

COMMISSION IMPLEMENTING DECISION (EU) 2017/2441**of 21 December 2017****on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the functioning of the European Union,

Having regard to 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⁽¹⁾, and in particular Article 25(4)(a) thereof,

Whereas:

- (1) Article 23(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council⁽²⁾ requires investment firms to ensure that the trades they undertake in shares admitted to trading on regulated markets, or traded on trading venues should take place on regulated markets, multilateral trading facilities (MTFs) or systematic internalisers, or third-country trading venues assessed by the Commission as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU.
- (2) Article 23(1) of Regulation (EU) No 600/2014 only applies a trading obligation in respect of shares. The trading obligation does not comprise other equity instruments, such as depositary receipts, ETFs, certificates and other similar financial instruments.
- (3) The equivalence procedure for trading venues established in third countries set out in Article 25(4)(a) of Directive 2014/65/EU aims to allow investment firms to undertake trades in shares that are subject to the trading obligation in the Union, on third-country trading venues recognised as equivalent. The Commission should assess whether 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 resulting from Regulation (EU) No 596/2014 of the European Parliament and of the Council⁽³⁾, from Title III of Directive 2014/65/EU, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC of the European Parliament and of the Council⁽⁴⁾, and which are subject to effective supervision and enforcement in that third country. This should be read in the light of the objectives pursued by that act, in particular its contribution to the establishment and functioning of the internal market, market integrity, investor protection and ultimately, but no less importantly, financial stability.
- (4) In accordance with the fourth subparagraph Article 25(4)(a) of Directive 2014/65/EU, a third-country legal and supervisory framework may be considered equivalent where that framework fulfils at least the conditions that (a) the markets are subject to authorisation and to effective supervision and enforcement on an ongoing basis, (b) have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable, (c) security issuers should be subject to periodic and ongoing information requirements ensuring a high level of investor protection, and (d) market transparency and integrity should be ensured by the prevention of market abuse in the form of insider dealing and market manipulation.

⁽¹⁾ OJ L 173, 12.6.2014, p. 349.

⁽²⁾ 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 (OJ L 173, 12.6.2014, p. 84).

