

Memorandum of Understanding



European Securities and Markets Authority



Securities and Futures Commission

Memorandum of Understanding on Cooperation Arrangements and Exchanges of Information related to information on derivatives contracts held in trade repositories

The Securities and Futures Commission (“SFC”) of Hong Kong and the European Securities and Markets Authority (“ESMA”) have reached this Memorandum of Understanding (“MoU”) regarding arrangements for the exchange of information related to the information on derivatives contracts held in trade repositories registered in accordance with the respective laws and regulations.

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”) organizes different types of access to data held in trade repositories.

Pursuant to Article 75 EMIR, an international agreement regarding mutual access can be entered into, under certain specific conditions, with the Union by the relevant third countries where a trade repository is established. In addition, pursuant to Article 76(1) EMIR, relevant authorities of third countries that do not have any trade repository established in their jurisdiction may contact ESMA with a view to establishing cooperation arrangements to access information on derivatives contracts held in European Union Trade repositories.

Neither Article 75 nor Article 76 EMIR is applicable to the present case for access by SFC to information held in European Union trade repositories. No international agreement within the meaning of Article 75 EMIR has yet been entered into. Furthermore, Article 76 EMIR is not applicable since there is at least one trade repository established in Hong Kong.

Article 33 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (ESMA) foresees that ESMA may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries.

SFC and ESMA express, through this MoU, their willingness to cooperate with each other, in the interest of fulfilling their respective responsibilities and mandates, with regards to exchanges of information related to information on derivatives contracts held in trade repositories established respectively in Hong Kong and in the European Union.

Therefore, the purpose of this MoU is to organise the exchange of information between SFC and ESMA related to information on derivatives contracts respectively held in Hong Kong and in European Union trade repositories so that SFC and ESMA both have an indirect access to the information on derivative contracts that they need to fulfil their responsibilities and mandates, provided that measures are in place to ensure that professional secrecy is protected, including the protection of business secrets respectively shared by SFC and ESMA with third parties.

This MoU is an arrangement between SFC and ESMA. It is not legally binding and it does not affect any other arrangements that SFC may enter into/have in place with any other national competent authorities of any Member States of the European Union. For the avoidance of doubt, this MoU does not affect any international agreement to be established under Article 75 EMIR.

Article 1

Definitions

For the purpose of this MoU:

- a) “Authority” means a signatory to this MoU or any successor thereto.
- b) “Covered TR” means either (i) a TR established in the European Union which has been registered by ESMA pursuant to Article 55 of EMIR, or (ii) the trade repository operated by or on behalf of the Hong Kong Monetary Authority.
- c) “Crisis Situation” means the occurrence of an adverse development or event which may materially impair the orderly functioning, integrity or stability of the financial markets or financial system in the jurisdiction of either Authority.
- d) “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 repositories¹.
- e) “ESMA” means the European Securities and Markets Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010².
- f) “Laws and Regulations” means in relation to ESMA applicable Union legislation within ESMA’s scope of action and in relation to SFC any applicable domestic laws and regulations in force in Hong Kong.
- g) “MoU” means this Memorandum of Understanding.
- h) “National Competent Authority” means a competent authority of a Member State of the European Union referred to in 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), in Directive No 2004/39/EC of 21

¹ OJ, L 201, 27.7.2012, p. 1.

² OJ L 331, 15.12.2010, p. 84.

April 2004 on markets in financial instruments³, and in Directive No 2003/6/EC of 28 January 2003 on insider dealing and market manipulation⁴.

- i) "Person" includes a natural person, unincorporated association, partnership, trust investment company or corporation and may be a Covered TR.
- j) "Regulatory Entity in the jurisdiction of SFC" means a regulatory entity or regulatory authority in Hong Kong that may require information on OTC derivatives contracts held in a Trade Repository in the course of its regulatory functions.
- k) "Requested Authority" means the Authority to whom a request for information is made under this MoU;
- l) "Requesting Authority" means the Authority making a request for information under this MoU;
- m) "Trade repository" or "TR" means a legal person that centrally collects and maintains the records of derivatives.

Article 2

General provisions

- 1) This MoU is a statement of intent to exchange information related to information on derivative contracts held in Covered TRs that centrally collect and maintain the records of derivatives in a manner consistent with, and permitted by, the Laws and Regulations, provided that measures are in place to ensure that professional secrecy is protected, including the protection of business secrets.
- 2) This MoU organises the exchange of information through ad-hoc requests for information where adequate reasoning is provided by the Requesting Authority to justify its request in accordance with Article 4.
- 3) 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.
- 4) This MoU does not prejudice or affect in any other way the respective competences of any institutions or authorities in the European Union and in any Member States of the Union.

