Final report

Technical advice on third country regulatory equivalence under EMIR – Canada
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Key to the references and terms used in this technical advice

AMF: Autorité des Marchés Financiers
BOC: Bank of Canada
CDIC: Canada Deposit Insurance Corporation
CIS: Collective investment schemes
CSA: Canadian Securities Administrators
DOF: Department of Finance
ESAs: European Supervisory Authorities, i.e. ESMA, EBA and EIOPA
ESMA: European Securities and Markets Authority
FCAC: Financial Consumer Agency of Canada
NCA: National Competent Authority from the European Union
OSC: Ontario Securities Commission
OSFI: Office of the Superintendent of Financial Institutions
OTC: Over The Counter
RTS: Regulatory Technical Standards
SRO: Self-Regulatory Organisation
Section I.

Executive summary

1. The European Commission mandated ESMA on 11 October 2012 to provide it with technical advice on the equivalence between the Canadian regulatory regime and different aspects of the EU regulatory regime under Regulation (EC) No. 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties (CCPs) and trade repositories (TRs). The mandate was subsequently reviewed to postpone the deadline to provide the advice and to change its scope in relation to certain jurisdictions.

2. The specific area of advice concerns the identification of potentially duplicative or conflicting requirements regarding the clearing obligation, reporting obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP.

3. This report sets out ESMA’s advice to the European Commission in respect of the equivalence between the Canadian regulatory regime and the EU regulatory regime under EMIR in respect of the clearing obligation, non-financial counterparties and risk-mitigation techniques for OTC derivatives transactions not cleared through a CCP.

4. The equivalence assessment conducted by ESMA follows an objective-based approach, where the capability of the regime in the third country to meet the objectives of the EU Regulation is assessed from a holistic perspective. The analysis of the differences and similarities has been conducted as factually as possible. The advice to the Commission has been based on that factual assessment but has also taken into account the analysis of the consequences for the stability and protection of EU entities and investors that an equivalence decision would have in those specific areas where the legally binding requirements are not considered equivalent.

5. The European Commission is expected to use ESMA’s technical advice to prepare possible implementing acts concerning the equivalence between the legal and supervisory framework of Canada under EMIR. Where the European Commission adopts such an implementing act then this shall imply that counterparties entering into a transaction subject to this EMIR shall be deemed to have fulfilled the obligations contained in Articles 4, 9, 10 and 11 of EMIR where at least one of the counterparties is established in that third country. ESMA’s conclusions in respect of this technical advice should not be seen to prejudge any final decision of the European Commission or of ESMA.

1 Hereafter the Regulation or EMIR.
Introduction

1. The European Commission mandated ESMA on 11 October 2012 to provide it with technical advice on the equivalence between the Canadian regulatory regime and two specific aspects of the EU regulatory regime under EMIR. On 27 February 2013, the Commission amended the original mandate to postpone the deadlines for the delivery of the technical advice by ESMA. For Canada, the original deadline of 15 June 2013 was changed to 15 July 2013. On 13 June 2012, the European Commission further amended the mandate to postpone the deadlines for the delivery of technical advice by ESMA and to change its scope in respect of certain jurisdictions. For Canada, the revised deadline of 15 June 2013 was changed to 1 October 2013 (see Annex I and II).

2. The mandate on equivalence for Canada therefore covers one specific area: the identification of potentially duplicative or conflicting requirements regarding the clearing obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP.

3. Securities markets in Canada operate under provincial regulation and supervision. As a result, there are 13 regulatory authorities, each administering a separate set of securities laws and regulations. Under the umbrella of the CSA, provincial regulators aim to harmonise regulatory requirements and coordinate oversight across Canada.

4. As it was not possible to assess 13 provinces, the assessment relied on the regulatory frameworks of Ontario and Québec. Given the high level of harmonisation in regulations that has been brought about by the adoption of National Instruments, and the fact that these two provinces account for a very significant proportion of the activity of the Canadian financial markets, ESMA believes that this is a reasonable approach. Reference to Canada in the document should thus be read accordingly.