⁽³⁾ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

⁽⁴⁾ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

- (5) The purpose of this equivalence assessment is to assess inter alia whether the legally binding requirements which are applicable in Switzerland to stock exchanges established and authorised therein under the supervision of the Swiss Financial Market Supervisory Authority ('FINMA') are equivalent to the requirements resulting from Regulation (EU) No 596/2014, from Title III of Directive 2014/65/EU, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC, which are subject to effective supervision and enforcement in that third country.
- (6) As regards the conditions that the stock exchanges are subject to authorisation and to effective supervision and enforcement on an ongoing basis, Article 26(b) of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading ('Financial Market Infrastructure Act', 'FMIA') defines a stock exchange as an institution for multilateral securities trading where securities are listed, whose purpose is the simultaneous exchange of bids between multiple participants and the conclusion of contracts based on non-discretionary rules. A stock exchange does not enjoy discretion over how it executes trades and is not allowed to trade on its own account or engage in matched principal trading. Furthermore, a stock exchange must provide participants with impartial and non-discriminatory access to its markets and services. To this effect, a stock exchange is required to have rules in place that prescribe the means by which a securities dealer or other parties supervised by FINMA as well as foreign participants authorised by FINMA may apply to become a participant. Pursuant to Article 27(4) FMIA in conjunction with Article 25(1) of the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading ('Financial Market Infrastructure Ordinance', 'FMIO'), FINMA reviews and approves regulations and their amendments on the admission, duties and exclusion of participants to a stock exchange. A stock exchange must deny membership to a participant that is not authorised by FINMA and may deny membership to any participant that is subject to a statutory disqualification.
- (7) The four conditions set out in the fourth subparagraph of Article 25(4)(a) of Directive 2014/65/EU must be fulfilled in order to determine that the legal and supervisory arrangements of a third country regarding the trading venues authorised therein are equivalent to those laid down in Directive 2014/65/EU.
- (8) According to the first condition, third-country trading venues must be subject to authorisation and to effective supervision and enforcement on an ongoing basis.
- (9) A stock exchange must be authorised by FINMA before it may begin operations. Pursuant to Articles 4 and 5 of the FMIA, FINMA grants authorisation if it finds that the applicable conditions and requirements with respect to the applicant are satisfied. The authorisation requirements are set out in the FMIA and the associated ordinances, which have force of law. The FMIA requires that a stock exchange has in place arrangements to address all of the types of conduct and activity that an applicant wishes to engage in. According to Article 27(1) of the FMIA, a stock exchange shall establish under FINMA's supervision its own regulatory and supervisory organisation which is appropriate for its activity. With FINMA's approval, the stock exchange's self-regulation becomes binding and enforceable regulation. According to Article 27 of the FMIA in conjunction with Article 24(1) of the FMIO an appropriate regulatory and supervisory organisation requires the establishment of a body that fulfils regulatory tasks, a trading supervisory body, a body responsible for the admission of securities to trading and an appeal body. These bodies must be independent of the stock exchange's business management, both organisationally and with respect to personnel. As part of the self-regulatory and supervisory organisation the respectively responsible body monitors and enforces compliance of the stock exchange's rules and regulations by the stock exchange's participants.
- (10) Furthermore, Article 18 of the FMIA requires stock exchanges to grant participants and market makers non-discriminatory and open access. FINMA ensures both during the authorisation process and on an ongoing basis that exchange rules comply with this requirement (see sections 3 to 5 of the SSX Rule Book in conjunction with the SSX Directive 1 and sections 3-5 of the BX Swiss Rule Book). Denial of access is only permissible on safety and efficiency grounds and subject to a stringent proportionality test (Art. 18 of the FMIA, 17 of the FMIO). Applicants who have been denied access may lodge an appeal with an independent appeal board (section 8 of the SSX Rule Book and section 15 of the BX Swiss Rule Book). Compliance of exchanges with Article 18 of the FMIA and Article 17 of the FMIO is subject to FINMA's supervision. The adoption of rules and amendments thereto require FINMA's ex ante approval, their implementation may be scrutinised by FINMA staff, audits, requests for information, or remedial action pursuant to Articles 24 ff. of the Federal Act on the Swiss Financial Market Supervisory Authority ('Financial Market Supervision Act', 'FINMASA').
- (11) As regards effective supervision, the FINMASA, the Federal Act on Stock Exchanges and Securities Trading ('Stock Exchange Act', 'SESTA') and the FMIA constitute the main pieces of the primary legislation which establishes

a legally enforceable regime for the trading of securities in Switzerland. The FINMASA, the SESTA and the FMIA empower FINMA with broad authority over all aspects of the securities industry, including the power to authorise and supervise securities dealers, central counterparties, central securities depositories, trade repositories and payment systems. The FMIA and the FMIO also identify and prohibit certain types of conduct in the markets and provide FINMA with disciplinary powers over regulated entities and persons associated with them. Article 29 of the FINMASA grants FINMA comprehensive access to all relevant information of any supervised person and entity, their audit firms and auditors. Under the Swiss framework, stock exchanges are primarily responsible for establishing the rules under which their participants conduct business and for monitoring the ways their participants conduct business. FINMA directly monitors stock exchange regulations to ensure they are in line with the legal framework. All regulations and any changes to them must be submitted to FINMA for approval (Article 27(4) of the FMIA). Investigations by FINMA are triggered either by reports of potential breaches of the law reported by stock exchanges to FINMA or on the basis of its own suspicion.

