Commission Implementing Decision (EU) 2020/1308 of 21 September 2020 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council (notified under document C(2020) 6539) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2020/1308

of 21 September 2020

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories[(1)] and in particular Article 25(6) thereof,

Whereas:

(1) On 29 March 2017, the United Kingdom of Great Britain and Northern Ireland (the 'United Kingdom') submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. On 17 October 2019, the Union and the United Kingdom reached an agreement on the Withdrawal Agreement[(2)], with a revised Protocol on Ireland and Northern Ireland and a revised Political Declaration[(3)]. Pursuant to that agreement and following its ratification by the House of Commons in the United Kingdom, its adoption by the European Parliament and its conclusion by the Council, the United Kingdom became a third country on 1 February 2020 and Union law will cease to apply to and in the United Kingdom on 31 December 2020.

(2) As announced in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 July 2020, 'Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom'[(4)], on the basis of an analysis conducted with the European Central Bank ('ECB'), the Single Resolution Board and the European Supervisory Authorities, the Commission has identified that financial stability risks could arise in the area of central clearing of derivatives through CCPs established in the United Kingdom ('UK CCPs'). In order to

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give clearing members established in the Union ('Union clearing members') the time to reduce their exposure to United Kingdom market infrastructure as well as CCPs established in the Union ('Union CCPs') the time to develop further their capacity to clear relevant trades, and to address the possible risks to financial stability, it is justified to adopt an equivalence decision for the United Kingdom in that area.

(3) Central clearing increases market transparency, mitigates credit risks and reduces the risks of contagion in the event of the default of one or more participants in a CCP. The provision of such services is therefore critical for ensuring financial stability. The provision of clearing services could also affect the implementation of central banks' monetary policy where transactions are cleared in the currency issued by a Union central bank. Moreover, financial instruments cleared by CCPs are also essential for financial intermediaries and their clients, e.g. to hedge interest rate risks, and could therefore also create risks for the real economy of the Union.

(4) As of 31 December 2019, the outstanding notional amount of OTC derivatives is about EUR 500 trillion worldwide, of which interest rate derivatives represent more than 75 % and foreign exchange derivatives almost 20 %. About 30 % of all OTC derivatives are denominated in euro and other Union currencies. The market for central clearing of OTC derivatives is highly concentrated, in particular the market for central clearing of euro-denominated OTC interest rate derivatives, of which more than 90 % are cleared in a single UK CCP.

(5) The withdrawal of the United Kingdom from the internal market and from the eco-system of common regulation, coordinated supervision and enforcement that underpin the internal market, together with the significant amount of financial instruments denominated in Union currencies which are cleared by UK CCPs, create major challenges for Union and Member States' authorities in managing financial stability, in particular in times of financial stress.

(6) The impact of the withdrawal of the United Kingdom from the Union has been the subject of several communications from the Commission to the European Parliament, the Council and ECB, including a Contingency Action Plan urging preparedness and readiness on the part of market participants[(5)]. The volume of current exposures of Union clearing members towards UK CCPs, the fundamental changes in the regulatory and supervisory framework applicable to UK CCPs and the United Kingdom financial system in general that will occur on 1 January 2021, together with the risks for the financial stability of the Union and for the transmission and conduct of the Union's monetary policy, requires the scaling down of the reliance on United Kingdom infrastructures. This implies the reduction of Union clearing members' exposures to UK CCPs, in particular OTC derivative exposures that are denominated in euro and other Union currencies, and a further extension and development of the capacity of CCPs authorised in the Union to provide such services. In order to achieve such reduction the industry is expected to develop a clear process to reduce their exposures and reliance on UK CCPs that are systemically important for the Union.

(7) From 1 January 2021, UK CCPs will be considered as 'third-country CCPs' within the meaning of Regulation (EU) No 648/2012 and, as such, may not provide clearing

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services in the Union, unless they are recognised by the European Securities and Markets Authority ('ESMA') in accordance with Article 25 of that Regulation. ESMA may only recognise a CCP established in a third country where the Commission has adopted an implementing act determining that the legal and supervisory arrangements governing CCPs from that country are equivalent to the requirements set out in Regulation (EU) No 648/2012 and after it has determined whether the CCP is systemically important for the financial stability of the Union. In the absence of the recognition of UK CCPs, counterparties established in the Union may not clear OTC derivatives that are subject to the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012 in UK CCPs. That situation may result in temporary challenges for those counterparties to fulfil their clearing obligations, which in turn may pose risks to the financial stability and the implementation of the monetary policy of the Union and its Member States. It is therefore necessary in that unprecedented situation, provided that the legal and supervisory arrangements governing UK CCPs are determined as equivalent, that those CCPs may continue to provide clearing services in the Union for a limited period of time and under specific conditions.