³ OJ L 145, 30.04.2004, p.1.

⁴ OJ L 96, 12.4.2003, p.16.

- 5) This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates.
- 6) The Authorities should, within the framework of this MoU, provide each another with the fullest cooperation permissible under their Laws and Regulations in relation to the exchange of information related to information on derivative contracts held in Covered TRs. Following consultation, request for information may be refused by the Requested Authority:
 - a) Where the exchange of information would require an Authority to act in a manner that would violate its Laws and Regulations;
 - b) Where a request for information has not been made pursuant to Article 4 of this MoU; or
 - c) On the grounds of public interest for SFC or of national / European Union public interest for ESMA.
- 7) The Authorities hereby designate contact persons as set forth in the Appendix to facilitate communication under this MoU.

Article 3

Scope of the exchange of information

- 1) The Authorities recognise the importance of exchanging information related to derivative contracts held in Covered TRs.
- 2) The Requested Authority will provide to the Requesting Authority the requested information on derivative contracts held in the Covered TRs to enable the Requesting Authority to fulfil its responsibilities and mandates when the following conditions are met:
 - a) the Requesting Authority has made a request for information pursuant to Article 4 of this MoU;
 - b) the requested information is available to the Requested Authority through its access to the data on derivative contracts held by the Covered TRs in its jurisdiction;
 - c) the Requested Authority has not refused the request pursuant to Article 2(6)(a) or (c).
- 3) *Notification*. Each Authority will inform the other Authority as soon as practicable of:

- a) any known material event that could adversely impact the availability of information on derivative contracts held in a Covered TR;
- b) changes and pending changes to the relevant obligations and requirements to which Covered TRs are subject and to any relevant Laws and Regulations applicable to Covered TRs when these changes could have a material effect on the availability of information relating to information on derivative contracts held in Covered TRs; and
- c) changes and pending changes to the relevant Laws and Regulations as well as any known event that could impact the fulfilment of the conditions under this MoU (including where the measures in place to protect professional secrecy cease to exist);
- d) changes in the relevant jurisdictions that can affect the conditions under which this MoU is entered into; and
- e) changes in the responsibilities and mandates of the Authorities that can affect their right to access information held in TRs.

The determination of what constitutes “material event” or “material effect” will be left to the reasonable discretion of the notifying Authority.

Article 4

Execution of requests for information

- 1) To the extent possible, a request for information on derivatives contracts held in Covered TRs pursuant to Article 3 will be made in writing (which may be transmitted electronically) and addressed to the relevant contact person identified in the Appendix. A request should specify the following:
 - a) necessary details allowing the Requested Authority to identify the type of information on derivatives contracts sought by the Requesting Authority;
 - b) the name of the Covered TRs from which the information is available;
 - c) an adequate description of the reasons for which the information is requested;
 - d) a description of the responsibilities and mandates relating to the information requested, citing the Laws and Regulations applicable;
 - e) a confirmation that the measures are in place to ensure that professional secrecy is protected, including the protection of business secrets shared by the Requesting Authority with third parties; and

- f) the desired time period for reply by the Requested Authority and, where appropriate, the urgency thereof.
- 2) In Crisis Situations, the Authorities will endeavour to notify each other of the Crisis 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 Crisis Situation. During Crisis Situations, requests for information may be made to the contact person identified in the Appendix in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

Article 5

Permissible uses of information

The Requesting Authority will use non-public information received in accordance with this MoU solely for the purpose of fulfilling its responsibilities and mandates as defined in the Laws and Regulations of the Requesting Authority that are relevant to and within the limits of this MoU.

Article 6

Confidentiality and onward sharing of information

- 1) Except for disclosures under paragraphs 4 to 6 of this Article and permissible uses of information under Article 5, the Requesting Authority will keep confidential to the extent permitted by law the non-public information received under this MoU, the contents of such requests, any non-public information exchanged between the Authorities under this MoU, and any other matters arising under this MoU. The terms of this MoU are not confidential.
- 2) Each Authority acknowledges that measures are in place in its jurisdiction to ensure that professional secrecy is protected, including the protection of business secrets shared by the Authority with third parties.
- 3) Except for disclosures under paragraphs 4 to 6 of this Article and permissible uses of information under Article 5, the Requesting Authority must obtain the prior written consent of the Requested Authority before disclosing non-public information received under this MoU to any non-signatory to this MoU. During a Crisis 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 not obtained from the Requested Authority, the Authorities will 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.

