

**Memorandum of Understanding**



**European Securities and Markets Authority**

**and**



**Financial Services Board**

## **Memorandum of Understanding Related to ESMA's Monitoring of the Ongoing Compliance with Recognition Conditions by CCPs established in South Africa**

In view of central counterparties ("CCPs") established in South Africa having applied to the European Securities and Markets Authority ("ESMA") for recognition as CCPs, pursuant to Article 25 of 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 ("EMIR") ("Covered CCPs"), Financial Services Board ("The Local Authority") and ESMA have reached this Memorandum of Understanding ("MoU") regarding arrangements for cooperation related to ESMA's monitoring of the on-going compliance by the Covered CCPs with the recognition conditions set out in Article 25 of EMIR (the "Recognition Conditions").

Under Article 25(6) of EMIR, the European Commission has adopted the Commission implementing decision (EU) 2015/2039 of 13 November 2015 determining that the legal and supervisory arrangements of South Africa ensure that Covered CCPs comply with legally binding requirements which are equivalent to the requirements of EMIR, that Covered CCPs are subject to effective supervision and enforcement in South Africa on an on-going basis, and that the legal framework of South Africa provides for an effective equivalent system for the recognition of CCPs under the South Africa legal regimes of third countries.

Article 25(2)(c) of EMIR requires the establishment of cooperation arrangements as a precondition for ESMA to recognise CCPs established in South Africa to provide clearing services to clearing members or trading venues established in the European Union.

Therefore, the purpose of this MoU is two-fold, namely to 1) ensure the fulfilment of the condition set out in Article 25(2)(c) of EMIR, *i.e.*, that cooperation arrangements have been established as regards the Covered CCPs; and 2) provide ESMA with adequate tools to monitor the on-going compliance by the Covered CCPs with the Recognition Conditions.

This MoU is an arrangement between the Local Authority and ESMA and not a collective arrangement with other European Union authorities. As such, it will not impact any arrangements which may be agreed directly between other European Union authorities and Local Authority.

### **Article 1**

#### **Definitions**

For the purpose of this MoU:

- a) "Authority" means a signatory to this MoU or any successor thereto;
- b) "Books and Records" means documents, electronic media, and books and records within the possession, custody and control of, and other information about, a Covered CCP;
- c) "CCP" means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer;
- d) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered CCP;
- e) "ESCB" means the European System of Central Banks;

- f) "Governmental Entity" means:
- i. If the Requesting Authority is Local Authority, the South African Reserve Bank; and
  - ii. If the Requesting Authority is ESMA, the authorities identified in Article 25(3) of EMIR, namely;
    - (a) the competent authority of a Member State in which the Covered CCP provides or intends to provide clearing services and which has been selected by the CCP;
    - (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States of the European Union which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 of EMIR on an aggregate basis over a one-year period;
    - (c) the competent authorities responsible for the supervision of trading venues located in the European Union, served or to be served by the CCP;
    - (d) the competent authorities supervising CCPs established in the European Union with which interoperability arrangements have been established;
    - (e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;
    - (f) the central banks of issue of the most relevant European Union currencies of the financial instruments cleared or to be cleared.
- g) "Laws and Regulations" means, in relation to ESMA, applicable European Union legislation within ESMA's scope of action as set out in Article 1(2) of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC and, in relation to Local Authority, the Financial Markets Act, 2012 (Act No. 19 of 2012), the Financial Services Board Act, 1990 (Act No. 97 of 1990), the Inspection of Financial institutions Act, 1998 (Act No. 80 of 1998) and the Financial Institutions (Protection of Funds) Act 2001 (Act No 28 of 2001);
- h) "On-site Inspection" means any regulatory visit by ESMA to the premises of a Covered CCP located in the Local Authority's territory, including inspection of Books and Records;
- i) "Person" includes a natural person, unincorporated association, partnership, trust investment company or corporation and may be a Covered CCP;
- j) "Requested Authority" means the Authority to whom a request is made under this MoU; and
- k) "Requesting Authority" means the Authority making a request under this MoU.