5. This report sets out ESMA’s advice to the European Commission in respect of the equivalence between the Canadian regulatory regime and the EU regulatory regime under EMIR in respect of the clearing obligation, non-financial counterparties and risk mitigation techniques for OTC derivatives transactions not cleared through a CCP.

6. ESMA has liaised with its counterparts in Ontario and Québec, OSC and AMF, in the preparation of this report and has exchanged materials and views on the key areas of the analysis. However, the views expressed in this report are those of ESMA and ESMA alone is responsible for the accuracy and conclusions of this advice. ESMA has decided not to launch a public consultation on this advice. The advice is not about a policy option or a legislative measure that could be subject to improvement or reconsideration due to market participants’ views or comments. It is a factual comparison of the respective rules of a third country jurisdiction with the EU regime and an advice on how to incorporate these differences in a possible equivalence decision. ESMA is aware of the effects that an equivalence decision by the Commission could have on market participants, but considers that the key element of this advice is of a factual nature, not a policy one.

Purpose and use of the European Commission’s equivalence decision

7. According to Article 13(2) of the EMIR, the European Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the clearing and reporting requirements laid down in EMIR (Articles 4, 9, 10 and 11) to avoid duplicative or conflicting rules.

8. In accordance with Article 13(1) of EMIR, the Commission, assisted by ESMA, must monitor, prepare reports and recommend possible action to the European Parliament and the Council on the international application of the clearing and reporting obligations, the treatment of non-financial undertak-
ings and the risk mitigation techniques for OTC trades that are not cleared by a CCP, in particular with regard to potential duplicative or conflicting requirements on market participants.

9. The European Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country 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. An implementing act adopted by the Commission declaring that the abovementioned conditions have been fulfilled for a third country shall imply, according to Article 13(3), that if at least one of the counterparties entering into an OTC derivatives transaction is established in that third country and the contract is subject to EMIR, the counterparties will be deemed to have fulfilled the requirements of EMIR by dis-applying EMIR provisions and applying the provisions of the equivalent third country regime.

10. The European Commission has requested ESMA’s technical advice in respect of Canada to prepare possible implementing acts under Articles 13(2) of EMIR. This report contains ESMA’s advice in respect of Canada under Articles 13(2) of EMIR.

11. ESMA’s conclusions in respect of this technical advice should not be seen to prejudge any final decision of the European Commission on equivalence.

ESMA’s Approach to assessing equivalence

12. Concerning the assessment approach taken in preparing this technical advice, ESMA has followed an objective-based approach, where the capability of the regime in the third country to meet the objectives of the EU Regulation is assessed from a holistic perspective.

13. In providing its technical advice ESMA has taken account of the following:
   - The requirements of the ESMA Regulation.
   - The principle of proportionality: that the technical advice should not go beyond what is necessary to achieve the objective of the implementing acts set out in the legislative act.
   - The objectives of coherence with the regulatory framework of the Union.
   - That ESMA is not confined to elements that should be addressed by the implementing acts but may also indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
   - The need for horizontal questions to be dealt with in a similar way to ensure coherence between different areas of EMIR.
   - The desirability that ESMA’s technical advice cover the subject matters described by the delegated powers included in the relevant provisions of the legislative act and its corresponding recitals as well as in the relevant Commission’s request for technical advice.
   - That ESMA should address to the Commission any question it might have concerning the clarification on the text of the legislative act.
Section II. Technical advice on potential duplicative or conflicting requirements

14. In its mandate, the Commission requested ESMA to provide advice on the legal and supervisory regime in Canada and to advise whether (i) the legal, supervisory and enforcement arrangements of Canada are equivalent to the respective requirements in EMIR, (ii) ensure an equivalent protection of professional secrecy, and (iii) are being applied in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.