- (12) Once a stock exchange has been authorised, FINMA monitors on an ongoing basis whether it continues to comply with the conditions and duties associated with the authorisation (Article 83 of the FMIA). A stock exchange is legally required to notify FINMA of any changes to the circumstances on which its authorisation or approval was originally based. If the changes are material, the financial market infrastructure must obtain prior authorisation or approval from FINMA to pursue its activities (Article 7 of the FMIA). Key requirements are the compliance with organisational requirements; the existence and effectiveness of the internal control system; the appropriateness of IT systems; and proper business conduct. FINMA's supervision extends to all bodies of the stock exchange including its trading surveillance and sanctioning functions. Pursuant to Article 24, 24a of the FINMASA, FINMA may carry out audits directly, or indirectly through licensed audit companies, both on-site and off-site. Articles 27, 30 and 34 of the FMIA also require all authorised stock exchanges to be able to enforce compliance by their issuers, participants and persons associated with their participants with the provisions of the FMIA and FMIO, associated acts and regulations, and their own rules and regulations. As part of its duty to enforce compliance by their members, the stock exchange is responsible for investigating and disciplining any breaches of the applicable laws and rules.
- (13) As regards the effective enforcement, FINMA has a range of administrative mechanisms for enforcing its powers and authority. Where breaches of the law or irregularities are identified, FINMA takes the necessary corrective measures, which may involve administrative enforcement proceedings. With due regard to the principle of proportionality, FINMA imposes the measures it deems most appropriate to ensure compliance with the law. The measures available include reprimands, specific instructions to restore compliance with the law, prohibitions on individuals practising their profession, prohibitions on dealers conducting business, and the revocation of licenses. FINMA may also confiscate illegally generated profits or illegally avoided losses and may order publication of a final and binding ruling. To restore compliance of a stock exchange with applicable provisions, FINMA may use its administrative powers also for the removal of board members or staff whose irreproachable business conduct is in doubt. FINMA's own administrative mechanisms are backed up by provisions for criminal sanctions in relation to the offences described in Chapter 4 of FINMASA. Provisions for criminal sanctions are also included in Articles 147 ff. of the FMIA and Articles 42a and 43 of the SESTA. FINMA hands these cases on to the competent prosecution authorities. FINMA and the competent prosecuting authority coordinate their investigations, as far as this is practicable and necessary. In general, the Federal Department of Finance Legal Services both prosecutes and judges violations of the criminal provisions of FINMASA and of the financial markets acts. However, the Federal Attorney General's Office is competent for the prosecution of insider trading and price manipulation offences under FMIA.
- (14) It can therefore be concluded that Swiss stock exchanges are subject to authorisation and to effective supervision and enforcement on an ongoing basis.
- (15) According to the second condition, third-country trading venues must have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable.
- (16) Swiss law requires that stock exchanges issue regulations on the admission of securities to trading (Articles 35 and 36 of the FMIA). These regulations have to be approved by FINMA. The regulations shall take account of recognised international standards and in particular shall contain provisions on the tradability of securities; the publication of information on which investors rely for assessing the characteristics of securities and the quality of

the issuer; the duties of the issuer, its representatives and third parties for the entire duration of the listing or admission of securities to trading; the obligation, regarding the admission of equity securities, to comply with Articles 7 and 81 of the Federal Act of 16 December 2005 on the Licensing and Oversight of Auditors. The admission to trading of securities and the listing, a qualified form of an admission to trading, of securities on stock exchanges are governed primarily by Listing Rules and Additional Rules for Listing and Admission to Trading. The stock exchange reviews the application filed by the issuer for each security and verifies that all pertinent requirements are fulfilled. For each application, the stock exchange releases a written decision. The information on an admission decision is publicly available. With the listing of a security, the issuer is subject to maintenance obligations concerning periodic reporting obligations as, for example, financial reporting and corporate governance obligations, but also occurrence-based reporting obligations such as regular reporting obligations, disclosure of management transactions and ad hoc publicity. According to Article 35(3) of the FMIA, the stock exchange monitors the issuer's compliance with these rules and imposes the sanctions provided for contractually in the event of violations. According to Article 33(1) of the FMIO, a stock exchange shall guarantee that all securities admitted to trading and all listed securities can be traded in a fair, efficient and orderly manner. With regard to equity securities, the Listing Rules provide for free float requirements to ensure that such securities can be traded efficiently. The independent bodies of the stock exchange may temporarily suspend the trading of securities if unusual circumstances, and specifically the breach of important disclosure obligations by the issuer, indicate that such a suspension is advisable. They may cancel the listing of securities, if the solvency of the issuer is in serious doubt, or insolvency or liquidation proceedings have already commenced. FINMA may also compel a stock exchange to suspend trading in a given security by using its powers under Article 31 of the FINMASA with a view to restoring compliance with the provisions of the FMIA or responding to other irregularities.