- 4) When, according to the Laws and Regulations of an Authority, the Requesting Authority must transmit the information obtained under this MoU to or by the order of other persons that are not signatories of this MoU, the Requesting Authority must notify the Requested Authority of such transmission, including the details of the information transmitted. When complying with a demand for such a transmission of information, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
- 5) In cases other than those referred to in paragraphs 4 and 6 of this Article, the SFC and ESMA may respectively share non-public information obtained under this MoU with a Regulatory Entity in the jurisdiction of SFC and with a National Competent Authority under Articles 83 and 84 EMIR. In such circumstances:
 - a. the Requesting Authority must give prior notification to the Requested Authority of such transmission, including the details of the information to be transmitted, which Regulatory Entity in the jurisdiction of the SFC or National Competent Authority (as applicable) will receive the information, and why the Regulatory Entity in the jurisdiction of the SFC or National Competent Authority needs the information; and
 - b. the Requesting Authority must have received adequate assurances concerning the use, the conditions of professional secrecy and confidential treatment of the information by the Regulatory Entity in the jurisdiction of SFC or the European Union's National Competent Authorities (as applicable), including as necessary, assurances that:
 - i. the information is shared for a purpose within the scope of responsibilities and mandates of the Regulatory Entity in the jurisdiction of SFC or the National Competent Authority (as applicable);
 - ii. the Regulatory Entity in the jurisdiction of SFC or the National Competent Authority (as applicable) maintains 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 with other parties without getting the prior written consent of SFC (in the case of information shared by ESMA with a National Competent Authority) or ESMA (in the case of information shared by the SFC with a Regulatory Entity in the jurisdiction of SFC).

- 6) Where the request for information relates to derivatives contracts entered into by a European entity supervised by a National Competent Authority or underlying instruments negotiated in markets supervised by a National Competent Authority, ESMA will transmit such information to that National Competent Authority.
- 7) The Authorities intend that the sharing or disclosure of non-public information, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.

Article 7

Personal data

Any personal data provided to or by ESMA in accordance with this MoU shall be processed by ESMA pursuant to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Such data shall be processed by ESMA solely for the purposes of fulfilling the respective regulatory mandates without prejudice to its possible transmission to the bodies charged with regulatory tasks in application of Union law.

Article 8

Successor authorities

Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of this MoU will apply to the successor authority or authorities performing those relevant functions 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 the successor authority or authorities or the other 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. Notwithstanding the foregoing, such successor authority or authorities will become a signatory or signatories to this MoU.

Article 9

Amendment

The Authorities intend to periodically review the functioning and effectiveness of the cooperation arrangements between the Authorities 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 all signatories.

Article 10

Execution of the MoU

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

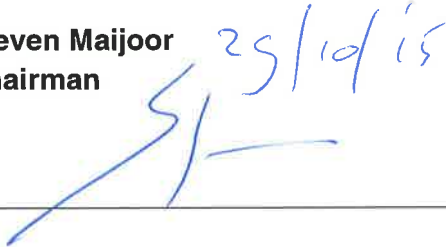

Article 11

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 will 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 information that were made under this MoU before the effective date of notification until all requests are fulfilled or the Requesting Authority withdraws such request(s) for information.
- 4) In the event of termination of this MoU, information obtained under this MoU will continue to be treated in a manner prescribed under Articles 5 to 7.
- 5) Where the conditions for cooperation under this MoU are no longer met (including where the measures in place for professional secrecy cease to exist), the MoU will terminate with immediate effect.
- 6) Where the cooperation arrangement provided by Article 75 EMIR is established between ESMA and SFC, this MoU will terminate with immediate effect.

Signatures

Date:

European Securities and Markets Authority Steven Maijor Chairman  25/10/15	Securities and Futures Commission Ashley Alder Chief Executive Officer 19/11/15 
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Appendix

Contact Persons

European Securities and Markets Authority	Securities and Futures Commission
Name: Amandine Zelenko Telephone: + 33 1 58 36 51 61 Email: amandine.zelenko@esma.europa.eu	Name: Christine Kung Telephone: + 852 2231 1558 Email: international@sfc.hk