Part I. General legal and supervisory regime in Canada

15. Given its federal nature, Canada has a relatively complex regulatory structure. At the federal level, the regulatory framework for the financial sector includes the:
   - Department of Finance Canada (DOF), responsible for the overall stability of the Canadian financial system and with overarching authority over financial sector legislation at the federal level;
   - Bank of Canada (BOC), which provides liquidity to the Canadian financial system, oversees key payment, clearing and settlement systems, and assesses risks to financial system stability;
   - Office of the Superintendent of Financial Institutions (OSFI), the prudential regulator and supervisor of federally regulated financial institutions (banks, trust and loan companies and insurance companies) and private pension plans;
   - Canada Deposit Insurance Corporation (CDIC), which insures deposits of member institutions and is the Canadian bank resolution authority; and
   - Financial Consumer Agency of Canada (FCAC), which protects and informs consumers of financial products and services at the federal level.

16. In addition to the federal government, provincial governments also have jurisdiction over the financial sector. In the case of banks, the federal government is responsible for their prudential regulation, while jurisdiction over market conduct is shared responsibility. Most credit unions and caisses populaires are provincially incorporated and almost exclusively regulated at the provincial level for both prudential and market conduct purposes. Trust and loan companies are regulated at the provincial level for market conduct and at the federal level for prudential purposes, and the same split applies to the life and health insurance sector. The regulation of pension plans is also shared between the federal and provincial governments.

17. In the securities sector, each Canadian province or territory has its own regulatory authority, although laws and regulations are in general harmonised across the provinces. As a result, there are 13 regulatory authorities, each one administering a separate set of securities laws and regulations. Overall, securities legislation in all the provinces and territories has the same underlying objectives—the protection of investors and ensuring fair, efficient capital markets—and the regulatory authorities share the same core responsibilities. The CSA - a voluntary umbrella organisation of provincial and territorial securities regulators - seeks to improve, coordinate and harmonise regulation of the Canadian capital markets. In recent years, all CSA members, other than Ontario (whose publicly listed companies account for 40% of the total market capitalisation in Canada), have adopted a “passport” rule, which streamlines filings and review procedures for prospectus filings, discretionary relief applications, market intermediary registrations, and credit rating organization designations. Generally, the passport system gives a market participant automatic access to the capital markets in other Canadian jurisdictions by obtaining a decision only from its “principal regulator” and meeting the requirements of one set of harmonized laws. Although Ontario has not adopted the passport system, all CSA members have
adopted policies to provide an interface between Ontario and the other Canadian jurisdictions. Under these interface policies, if a market participant’s head office is in Ontario (and in certain other prescribed circumstances), the OSC will act as principal regulator and its decision will be effective in the other Canadian jurisdictions. Further, market participants based in other Canadian jurisdictions that also want to access the Ontario capital market may generally do so by dealing with their principal regulator. Provincial and territorial securities regulators also coordinate with and rely upon self-regulatory organisations, including the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada, for certain aspects of the regulation and supervision of the Canadian markets and participants.

18. There are several mechanisms to facilitate collaboration between the regulatory bodies at the federal level and with the main provincial securities commissions. However there is no single entity that is formally responsible for undertaking macroprudential oversight of the financial system.

19. A unique element of federal financial regulations in Canada is that they lapse after five years, i.e. the legislation contains a so-called “sunset clause”. This clause results in a review of all legislation to ensure that it is current, contributes to stability and growth of the financial sector and, by extension, allows Canada to remain a global leader in financial services. The most recent legislative review was completed in 2007, with the current five-year review being launched in September 2010. The sunset date for financial institution statutes is April 2012.

20. In the four largest jurisdictions—Alberta, British Columbia, Ontario and Quebec—which roughly supervise 95 percent of the Canadian market, the regulatory agencies are operationally independent and fully self-funded by levies imposed on market participants and activities. They have comprehensive powers, including enforcement powers. In the case of the AMF, enforcement powers are exercised through an independent tribunal, the Bureau de Décision et de Révision en Valeurs Mobilières.