(8) In accordance with Article 25(6) of Regulation (EU) No 648/2012, three conditions are to be fulfilled in order to determine that the legal and supervisory arrangements of a third country regarding CCPs authorised therein are equivalent to those laid down in that Regulation.

(9) First, the legal and supervisory arrangements of a third country is to ensure that CCPs in that third country comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012. Based on the information available to the Commission, the United Kingdom incorporated the relevant provisions of Regulation (EU) No 648/2012 into its domestic law with effect from the date of the United Kingdom's withdrawal from the Union[(6)] and therefore United Kingdom domestic law can be considered equivalent to the requirements laid out in Title IV of Regulation (EU) No 648/2012.

(10) Second, the legal and supervisory arrangements of the third country is to ensure that CCPs established in that third country are subject to effective supervision and enforcement on an ongoing basis. Until 31 December 2020, UK CCPs are under the supervision of the Bank of England, as determined by United Kingdom domestic law in accordance with Regulation (EU) No 648/2012[(7)]. As part of the incorporation of Regulation (EU) No 648/2012 into United Kingdom domestic law, the Bank of England remains responsible for the supervision of CCPs after that date and there are, for the moment, no indications that any important changes to that supervision are foreseen.

(11) Third, the legal framework of the third country is to provide for an effective equivalent system for the recognition of CCPs authorised under that third country's legal regime. The United Kingdom has incorporated the key elements of the equivalence system in Article 25 of Regulation (EU) No 648/2012 into United Kingdom domestic law. However, the United Kingdom has introduced a Temporary Recognition Regime which suspends key amendments to Regulation (EU) No 648/2012 for a period of at least three years. That Temporary Recognition Regime also gives the Bank of England

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wide discretionary powers to withdraw the 'temporary deemed recognition', which creates legal uncertainty for CCPs recognised under this regime. Notwithstanding that uncertainty, the third condition can be considered as fulfilled at this point in time.

(12) On that basis, it can be concluded that the legal and supervisory arrangements of the United Kingdom which will be applicable to UK CCPs after the end of the transition period meet all the conditions laid down in Article 25(6) of Regulation (EU) No 648/2012.

(13) This Decision is based on the information currently available on the legal and supervisory arrangements applicable to UK CCPs from 1 January 2021. Those legal and supervisory arrangements should only be considered equivalent where the requirements applicable to CCPs in United Kingdom domestic law are maintained and continue to be effectively applied and enforced on and after that date, in order to avoid that any changes to the United Kingdom regulatory and supervisory framework negatively affect the equivalence in terms of regulation or supervision, leading to an un-level playing field between Union and UK CCPs or to financial stability risks for the Union. Since the Commission is able to amend, suspend, review or revoke this Decision at any time, in particular where developments occur in a third country which affect the equivalence determination, the effective exchange of information and coordination of supervisory activities between ESMA and the Bank of England is an essential prerequisite for maintaining the determination of equivalence during the period of validity of this Decision.

(14) The exchange of information between ESMA and the Bank of England requires the conclusion of comprehensive and effective cooperation arrangements in accordance with Article 25(7) of Regulation (EU) No 648/2012. Those cooperation arrangements ensure the pro-active sharing of all relevant information with the authorities referred to in Article 25(3) of Regulation (EU) No 648/2012, including the ECB and the other members of the European System of Central Banks, for the purpose of consulting those authorities about the recognised status of UK CCPs or where that information is necessary for those authorities to carry out their supervisory tasks.

(15) The cooperation arrangements established pursuant to Article 25(7) of Regulation (EU) No 648/2012 must ensure that ESMA has immediate access in all situations, on an ongoing basis, to all information, including but not limited to information allowing for the assessment of any material risks posed by UK CCPs to the Union or its Member States, either directly or indirectly. The cooperation arrangements are to specify the mechanisms and procedures for the prompt exchange of information related to the clearing activities of UK CCPs with respect to financial instruments denominated in Union currencies, trading venues, clearing participants as well as subsidiaries of Union credit institutions and investment firms; to interoperability arrangements with other CCPs; to own resources; to default funds composition and calibration, to margins, liquid resources and collateral portfolios including haircut calibrations and to stress tests. They are also to specify the mechanisms and procedures for the prompt notification of any change affecting UK CCPs or the United Kingdom legal and supervisory arrangements applicable to UK CCPs and for the prompt