

Memorandum of Understanding



**SECURITIES AND
FUTURES COMMISSION**
證券及期貨事務監察委員會

Securities and Futures Commission



BaFin

Bundesanstalt für
Finanzdienstleistungsaufsicht

Bundesanstalt für Finanzdienstleistungsaufsicht

Memorandum of Understanding Related to Central Counterparties

In view of the growing globalization of the world's financial markets and the increase in cross-border operations and activities of central counterparties, the Securities and Futures Commission of Hong Kong ("**SFC**") and the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany ("**BaFin**") have reached this Memorandum of Understanding ("**MoU**").

This MoU expresses the authorities' willingness to consult, cooperate and exchange information with one another in the interest of fulfilling their respective responsibilities and mandates in relation to central counterparties which they regulate.

Article 1

Definitions

For the purpose of this MoU:

- a) "Authority" means a signatory to this MoU or any successor thereto;
- b) "Authorized ATS provider" means a person who has been authorized by the SFC under section 95(2) of the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong) ("SFO") to provide automated trading services (as defined in the SFO);
- c) "CCP" means a legal person that is a central counterparty which 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 and is any one of the following:
 - i. a central counterparty which is established in Germany, which is authorized as a central counterparty under Article 14 of EMIR and which has applied to the SFC to be an Authorized ATS provider or a Designated Person;
 - ii. a central counterparty which is established in Hong Kong, which is a clearing house recognised under section 37 of the SFO or an Authorized ATS provider, and which has applied for recognition as a central counterparty under EMIR to provide clearing services to Clearing Members in Germany.
- d) "Clearing Member" means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation and which also serves as an intermediary through which market participants access the CCP's services.
- e) "Clearing Participant" means a member of a CCP that does not serve as an intermediary, but trades and clears transactions through the CCP solely for its own account, as principal.

- f) "Client" means an undertaking with a contractual relationship with a Clearing Member of a CCP which enables that undertaking to clear its transaction with that CCP.
- g) "Designated Person" means a person who has been designated by the SFC under section 101J(1) of the SFO as a central counterparty for the purposes of Part IIIA of the SFO;
- h) "Disclosing Authority" means the Authority providing any information under this MoU;
- i) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a CCP;
- j) "EMIR" means 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;
- k) "EMIR Conditions" means the conditions under which BaFin supervises central counterparties in accordance with EMIR.
- l) "ESMA" means the European Securities and Markets Authority;
- m) "HK Conditions" means the conditions imposed by the SFC on a CCP pursuant to the CCP's application to be an Authorized ATS provider or a Designated Person and any continuing requirements under relevant Laws and Regulations;
- n) "Home Authority" means the Authority in whose jurisdiction a CCP is physically located;
- o) "Laws and Regulations" means in relation to the SFC any laws, regulations, and regulatory requirements in force in Hong Kong and administered by the SFC, and in relation to BaFin, any laws, regulations, and regulatory requirements in force in Germany and administered by BaFin;
- p) "Members of the Supervisory College" as referred to in Article 7(8) of this MoU means the members of the supervisory college set out in Article 18 of EMIR;
- q) "MoU" means this Memorandum of Understanding;
- r) "On-site Visit" means any regulatory visit by the Requesting Authority to the premises of a CCP located in the jurisdiction of the Requested Authority, in line with Article 5 of this MoU;
- s) "Other Authority" means
 - i. if the Requesting Authority is the SFC, the Hong Kong Monetary Authority; and
 - ii. if the Requesting Authority is BaFin, the Deutsche Bundesbank.

- t) "Person" regarding this MoU includes a natural person, unincorporated association, partnership, trust investment company or corporation and may be a Clearing Member, Client, Clearing Participant, a central counterparty or a CCP;
- u) "Receiving Authority" means the Authority receiving any information under this MoU;
- v) "Requested Authority" means the Authority to whom a request is made under this MoU;
- w) "Requesting Authority" means the Authority making a request under this MoU; and
- x) "Visiting Authority" means the Authority conducting an On-Site Visit.