21. Authorisation and supervision of issuers, CIS, registrants and credit rating organisations are the areas where more progress has been achieved. All members of the CSA, other than Ontario, developed and expanded the passport system, through which prospectus approval, discretionary exemption decisions, registration, and credit rating organization designations can be carried out through a principal regulator. A principal regulator’s approval can be used as a passport in all other passport jurisdictions in which the market participant wishes to participate. As noted earlier, while Ontario has not adopted the passport system, all CSA members have adopted policies to provide an interface between Ontario and the other Canadian jurisdictions, under which Ontario can act as principal regulator. The provincial regulators have also developed a coordinated approach for exchanges and SRO oversight.

22. Provincial regulators rely largely on self-regulatory organizations (SROs) for the regulation and supervision of the market and its participants. The main SROs are the Investment Industry Regulatory Organization of Canada Inc., which has self-regulatory powers over securities (equities and debts) dealers; the Mutual Fund Dealers Association of Canada, which has powers over mutual fund dealers; the Chambre de la sécurité financière, which regulates mainly mutual fund representatives in Quebec. The Montréal Exchange is recognized as a SRO. The equity exchanges (TSX and TSXV) should be considered SROs, although they have outsourced market regulation functions to the Investment Industry Regulatory Organization of Canada Inc.

23. An independent assessment was carried out by the International Monetary Fund through its Financial Sector Assessment Program (FSAP) of the Canadian financial supervisory system (IMF Country Report No. No. 08/59) which includes a detailed assessment of the IOSCO Objectives and Principles of Securities Regulation. The FSAP and assessment of IOSCO Objectives and Principles of Securities Regulation are assessments of the supervisory regulations, arrangements and practices in a jurisdiction against the most relevant international standards in each field.
24. The last FSAP for Canada was published in January 2008 and therefore does not cover the revised IOSCO Objectives and Principles of Securities Regulation, which were updated in 2010. The report did however conclude that at that time, and based on the previous IOSCO Objectives and Principles of Securities Regulation, all of the general preconditions for an effective securities regulatory regime appeared to be in place in Canada.

25. The main findings in the FSAP report, although they point out several areas for possible improvement, depict the compliance with the IOSCO principles of securities regulation as broadly in compliance with international standards then.

**Par II – Equivalence to the requirements in EMIR for clearing obligation, reporting obligation, non-financial counterparties and for OTC derivatives contracts not cleared by a CCP**

26. In Québec the AMF has the power to impose a clearing obligation but the rules governing the manner as to how it may impose a clearing obligation must be provided by regulation. Section 87.1 was added to the Derivatives Act (Québec) by Bill 31 (2013, chapter 18) An Act to amend various legislative provisions mainly concerning the financial sector which was assented to on June 14, 2013. In accordance with Section 120 of Bill 31, the new Section 87.1 will come into force on the date set by the Government which will be at the latest the date that the rule governing the clearing obligation of derivatives will come into force. Section 87.1 of the Act states that the Authority may, in the manner prescribed by regulation, determine the derivatives which must be cleared by a clearing house.

27. In Ontario the OSC has the authority to impose a clearing obligation pursuant to Section 143(1), Para 35(iii) (to be proclaimed) of the Ontario Securities Act.

28. Work has started on the reform of OTC derivatives for example on April 18, 2013, CSA published the sixth in a series of eight papers, entitled Consultation Paper 91-407 – Derivatives: Registration. In this Consultation Paper, CSA proposes a registration framework for the regulation of key OTC derivatives market participants.

29. However, at the time of writing, rules relating to the clearing obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP have not yet been published. Therefore both for AMF and for OSC the specific rules governing how the clearing obligation will be imposed and the products it will apply to do not exist yet and are under development. They are expected to be published for public comment in Q4 2013 and be implemented end of 2014.