- (17) The Swiss regulatory framework includes requirements for providing pre-trade information to market participants. Pre-trade transparency has its legal basis in Article 29(1) of the FMIA which stipulates that the stock exchange shall publish the five best bid and offer prices for each share and other security in real time, as well as the sizes of the trading positions at these prices. The same also applies for actionable indications of interest (Article 27(3) of the FMIO). Waivers are available for reference price systems, systems that exist only to formalise transactions already negotiated, orders held in an order management facility of the stock exchange pending disclosure and orders that are large in scale compared with normal market size. The Swiss regulatory framework also includes requirements for providing post-trade information. Post-trade transparency has its basis in Article 29(2) of the FMIA that stipulates that the stock exchange shall immediately publish information on the transactions carried out on- and off-exchange for all securities admitted to trading. In particular, the price, volume and time of the transactions must be published. The exemptions from post-trade transparency are the same as for pre-trade transparency. Information on certain atypical transactions will also be published with delay. The stock exchange pre- and post-trade data services are fully transparent and offered to all exchange participants on a non-discriminatory basis. Delayed data is available to all users free of charge.
- (18) It can therefore be concluded that Swiss stock exchanges have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner and are freely negotiable.
- (19) According to the third condition, security issuers must be subject to periodic and ongoing information requirements ensuring a high level of investor protection.
- (20) The stock exchange's regulations on the admission to trading must set out the information to be published to allow investors to assess the characteristics of the securities and the quality of the issuer to ensure a high level of investor protection. Issuers whose securities are admitted to trading on a Swiss stock exchange are required to publish annual and interim financial reports. The issuer must make its annual financial statements available on its website. Securities admitted to trading on a Swiss stock exchange may also be traded on another venue. The reporting obligation applicable to issuers applies regardless of the venue on which trading takes place. The disclosure of comprehensive and timely information about security issuers allows investors to assess the business performance of issuers and ensures appropriate transparency for investors through a regular flow of information.
- (21) It can therefore be concluded that issuers whose securities are admitted on Swiss stock exchanges are subject to periodic and ongoing information requirements ensuring a high level of investor protection.