Article 2

General provisions

1. This MoU is a statement of intent to consult, cooperate and exchange information in connection with responsibilities and mandates of each Authority relating to the CCPs. 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 Regulations applicable to each Authority.
2. This MoU does not create any legally binding obligations, confer any rights, or supersede any Laws and Regulations. 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 information under this MoU.
3. 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 country or the region where the other Authority is located. This MoU does not prejudice or affect in any other way the respective competencies of the Authorities under their respective Laws and Regulations.
4. This MoU complements, but does not alter the terms and condition of the following existing arrangements:
 - a) the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (**IOSCO MMoU**), to which the Authorities are signatories, which covers mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the Laws and Regulations of the jurisdictions of the Authorities as defined in the IOSCO MMoU including assistance in the context of enforcement investigations;
 - b) the Memorandum of Understanding between SFC and BaFin dated 1 March 1998, except that this MoU will supersede the provisions of the Memorandum of

Understanding dated 1 March 1998 in so far as it relates to cooperation and exchange of information regarding the supervision and oversight of the CCPs;

- c) the Memorandum of Understanding between SFC and BaFin dated 22 July 2013 concerning consultation, cooperation and the exchange of information related to the supervision of entities that are subject to the Alternative Investment Fund Managers Directive 2011 of the European Union (AIFMD entities);
 - d) the Memorandum of Understanding between SFC and BaFin dated 9 May 2018 concerning mutual assistance in the supervision and oversight of Cross-Border Regulated Entities as defined therein;
 - e) any other arrangements concerning cooperation matters between the Authorities; and
 - f) the Memorandum of Understanding between the SFC and ESMA dated December 2014 with regard to their respective responsibilities in connection with central counterparties established in Hong Kong and which are recognised as central counterparties under EMIR.
5. Each Authority should, within the framework of this MoU, and subject to each Authority's Laws and Regulations, use reasonable endeavours to provide one another with the fullest cooperation in relation to the CCPs. Nevertheless, cooperation may be denied in the following circumstances:
- a) where cooperation would require an Authority to act in a manner that would violate the Laws and Regulations applicable to the Authority; or
 - b) where a request for assistance is not made in accordance with the terms of this MoU; or
 - c) where the execution of a request for information would otherwise be contrary to the public interest.
6. The Authorities represent that as of the date of this MoU the Laws and Regulations applicable to each Authority do not prevent either of them from providing assistance to the other, unless the request falls under any of the situations described in Article 2(5) of this MoU.
7. Communications made under this MoU, including but not limited to written requests and notices, should be in English.
8. To facilitate communication and cooperation under this MoU, the Authorities hereby designate contact persons. The contact details are set out in the Appendix. Any modifications to the details of contact persons should be communicated without undue delay to the other Authority.

Article 3

Scope of cooperation

1. The Authorities recognize the importance of close communication concerning the CCPs and intend to cooperate regarding:
 - a) general issues, including with respect to regulatory, supervisory, or other related developments;
 - b) issues relevant to the operations, activities and services of the CCPs; and
 - c) any other areas of mutual interest.
2. The Authorities recognize the importance of close cooperation in the event that a CCP experiences or is threatened by a potential financial crisis, a resolution scenario or other Emergency Situation. This applies in particular if the CCP is systemically important.
3. Cooperation will be most useful in circumstances where issues of regulatory concern may arise, including but not limited to:
 - a) the SFC authorization of a CCP to be an Authorized ATS provider or a Designated Person and any further application for additional activities;
 - b) BaFin's authorization of a CCP under EMIR and any further application for additional activities;
 - c) changes in a CCP's internal rules administered by the relevant Authority, or to policies and procedures that could have a material effect on the way in which the CCP complies with any Laws and Regulations, HK Conditions or EMIR Conditions; or
 - d) regulatory or supervisory actions taken or approvals required by the SFC or BaFin in relation to a CCP and including changes to the relevant obligations and requirements to which the CCPs are subject that may impact the CCPs' continued compliance with any Laws and Regulations, HK Conditions or EMIR Conditions.
4. The Authorities should seek to inform each other as soon as practicable of:
 - a) any material event of which the Authority is aware that could adversely impact on the financial or operational stability of a CCP, including such events as a default or potential default of a Clearing Member or Clearing Participant, and where the CCP is deemed to be in breach of the conditions of any license, registration, authorization 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, authorization or recognition concerning or related to a CCP and which may have a material effect on that CCP;

- c) any permission, approval, authorization or designation granted to a CCP to provide clearing services to Clearing Members, Clearing Participants or trading venues;
- d) any significant proposed changes to the ownership or risk management of a CCP or any material extension of the range of activities and services that a CCP provides;
- e) any material modification to a CCP's internal rules administered by the relevant Authority or to Laws and Regulations applicable to the CCP that will impact the legal or supervisory arrangements, operations, functions, activities or reputation of the CCP;
- f) any material regulatory change relating to any resolution measure (including resolution planning) that may have a significant impact on the operations, functions or activities of a CCP; and
- g) any material change in the Authorities' respective professional secrecy legislation.

