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COMMISSION IMPLEMENTING DECISION

of XXX

on the equivalence of the regulatory framework of Australia for central counterparties to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

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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 repositories ⁽¹⁾, and in particular Article 25(6) thereof,

Whereas:

- (1) The procedure for recognition of central counterparties (“CCPs”) established in third countries set out in Article 25 of Regulation (EU) No 648/2012 aims to allow CCPs established and authorised in third countries whose regulatory standards are equivalent to those laid down in that Regulation to provide clearing services to clearing members or trading venues established in the Union. That recognition procedure and the equivalence decision provided for therein thus contribute to the achievement of the overarching aim of Regulation (EU) No 648/2012 to reduce systemic risk by extending the use of safe and sound CCPs to clear over-the-counter (“OTC”) derivative contracts, including where those CCPs are established and authorised in a third country.
- (2) In order for a third country legal regime to be considered equivalent to the legal regime of the Union in respect of CCPs, the substantial outcome of the applicable legal and supervisory 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 legal and supervisory arrangements of Australia ensure that CCPs established and authorised therein do not expose clearing members and trading venues established in the Union to a higher level of risk than the latter could be exposed to by CCPs authorised in the Union and, consequently, do not pose unacceptable levels of systemic risk in the Union.
- (3) On 1 September 2013, the Commission received the technical advice of the European Securities and Markets Authority (“ESMA”) on the legal and supervisory arrangements applicable to CCPs authorised in Australia. The technical advice concludes that all of the provisions in Title IV of Regulation (EU) No 648/2012 are replicated by corresponding legally binding requirements which are applicable, at a jurisdictional level, to CCPs authorised in Australia.
- (4) In accordance with Article 25(6) of Regulation (EU) No 648/2012, three conditions need 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.

¹ OJ L 201, 27.7.2012, p. 1.

- (5) According to the first condition, CCPs authorised in a third country must comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (6) The legally binding requirements of Australia for CCPs authorised therein consist of the Corporations Act 2001 ("Corporations Act"), which together with the Corporations Regulations 2001 ("Corporations Regulations"), establish the legal framework for clearing and settlement facilities ("CS facilities"). Part 7.3 of the Corporations Act provides that before granting a licence to carry out the activities of clearing or settlement, the Minister must be satisfied, among other things, that the CCP concerned has adequate operating rules and procedures which conform to the applicable laws and regulations to ensure, as far as it is reasonably practicable, that systemic risk is reduced and that the CCP is operated in a fair and effective manner. The CCP must also have adequate arrangements for handling conflicts of interest and for enforcing its internal rules and procedures. The Australian Securities and Investments Commission ("ASIC") and the Reserve Bank of Australia ("RBA") advise the Minister regarding the granting of CS facilities' licences and changes of their internal rules and procedures, and are in charge of assessing, and in the case of ASIC of enforcing, CCPs' compliance with their obligations under the Corporations Act.
- (7) ASIC provides regulatory guidance to regulated entities to explain specific issues already covered by legislation. In particular, ASIC revised its regulatory guidance on licensing and oversight of CS facilities' licences in December 2012 under the updated Regulatory Guide 211 "Clearing and settlement facilities: Australian and overseas operators" ("RG 211). ASIC's RG 211 implements the Principles for Financial Market Infrastructures ("PFMIs") issued in April 2012 by the Committee on Payment and Settlement Systems² ("CPSS") and the International Organization of Securities Commission ("IOSCO"), which are relevant for the obligations set out in the Corporations Act, and provides guidance to CCPs on how to comply with their obligations under the Corporations Act. Therefore, failure to comply with the Corporations Act as explained in RG 211 could entail enforcement action and sanctioning measures.
- (8) RBA has the power, under the Corporations Act, to determine financial stability standards for the purpose of ensuring that CCPs operate in a way that causes or promotes the overall stability of the Australian financial system. In particular, in November 2012, RBA's Payments System Board approved the determination of new financial stability standards, the Financial Stability Standards for Central Counterparties ("FSS"), which comprise 21 standards for CCPs, with accompanying sub-standards and guidance. Other than certain sub-standards, which came into effect on 31 March 2014, the FSS became effective in March 2013. The FSS are to be complied with by all licensed CCPs.
- (9) The core principles for CS facilities set out in Part 7.3 of the Corporations Act and the Corporations Regulations, as explained under ASIC's RG 211, and the FSS determined by RBA (together "the primary rules"), set out the high-level standards with which CCPs must comply in order to obtain authorisation to provide clearing services in Australia. Those primary rules comprise the first tier of the legally binding requirements in Australia. In order to comply with the primary rules, CCPs adopt, in addition, their internal rules and procedures which must conform with the specific