**Part III – Equivalent protection of professional secrecy**

30. With regards to protection of professional secrecy, the latest IMF report assesses IOSCO Principle 5 (that requires that the staff of the Regulator should observe the highest professional standards, including appropriate standards of confidentiality) and concludes: “The regulatory agencies have developed codes of ethics. Reporting obligations on investment activities are in place as well as mechanisms to monitor compliance.”

31. **ESMA finds the provisions related to the guarantee of professional secrecy compatible with the objectives and results regarding data protection and advises the European Commission to consider equivalence in this respect.**
Part IV – Equity and non-distortion

32. The supervisory and enforcement regimes with respect to OTC derivatives are not harmonised in Europe. However, EMIR requires the Member States to put in place effective, proportionate and dissuasive measures for the enforcement of the provisions related to the clearing obligation and risk mitigation techniques.

33. The Canadian regime does not provide any supervisory and enforcement regime established specifically for persons subject to the clearing obligation or benefiting from an exemption to the clearing obligations or to risk mitigation technique provisions since the specific rules governing those matters are yet to be implemented.

34. Taking into account also the general provisions on the Canada supervisory system highlighted in Part I, one can consider that when in place the relevant provisions will benefit from the same effective supervision and enforcement mechanisms and will be so in an equitable and non-distortive manner. ESMA thus advises the Commission to consider equivalence for Canada in respect of the effective supervisory and enforcement arrangements in an equitable and non-distortive manner.

Conclusion on mechanisms to avoid potential duplicative or conflicting requirements

35. Due to the absence of legally binding requirements equivalent to the clearing obligation, non-financial counterparties provisions and risk mitigation techniques foreseen in Articles 4, 10 and 11 of EMIR in the Canadian regime, ESMA considers that at this stage the necessary conditions to adopt an implementing act under Article 13(3) of EMIR on equivalence of the Canadian regime that would allow for the disapplication of Article 4, 10 and 11 of EMIR are not yet in place.
ANNEX I – Original Mandate from the European Commission – 11 October 2012

FORMAL REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE IMPLEMENTING ACTS CONCERNING REGULATION 648/2012 ON OTC DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES (EMIR)

With this formal mandate the Commission seeks ESMA's technical advice to prepare possible implementing acts concerning the equivalence between the legal and supervisory frameworks of certain third countries and Regulation No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR' or the "legislative act"). Any such implementing acts that may be proposed by the Commission must be adopted in accordance with Article 291 of the Treaty on the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this formal mandate and revise the timetable if the scope is amended. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.


According to Articles 25(6) and 75(1) of the legislative act the Commission may adopt an implementing act determining that the legal and supervisory arrangements of a third country ensure that CCP’s and trade repositories, which are respectively established or authorized in a specific third country comply with legally binding requirements which are equivalent to the requirements laid down in EMIR. Furthermore, according to Article 13(2) of the legislative act, the Commission may also adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the clearing and reporting requirements laid down in EMIR (Articles 4,9,10 and 11) to avoid duplicative or conflicting rules.

***

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the established practice within the European Securities Committee, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of these possible implementing acts.

The powers of the Commission to adopt implementing acts are subject to Articles 13(2), 25(6) and 75(1) of the Legislative act. As soon as the Commission adopts an implementing act, the Commission will notify it simultaneously to the European Parliament and the Council.

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³ OJ L55/13, 28.2.2011, p. 13-18

1.1 Scope.

CCPs
ESMA may recognise a CCP established in a third country under certain conditions. According to Article 25 (2a) EMIR one of those conditions is that the Commission has adopted an implementing act in accordance with Article 25 (6) EMIR determining that the legal and supervisory regime in the country in which the CCP is established ensure that CCPs established there comply with legally binding requirements which are equivalent to those of Title IV of EMIR, that those CCPs are subject to effective ongoing supervision and enforcement in the third country, and that its legal framework provides for an effective equivalent system for the recognition of CCPs authorised under the legal regime of a third country.