The determination of what constitutes "material event", "adversely impact", "material effect", "material extension", "material modification", "material change", "material regulatory change", "significant impact" or "significant proposed changes" will be left to the reasonable discretion of the Authority providing the information.

5. 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 administered by the Requested Authority to which a CCP is subject, provided that the Requested Authority is authorized to collect such information. Such requests should 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:

- a) information that would assist the Requesting Authority in verifying that a CCP complies with the relevant obligations and requirements of the Laws and Regulations administered by the Requesting Authority;
- b) information that would assist the Requesting Authority in verifying compliance with its request to a CCP to observe a measure that such CCP or the Requesting Authority has adopted to ensure compliance with the HK Conditions or EMIR Conditions (as appropriate) or to cease a practice that the Requesting Authority determines is contrary to the HK Conditions or EMIR Conditions (as appropriate);
- c) information that would assist the Requesting Authority in understanding changes to the relevant obligations and requirements to which the CCPs are subject under the Laws and Regulations of the Requested Authority;
- d) information relevant to the financial and operational condition of a CCP, which might include periodic reports submitted directly by a CCP to the Requested Authority;

- e) relevant regulatory information and filings that a CCP is required to submit to the Requested Authority; and
- f) regulatory reports and assessments, or findings or information contained therein, prepared by a Requested Authority relating to a CCP.

The information to be provided by an Authority pursuant to this paragraph will be limited to the information referring to the affected Clearing Member, Clearing Participant or the affected CCP licensed, registered, authorized, or recognized, by that Authority.

Article 4

Execution of requests for information

1. To the extent possible, a request for written information pursuant to Article 3(5) of this MoU should be made in writing (which may be transmitted electronically) and addressed to the relevant contact person identified in the Appendix. A request 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; and
 - c) the desired time period for reply and, where appropriate, the urgency thereof.
2. In Emergency Situations, the Authorities should endeavour to notify each other of the Emergency Situation and communicate information between them 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 Visits

1. When an Authority seeks to conduct an On-Site Visit to the premises of a CCP, the Authorities should discuss and reach a common view on the terms on which the On-Site Visit will take place, taking into full account each other's jurisdiction, legal framework and statutory obligations, in particular in determining the respective roles and responsibilities of the Authorities.
2. An On-Site Visit will be conducted in accordance with the following procedure:

- a) the Visiting Authority will consult the Home Authority with a view to reaching a common view on the intended timeframe for, and the purpose and scope of, any On-site Visit. Personnel from the Home Authority may accompany or assist officers of the Visiting Authority during the On-site Visit;
- b) when establishing the scope of any proposed On-site Visit by officers of the Visiting Authority, the Visiting Authority should give due and full consideration to the supervisory activities of the Home Authority given the Visiting Authority's reliance on the supervision and enforcement capabilities of the Home Authority in respect of the CCPs and will consider any information that was made available or is capable of being made available by the Home Authority; and
- c) the Home Authority intends to assist the Visiting Authority in reviewing, interpreting and analysing the contents of public and non-public documents and obtaining information from directors and senior management of the CCPs.

Article 6

Permissible uses of information

1. The Requesting Authority shall use non-public information obtained under this MoU solely for the purpose of ensuring compliance by the CCPs with the Laws and Regulations applicable to the Requesting Authority that are relevant to and within the limits of this MoU. The Authorities recognize that this MoU is not intended to gather information for enforcement purposes. Non-public information for enforcement purposes should be sought under and used in accordance with the terms and conditions of the IOSCO MMoU, as amended from time to time.
2. Before using non-public information furnished under this MoU for any purpose other than that stated in Article 6(1) of this MoU, the Requesting Authority must obtain 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 non-public information from a Disclosing Authority is passed on to a Receiving Authority by a third party that is not a signatory of this MoU, the Receiving Authority will use and treat such 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 CCP.