² As of 1 September 2014 the Committee on Payment and Settlement Systems has changed its name to Committee on Payment and Market Infrastructures "CPMI").

requirements set out in the Corporations Act and the Corporations Regulations, as explained under RG 211, and the FSS, which are submitted to the Minister prior to authorisation as a CS facility. Changes to the internal rules and procedures of CCPs must be notified to the Minister. The Minister can disallow changes in the internal rules and procedures of CCPs. The internal rules and procedures of CCPs have the effect of a contract and are legally binding on CCPs and their respective participants.

- (10) The legally binding requirements set out in the primary rules applicable to CCPs authorised in Australia deliver substantial results equivalent to those of the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (11) The Commission therefore concludes that the legal and supervisory arrangements of Australia ensure that CCPs authorised therein comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (12) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Australia in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (13) CCPs authorised in Australia are subject to on-going supervision and oversight by ASIC and RBA. ASIC is responsible for enforcing CCPs' compliance with their obligations under the Corporations Act and in this respect, it conducts periodic assessments of compliance by CCPs with their licence obligations, other than their obligations relating to FSS and systemic risk reduction, and in particular with their duty to operate in a fair and effective manner to the extent it is reasonable to do so, and submits a report to the Minister, which is published. RBA monitors compliance by CCPs with their obligations under their respective licences and relating to financial stability and reduction of systemic risk, conducts periodic assessments of compliance by each CCP with the FSS and submits a report to the Minister, which is also published. CCPs authorised in Australia may receive written directions from the Minister and from ASIC. If a CCP fails to comply with a written direction, ASIC may apply to the courts which may order the CCP to comply with the written direction.
- (14) The Commission therefore concludes that the legal and supervisory arrangements of Australia in respect of CCPs authorised therein provide for effective supervision and enforcement on an ongoing basis.
- (15) According to the third condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Australia must include an effective equivalent system for the recognition of CCPs authorised under third country legal regimes ("third country CCPs").
- (16) Third country CCPs may apply for an 'overseas clearing and settlement facility licence' ("an overseas CCP licence") enabling them to provide in Australia some or all of the clearing services they are authorised to provide in their home country.
- (17) The criteria applied to third country CCPs applying for an overseas CCP licence in Australia are comparable to those provided for third country CCPs applying for recognition under Article 25 of Regulation (EU) No 648/2012. As a prerequisite for recognition, the regulatory regime of the third country in which the CCP is authorised must be deemed 'sufficiently equivalent', in relation to the degree of protection from systemic risk and level of effectiveness and fairness of services it achieves, to the Australian regulatory regime for comparable domestic CCPs. The assessment of

‘sufficient equivalence’ involves similar considerations as those assessed under Regulation (EU) No 648/2012. The establishment of cooperation arrangements between the Australian authorities and the relevant foreign supervisory authorities is also required to grant an overseas CCP licence.

- (18) It should therefore be considered that the legal and supervisory arrangements of Australia provide for an effective equivalent system for the recognition of third country CCPs.
- (19) The conditions laid down in Article 25(6) of Regulation (EU) No 648/2012 can therefore be considered to be met by the legal and supervisory arrangements of Australia regarding CCPs authorised therein and those legal and supervisory arrangements should be considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012. The Commission, informed by ESMA, should continue monitoring the evolution of the Australian legal and supervisory framework for CCPs and the fulfilment of the conditions on the basis of which this decision has been taken.
- (20) 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 Article 25 of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Australia applicable to CCPs authorised therein, consisting of Part 7.3 of the Corporations Act 2001 and the Corporations Regulations 2001, as explained under Regulatory Guidance 211 "Clearing and settlement facilities: Australian and overseas operators", and the Financial Stability Standards for Central Counterparties, 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 twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Commission
The President