- (22) According to the fourth condition, the third-country legal and supervisory framework must ensure market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
- (23) Articles 142 and 143 of the FMIA prohibit insider trading and market manipulation by any person. In addition, under the conditions of Articles 154 and 155 of the FMIA, the exploitation or the attempted exploitation of insider information and price manipulation constitute criminal offences. The stock exchange must issue regulations regarding the disclosure of inside information by issuers. Under the Listing Rules of a stock exchange, the issuer must inform the market of any price-sensitive facts which have arisen, or are about to arise, in its sphere of activity, as soon as it becomes aware of such information. Price-sensitive facts are facts which are capable of triggering a significant change in market prices. Disclosure must be made so as to ensure the equal treatment of all market participants. Further, under Article 31(1) of the FMIA, Swiss stock exchanges are required to monitor price formation and the transactions executed on the stock exchange with a view to detecting insider trading, price and market manipulation and other breaches of statutory and regulatory provisions. To this end, a stock exchange must also review transactions which are conducted outside of the trading venue and which are reported to it or brought to its attention in some other way (Article 31(1) of the FMIA). This supervisory task must be carried out by an independent body of the stock exchange. Issuers must be able to provide FINMA upon request with an insider list based on their duty to provide information, including all additional information and documents that FINMA requires to carry out its tasks (Article 29(1) of the FINMASA in conjunction with Article 145 of the FMIA). A stock exchange must notify FINMA of any suspected breaches of the law or other irregularities. If the breaches in question involve criminal offences, it must also inform the competent prosecuting authority without delay (Article 31(2) of the FMIA). FINMA investigates on information about violations of the law received from stock exchanges, as well as based on its own market monitoring with the aim of enforcing the provisions of supervisory law that prohibit market abuse.
- (24) It can therefore be concluded that the Swiss legal and supervisory framework ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
- (25) It can therefore further be concluded that the legal and supervisory framework governing stock exchanges as set out in the Annex to this Decision and operated in Switzerland under the supervision of FINMA complies with the four conditions for legal and supervisory arrangements and hence should be considered to provide for an equivalent system to the requirements for trading venues laid down in Directive 2014/65/EU, Regulation (EU) No 600/2014, Regulation (EU) No 596/2014 and Directive 2004/109/EC.
- (26) Given that a significant number of shares that are issued and admitted to trading in Switzerland are also traded on trading venues in the EU, it is appropriate to ensure that all investment firms subject to the trading obligation as set out in Article 23(1) of Regulation (EU) No 600/2014 preserve the ability to undertake trades in shares admitted to trading on the Swiss exchanges where their primary liquidity resides. As the primary liquidity of shares admitted to trading on the Swiss exchanges resides in these exchanges, the recognition of the legal and supervisory framework of Switzerland would allow investment firms to trade shares admitted to trading in Switzerland on Swiss exchanges and to fulfil their best execution obligation towards their clients.
- (27) The decision is based on data that demonstrates that overall EU trading in a multitude of shares admitted on the Swiss exchanges is of such frequency that MiFID firms could not avail themselves of the exception set out in Article 23(1) (a) of Regulation (EU) No 600/2014. This implies that the trading obligation set out in Article 23(1) of Regulation (EU) No 600/2014 would apply to a significant number of shares admitted to trading in Switzerland.
- (28) The decision will also be complemented by cooperation arrangements to ensure the effective exchange of information and coordination of supervisory activities between the national competent authorities and FINMA.
- (29) This Decision is based on the legally binding requirements applicable to Swiss stock exchanges at the time of the adoption of this Decision. The Commission should continue monitoring on a regular basis the evolution of the legal and supervisory arrangements for Swiss stock exchanges and the fulfilment of the conditions on the basis of which this Decision has been taken.

- (30) This Decision also takes into account the Council conclusions of 28 February 2017 in accordance with which a precondition for further developing the sectoral approach with Switzerland is the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the Single Market of the Union. To ensure the integrity of financial markets in the Union, this Decision should expire on 31 December 2018, unless extended by the Commission before that date. When deciding on whether to extend the applicability of this decision, the Commission should in particular consider progress made towards the signature of an Agreement establishing that common institutional framework.
- (31) The Commission should conduct regular reviews of the legal and supervisory arrangements applicable to stock exchanges in Switzerland. Those reviews are without prejudice to the possibility of the Commission to undertake a specific review at any earlier time, where relevant developments make it necessary for the Commission to re-assess the equivalence granted by this Decision and, in particular, the progress made towards the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the Single Market of the Union. Any re-assessment could lead to the repeal of this Decision.
- (32) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,
- (33) Considering that Regulation (EU) No 600/2014 and Directive 2014/65/EU apply from 3 January 2018, it is necessary that this decision enters into force on the day following the day of publication in the Official Journal of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of Article 23(1) of Regulation (EU) No 600/2014 the legal and supervisory framework applicable to stock exchanges in Switzerland set out in the Annex to this Decision shall be considered to be equivalent to the requirements resulting from Directive 2014/65/EU, Regulation (EU) No 600/2014, Regulation (EU) No 596/2014 and Directive 2004/109/EC and to be subject to effective supervision and enforcement.

Article 2

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall expire on 31 December 2018.

Done at Brussels, 21 December 2017.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Stock exchanges in Switzerland considered equivalent to regulated markets as defined in Directive 2014/65/EU:

- (a) SIX Swiss Exchange AG
 - (b) BX Swiss AG
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