Article 7

Confidentiality and onward sharing of information

1. Except as stated in Article 7(2), 7(3) or 7(4) of this MoU, or pursuant to a legally enforceable demand as referred to in Article 7(5) of this MoU, 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 the responses to them, and any other matters arising under this MoU.
2. As required by law or authorized by law, it may become necessary for a Requesting Authority to share non-public information obtained under this MoU with an Other Authority in its jurisdiction. In such circumstances and to the extent permitted by law:
 - a) the Requesting Authority shall notify the Requested Authority about what information it intends to share, which Other Authority will receive it and why the Other Authority needs the information; 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 Other Authority's use and confidential treatment of the information, including, as necessary, assurances that:
 - i. the information is shared for a purpose within the scope of responsibilities and mandate of the Other Authority, and the Other Authority has confirmed that it requires the information to enable it to fulfil its responsibilities and mandates;
 - ii. the Other Authority will maintain a level of confidentiality in respect of the information it has received at least equivalent to that which the Requesting Authority is subject to (including, where relevant, restrictions or conditions imposed on it by the Requested Authority); and
 - iii. there will be no onward-sharing of the information by the Other Authority with any third party without getting the prior written consent of the Requested Authority.
3. The Authorities understand that BaFin exercises its functions within the Single Supervisory Mechanism in which it co-operates closely with the Deutsche Bundesbank (**Bundesbank**) in carrying out the supervision of banks (including clearing organizations) and investment firms and that the Bundesbank is entrusted *inter alia* with the ongoing monitoring of banks (including clearing organizations) and investment firms. In this context the following understandings will apply:
 - a) Under section 7, para 3 KWG (**Banking Act**), BaFin and the Bundesbank shall exchange observations and findings that are necessary for the performance of their respective functions, which means that BaFin is required to share information received under this MoU with the Bundesbank under the Banking Act, having regard to the domestic allocation of responsibility for the supervision of Authorized Institutions in Germany as outlined in section 7 of the Banking Act;

- b) When sharing information with the Bundesbank, the Bundesbank shall be treated as an Other Authority under this MoU, and BaFin will comply with the provisions set out in Article 7(2); and
 - c) In addition to the provisions in Article 7(2), BaFin affirms that the Bundesbank falls under the confidentiality regime of the Banking Act which will require the Bundesbank
 - i. to preserve the confidentiality of the information received under this MoU and not to disclose it to third parties without the prior written consent of the SFC; and
 - ii. to use information received under this MoU only to the extent that is necessary for the performance of its functions under the Banking Act and to treat such information in accordance with the terms of this MoU.
4. Except as stated in Article 7(2) of this MoU and without prejudice to Article 6(3) of this MoU if disclosure is needed, 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. If the Requesting Authority receives a legally enforceable demand from a third party for non-public information furnished under this MoU, the Requesting Authority:
- a) will notify the Requested Authority of the demand as soon as reasonably practicable; and
 - b) will take all appropriate measures to preserve the confidentiality of the information, including asserting legal exemptions or privileges.
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 CCP.
8. The provisions in this Article 7 referring to an Other Authority shall apply accordingly to the Members of the Supervisory College.

Article 8

Periodic Meetings

Representatives of the Authorities intend to meet periodically, as appropriate, to update each other on their respective functions and regulatory oversight programs and to discuss issues of common interest relating to the supervision and developments concerning the CCPs, including but not limited to contingency planning and crisis management, the adequacy of existing cooperative arrangements, systemic risk concerns, default procedures, and the possible improvement of cooperation and coordination among the Authorities. Such meetings may be conducted by conference call, video conference or on a face-to-face basis, as appropriate.

Article 9

Successor authorities

Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of this MoU should apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities should become a signatory or signatories to this MoU without the need for any further modification to this MoU and notice should be provided to the other Authority. This should not affect the right of the successor authority or authorities or the other Authority to give written notice as provided in Article 11(2) of this MoU that it no longer wishes to be a signatory to this MoU if it wishes to do so.

Article 10

Amendments and Publication

The Authorities will periodically review the functioning and effectiveness of the cooperation arrangements under this MoU with a view, *inter alia*, to expanding or altering the scope or operation of this MoU should that be judged necessary. This MoU may be amended with the written consent of both Authorities.

Article 11

Termination

1. This MoU will remain operative for an unlimited period of time.
2. If an Authority no longer wishes to be a signatory to this MoU, it should provide thirty (30) calendar days prior written notice to the other Authority.

Appendix

Contact Persons

Securities and Futures Commission	Bundesanstalt für Finanzdienstleistungsaufsicht
Name: Christine Kung Telephone: +852 2231 1558 Email: international@sfc.hk	Mr. Thomas Schmitz-Lippert Executive Director; International Policy; Financial Stability and Regulation Bundesanstalt für Finanzdienstleistungsaufsicht, Graurheindorfer Straße 108, 53117 Bonn Telephone: +49 228 4108 2134 Email: international.requests@bafin.de