of the SEC.⁷ However, given the types of OTC derivatives currently subject to the clearing obligation under EMIR, the CFTC equivalence decision will continue to be relevant to counterparties subject to the clearing obligation under EMIR trading those types of derivatives.

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Equivalence decision in relation to UK CCPs

The timing of the equivalence decision in respect of US CCPs serves to highlight the political nature of equivalence decisions by the EU, as it is difficult not to contrast with the position of UK CCPs. To date, the EU has only adopted an 18-month time-limited equivalence decision (i.e., until 30 June 2022), on the legal and regulatory framework of UK CCPs that are **already** established and authorised in the UK. ESMA recognized three UK CCPs as eligible to provide clearing services in the EU on that basis.

This may, however, change depending on the outcome of the further separate negotiations on financial services between the UK and EU by March 2021, during which “the Parties will discuss, inter alia, how to move forward on both sides with equivalence determinations between the Union and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side.”⁸

¹ Commission Implementing Decision (EU) 2021/85 of 27 January 2021 on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission (See [here](#)). Financial services: Commission adopts equivalence decision for U.S. central counterparties, 27 January 2021 (See [here](#)).

² 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

³ Recital 6, Commission Implementing Decision (EU) 2021/85.

⁴ The equivalence decision is conditional on the U.S. CCPs complying with the risk management requirements of Article 1 of the equivalence decision.

⁵ Public Register for the Clearing Obligation under EMIR, Section 1.1 OTC derivatives classes subject to the clearing obligation (See [here](#)).

⁶ Commission Implementing Decision (EU) 2016/377 of 15 March 2016 on the equivalence of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the Commodity Futures Trading Commission to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council (See [here](#)).

⁷ The CFTC is the competent authority for the supervision of all derivative contracts that are not based on a single security (a bond or share), loan or a narrow based group or index of securities. Recital 6, Commission Implementing Decision (EU) 2016/377.

⁸ The Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom, page 2 (See [here](#)).

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