Trade repositories
Trade repositories established in a third country that intend to provide services and activities must be recognised by ESMA. Such recognition also requires an implementing act of the Commission under Article 75(1) of EMIR determining that the legal and supervisory regime in the country in which the trade repository is established ensure that trade repositories authorised there comply with legally binding requirements which are equivalent to those of EMIR, that those trade repositories are subject to effective ongoing supervision and enforcement in the third country, and guarantees of professional secrecy exist that are at least equivalent to those of EMIR.

Potential duplicative or conflicting requirements on market participants
In accordance with Article 13(1) EMIR, the Commission, assisted by ESMA, must monitor, prepare reports and recommend possible action to the European Parliament and the Council on the international application of the clearing and reporting obligations, the treatment of non-financial undertakings and the risk mitigation techniques for OTC trades that are not cleared by a CCP, in particular with regard to potential duplicative or conflicting requirements on market participants.

The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country 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. An implementing act adopted by the Commission declaring that the above-mentioned conditions have been fulfilled for a third country shall imply, according to Article 13(3), that if at least one of the counterparties entering into an OTC derivatives transaction is established in that third country and the contract is subject to EMIR, the counterparties will be deemed to have fulfilled the requirements of EMIR.

1.2 Principles that ESMA should take into account.

In providing its technical advice ESMA is invited to take account of the following principles:
- It should respect the requirements of the ESMA Regulation, and, to the extent that ESMA takes over the tasks of CESR in accordance with Art 8(1)(l) of the ESMA Regulation, take account of the principles set out in the Lamfalussy Report and those mentioned in the Stockholm Resolution of 23 March 2001.

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the implementing acts set out in the legislative act.

- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.

- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the implementing acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.

- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the legislative act and its corresponding recitals as well as in the relevant Commission's request included in this mandate.

- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology in the Union.

- ESMA should address to the Commission any question they might have concerning the clarification on the text of the legislative act, which they should consider of relevance to the preparation of its technical advice.

2. Procedure.

The Commission is requesting the technical advice of ESMA in view of the preparation of the possible implementing acts to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

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The Commission reserves the right to revise and/or supplement this formal mandate and revise the timetable if the scope is amended. The technical advice received on the basis of this mandate will not prejudge the Commission’s final decision in any way.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of the implementing acts relating to the legislative act.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts possible delegated acts, it will notify them simultaneously to the European Parliament and the Council.

3. **ESMA is invited to provide technical advice on the following issues with the following priorities.**

Taking into account the existence or expected adoption of final primary and/or secondary legislation in third countries and in order to compare the provisions of EMIR to that legislation the following division and prioritisation of technical advice is required in two phases.

**CCPs**

ESMA is invited to provide technical advice on the legal and supervisory regime in specific third countries (specified below) applicable to CCPs and to advise whether they comply with legally binding requirements which are equivalent to those of Title IV of EMIR, that those CCPs are subject to effective ongoing supervision and enforcement in the third country, and that its legal framework provides for an effective equivalent system for the recognition of CCPs authorised under the legal regime of a third country.

The delivery of technical advice should be prioritised in two phases.

- Phase I: the USA and Japan;
- Phase II: Switzerland, Australia, Dubai, India, Singapore and Hong Kong.

**Trade repositories**

ESMA is invited to provide technical advice on the legal and supervisory regime in specific third countries (specified below) and to advise whether the legal and supervisory regime in the country in which the trade repository is established ensures that trade repositories authorised there comply with legally binding requirements which are equivalent to those of EMIR, that those trade repositories are subject to effective ongoing supervision and enforcement in the third country, and guarantees of professional secrecy exist that are at least equivalent to those of EMIR.
The delivery of technical advice should be prioritised in two phases.