## Article 2

### General provisions

1. Pursuant to the regime under EMIR for recognition of third-country CCPs, ESMA does not have direct supervision or enforcement powers over the Covered CCPs and relies on the supervision and enforcement capabilities of the Local Authority which supervise and enforce compliance with the Local Authority's Laws and Regulations.
2. This MoU does not cover cooperation with regards to CCPs established in the European Union because ESMA does not have direct supervisory powers in respect of such CCPs. For the avoidance of doubt, this MoU does not cover, in particular, cooperation in respect of CCPs established in the European Union of the supervisory college of which ESMA is a member.
3. This MoU is a statement of intent to consult, cooperate and exchange information in connection with ESMA's monitoring of the On-going compliance by the Covered CCPs with the Recognition Conditions. The cooperation and information sharing arrangements under this MoU should be interpreted and implemented in a manner that is permitted by, and consistent with, the laws and other legal or regulatory requirements applicable to each Authority.
4. This MoU does not create any legally binding obligations, confer any rights or supersede any domestic laws. This MoU does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this MoU.
5. This MoU is not intended to limit or condition the discretion of an Authority in any way in the discharge of its regulatory responsibilities or to prejudice or affect in any way the individual responsibilities, competencies or autonomy of any Authority. This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates. In particular, this MoU does not affect any right of any Authority to communicate with or obtain information or documents from any Person subject to its jurisdiction that is established in the territory of the other Authority.
6. The Local Authority should, within the framework of this MoU, provide each other with the fullest cooperation permissible under their Laws and Regulations in relation to ESMA's monitoring of the ongoing compliance by the Covered CCPs with the Recognition Conditions. Following notification, cooperation may be denied:
  - a) Where the cooperation would require an Authority to act in a manner that would violate its Laws and Regulations; or
  - b) On the grounds of national public interest for the Local Authority and of European public interest for ESMA.
7. The Authorities represent that as of the date of this MoU no domestic laws or regulations should prevent them from providing assistance to one another.
8. To facilitate communication and cooperation under this MoU, the Authorities hereby designate contact persons the details of which are as set out in the Appendix. Any amendments to the details of contact persons shall be communicated without undue delay to the other Authority.

## Article 3

### Scope of cooperation

1. The Authorities recognise the importance of close communication concerning the Covered CCPs and intend to cooperate regarding:
  - a) general issues, including with respect to regulatory, supervisory or other developments concerning the Covered CCPs;
  - b) issues relevant to the operations, activities and services of the Covered CCPs; and
  - c) any other areas of mutual interest.
2. The Authorities recognise in particular the importance of close cooperation in the event that a Covered CCP, particularly one whose failure likely would be systemically important to an Authority, experiences, or is threatened by, a potential financial crisis or other Emergency Situation.
3. Cooperation will be most useful in circumstances where issues of regulatory concern may arise, including but not limited to:
  - a) the initial application of a Covered CCP for recognition in the European Union pursuant to Article 25 of EMIR;
  - b) changes in a Covered CCP's internal rules, policies and procedures that could affect the way in which the Covered CCP complies with any Recognition Conditions; or
  - c) regulatory or supervisory actions or approvals taken by the Local Authority or ESMA in relation to a Covered CCP, including changes to the relevant obligations and requirements to which the Covered CCPs are subject that may impact the Covered CCPs' continued compliance with the Recognition Conditions.
4. *Notification.* The Authorities shall seek to inform each other as soon as practicable of:
  - a) any known material event that could adversely impact the financial or operational stability of a Covered CCP, including where the Covered CCP is deemed to be in breach of the conditions of any license, registration, authorisation or recognition, or of any Laws and Regulations to which it is subject;
  - b) enforcement or regulatory actions or sanctions, including the withdrawal, revocation, suspension or modification of any license, registration, authorisation or recognition concerning or related to a Covered CCP and which may have a material effect on the Covered CCP;
  - c) in respect of notification by ESMA to the Local Authority, any permission or approval granted to a Covered CCP to provide clearing services to clearing members, trading venues or, when known to the CCP, clients established in the European Union, including in respect of branches of entities established in the European Union;
  - d) in respect of notification by ESMA to the Local Authority, any request to a Covered CCP to observe a measure that ESMA has adopted to ensure compliance with the Recognition

Conditions, or to cease a practice that ESMA determines is contrary to the Recognition Conditions;

- e) any material extension of the range of activities and services that a Covered CCP provides with respect to current or new asset classes or current or new European Union trading venues; and
- f) material changes to the Laws and Regulations to which the Covered CCPs are subject.

