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Commission Implementing Decision (EU) 2018/2047 of 20 December 2018 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)

COMMISSION IMPLEMENTING DECISION (EU) 2018/2047

of 20 December 2018

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, exchange-traded funds (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. At the request of the competent authority of a Member State, 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

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particular its contribution to the establishment and functioning of the internal market, market integrity, investor protection and ultimately, but no less importantly, financial stability. On 30 July 2018, the German Financial Supervisory Authority requested that the Commission renew its assessment of the Swiss legal and supervisory framework and adopt an equivalence decision for the Swiss stock exchanges.

(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.

(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, and whether they are subject to effective supervision and enforcement in that third country.

(6) 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

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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

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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.

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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