- Phase I: the USA;
- Phase II: Hong Kong.

No further third countries are envisaged at this point in time.

**Potential duplicative or conflicting requirements**

ESMA is invited to provide technical advice on the legal and supervisory regime in specific third countries (specified below) and to advise whether the legal, supervisory and enforcement arrangements of a third country 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.

The determination of any such requirements and arrangements for the obligations for clearing, reporting and non-financial counterparties (Articles 4, 9 and 10 of EMIR) should be prioritised in two phases.

- Phase I: the USA and Japan;
- Phase II: Hong Kong, Switzerland, Canada and Australia.

The determination of any such requirements and arrangements for the obligations for risk mitigation techniques for OTC trades that are not cleared by a CCP (Article 11 of EMIR) should be prioritised in two phases.

- Phase I: the USA, Japan;
- Phase II: Hong Kong, Switzerland, Canada and Australia.

4. **Indicative timetable.**

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission may seek to adopt any implementing acts according to Article 291 of the TFEU. The powers of the Commission to adopt implementing acts are subject to the control mechanisms for Member States laid down in Regulation 182/2011.

The deadlines set to ESMA to deliver technical advice are as follows:

- Phase I: 15 March 2013
- Phase II: within 3 months after the entry into force of the European Commission's Regulations with regard to regulatory and implementing technical standards for EMIR but at the latest by 15th June 2013.
Subject: Revised request for ESMA technical advice on the equivalence between certain third country legal and supervisory frameworks and the Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

Dear Mr Maijoor,

On 11th October 2012, I sent you a formal request for ESMA technical advice on the equivalence between certain third country legal and supervisory frameworks in respect of Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

This request has then been subsequently amended to revise the list of countries to be considered and extend the deadline for ESMA to deliver its technical advice, with the view to better take into account on-going international discussions and developments in this area.

This technical advice is an important element for the development of European Union’s policy for third countries in the field of OTC derivatives regulation. At this stage, we consider that the deadlines for the submission of ESMA technical advice need to be reviewed in order to allow ESMA more time to take account of international on-going developments and to consider their implications fully.

As discussed between our staff, I would therefore like to formally revise the deadlines indicated in the Commission’s request for technical advice and ask ESMA to deliver its advice on Japan and the USA by 1 September 2013 and, for the remaining countries, to deliver its advice by 1 October 2013. The table in annex summarises the list of technical advice requested to ESMA, as well as their respective deadlines.

In any case, I would like to highlight that the extension of ESMA deadline to deliver its technical advice affects neither the procedure nor the timeline for recognition of third-country central counterparties or trade repositorions.

Commission européenne/ Europese Kommissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIE - Tel. +32 22591111
In particular, as explained in our memo on the Practical implementation of the EMIR framework to non-EU central counterparties¹, third-country central counterparties that are currently providing services to EU clearing members should apply by 15 September 2013 in order to benefit from the transitional provisions provided by EMIR and continue providing services to EU clearing members until a decision is made by ESMA on their recognition.

In accordance with EMIR, ESMA will have 180 working days after the receipt of a complete application by a third-country CCP to make a decision on its recognition. The Commission will work in parallel to ensure the timely adoption of any equivalence decisions, as appropriate, in order to enable ESMA to adopt its recognition decision within this timeframe. I look forward to continuing working with you in close cooperation during this important work ahead.

Yours sincerely,

[Signature]

Emil Paulis

Enclosures: Table on the deadlines for ESMA Technical Advice

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### Deadlines for ESMA Technical Advice

In view of the European Commission's Decisions on Equivalence

<table>
<thead>
<tr>
<th>Third Country</th>
<th>CCPs</th>
<th>Trade Repositories</th>
<th>Potential Duplicative or Conflicting Requirements</th>
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<tbody>
<tr>
<td>US</td>
<td>1 September 2013</td>
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