The information to be provided by an Authority pursuant to this paragraph will refer to the Covered CCPs. The determination of what constitutes "material extension", "material changes", "material event", "adversely impact" or "material effect" will be left to the reasonable discretion of the Authority providing the information.

5. *Exchange of Written Information.* Each Authority, upon written request, intends to provide the other Authority with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the Laws and Regulations to which the Covered CCPs are subject, provided that the Requested Authority is authorised to collect such information. Such requests shall be made pursuant to Article 4 of this MoU, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimising administrative burdens.

The information covered by this paragraph includes without limitation:

- a) information that would assist the Requesting Authority in verifying that a Covered CCP complies with the relevant obligations and requirements of the Laws and Regulations of the Requesting Authority;
- b) information that would assist ESMA in verifying compliance with its request to a Covered CCP to observe a measure that ESMA has adopted to ensure compliance with the Recognition Conditions or to cease a practice that ESMA determines is contrary to the Recognition Conditions;
- c) information that would assist the Requesting Authority in understanding changes to the relevant obligations and requirements to which the Covered CCPs are subject under the Laws and Regulations of the Requested Authority;
- d) information relevant to the financial and operational condition of a Covered CCP, which might include periodic reports submitted directly by a Covered CCP to an Authority;
- e) relevant regulatory information and filings that a Covered CCP is required to submit to an Authority; and
- f) regulatory reports and assessments, or findings or information contained therein, prepared by an Authority in respect of a Covered CCP.

The information to be provided by an Authority pursuant to this paragraph will refer to the Covered CCPs.

#### **Article 4**

## **Execution of requests for information**

1. To the extent possible, a request for written information pursuant to Article 3(4) should be made in writing (which may be transmitted electronically) and addressed to the relevant contact person identified in the Appendix. A request generally should specify at least the following:
  - a) the information sought by the Requesting Authority;
  - b) a concise description of the matter that is the subject of the request and the purpose for which the information is sought, including the Laws and Regulations applicable to the activity;
  - c) to whom, if anyone, including any Governmental Entity, onward disclosure of information is likely to be necessary and the reason for such disclosure; and
  - d) the desired time period for reply and, where appropriate, the urgency thereof.
2. In Emergency Situations, the Authorities shall endeavour to notify each other of the Emergency Situation and communicate information between each other as deemed appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

## **Article 5**

### **On-site Inspections**

1. ESMA does not intend to conduct any On-site Inspection of the Covered CCPs as part of its monitoring of the ongoing compliance by Covered CCPs with the Recognition Conditions, since under Article 25(6) of EMIR the European Commission has adopted Commission implementing decision (EU) 2015/2039 of 13 November 2015 determining that the legal and supervisory arrangements of the Local Authorities ensure that Covered CCPs comply with legally binding requirements which are equivalent to the requirements of EMIR, that Covered CCPs are subject to effective supervision and enforcement in the South Africa on an ongoing basis, and that the legal framework of the Local Authorities provides for an effective equivalent system for the recognition of CCPs authorised under the legal regime of third countries.
2. Given that ESMA, in respect of Covered CCPs, relies on the supervision and enforcement capabilities of the Local Authorities, which supervise and enforce compliance with the Local Authorities' Laws and Regulations, On-site Inspections by ESMA officers will only be considered in exceptional circumstances and subject to the prior agreement of the Local Authorities.
3. In such exceptional circumstances, the Authorities should discuss and reach understanding on the terms regarding an On-site Inspection by ESMA officers, in particular in determining the respective roles and responsibilities of the Authorities. ESMA will act in accordance with the following procedure before conducting an On-site Inspection:
  - a) ESMA will consult the Local Authorities with a view to reaching an understanding on the intended timeframe for, and the purpose and scope of, any On-site Inspection. The Local

Authorities may, in their discretion, accompany or assist the visiting ESMA officials during the On-site Inspection.

- b) When establishing the scope of any proposed On-site Inspection by ESMA officials, ESMA will consider the supervisory activities of the Local Authorities given ESMA's reliance on the supervision and enforcement capabilities of the Local Authorities in respect of Covered CCPs and will consider any information that was made available or is capable of being made available by the Local Authorities.
- c) The Local Authorities will assist ESMA in reviewing, interpreting and analysing the contents of public and non-public Books and Records and obtaining information from directors and senior management of a Covered CCP.

## **Article 6**

### **Permissible uses of information**

1. The Requesting Authority may use non-public information obtained under this MoU solely for the purpose of ensuring, monitoring or assessing compliance with the Laws and Regulations of the Requesting Authority.
2. Before using non-public information furnished under this MoU for any purpose other than that stated in Article 6(1), the Requesting Authority must obtain the written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult to discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
3. If an Authority ("Receiving Authority") receives, via a party that is not a signatory to this MoU, non-public information originally provided by the other Authority ("Disclosing Authority") that is related to the Disclosing Authority's supervision and oversight of a Covered CCP and that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information in accordance with the terms of this MoU.
4. The restrictions in this Article do not apply to an Authority's use of information it obtains directly from a Covered CCP.

## **Article 7**

### **Confidentiality and onward sharing of information**

1. Except as provided in Article 7(2)-(4), or pursuant to a legally enforceable demand, each Authority will keep confidential, to the extent permitted by law, non-public information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU. The terms of this MoU are not confidential.
2. Each Local Authority may share non-public information obtained under this MoU with the other Local Authority so long as that other Local Authority uses and treats that information in accordance with this MoU.



3. As required by law or authorised by law, it may become necessary for a Requesting Authority to share non-public information obtained under this MoU with a Governmental Entity in its jurisdiction. In such circumstances and to the extent permitted by law:
  - a) The Requesting Authority intends to notify the Requested Authority; and
  - b) Prior to the Requesting Authority sharing the non-public information, the Requesting Authority will provide adequate assurances to the Requested Authority concerning the Governmental Entity's use and confidential treatment of the information, including, as necessary, assurances that:
    - i. The Governmental Entity has confirmed that it requires the information for the purpose enabling it to fulfil its responsibilities and mandates as described in Article 1; and
    - ii. The information will not be shared by the Governmental Entity with other parties without getting the prior written consent of the Requested Authority.
4. Except as provided in Article 7(2) or (3) if disclosure is otherwise required by law, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing non-public information received under this MoU to any non-signatory to this MoU. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
5. To the extent possible, the Requesting Authority should notify the Requested Authority of any legally enforceable demand for non-public information that has been furnished under this MoU. When complying with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
6. The Authorities intend that the sharing or disclosure of non-public information, including deliberative and consultative materials, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.
7. The Authorities acknowledge that nothing in this Article 7 prevents an Authority from disclosing information it receives directly from a Covered CCP.

## **Article 8**

### **Successor authorities**

1. Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of the MoU shall apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities shall become a signatory or signatories to this MoU without the need for any further amendment to this MoU, and notice will be provided to the other Authority.. This will not affect the right of any Authority to give written notice

as provided in Article 11(2) that it no longer wishes to be a signatory to this MoU if it wishes to do so.

## **Article 9**

### **Amendments**

1. The Authorities intend to periodically review the functioning and effectiveness of cooperation arrangements between the Authorities. This MoU may be amended with the written consent of all signatories.

## **Article 10**

### **Execution of the MoU**

1. This MoU will enter into force on the date that it is signed by the Authorities.

## **Article 11**

### **Termination**

1. This MoU will remain operative for an unlimited period of time.
2. If an Authority wishes to no longer be a signatory to this MoU, it shall provide thirty (30) calendar days prior written notice to the other Authority.
3. If an Authority gives such notice, the parties will consult concerning the disposition of any pending requests. If an agreement cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MoU before the expiration of the 30-day period until all requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance.
4. In the event of termination of this MoU, information obtained under this MoU will continue to be treated in the manner described under Articles 6 and 7.
5. If this MoU is terminated without being substituted in a reasonable timeframe by an equivalent arrangement, pursuant to Article 25 of EMIR, ESMA will consider the withdrawal of recognition of the Covered CCPs.

**Signatures**

Date:

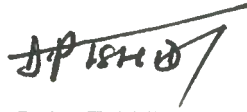
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European Securities and Markets Authority



Steven Maijoor  
Chairman

Financial Services Board



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