

ISDA and FIA feedback on Recognition of financial benchmarks in Singapore and Australia.

ISDA and FIA (the ‘Associations’) welcome the European Commission’s draft decisions to declare the regulatory and supervisory frameworks for Designated Benchmarks in Singapore and Significant Financial Benchmarks in Australia as “equivalent” under Article 30 of the European Benchmarks Regulation (BMR). The Associations would also like to reiterate our support for the extension of the BMR transition deadline, which has been granted for critical and third-country benchmarks, and call for its publication in the Official Journal at the earliest possible date.

The Associations understand that the spirit of equivalence in global financial market regulation relies on recognising foreign regulatory frameworks and all the regulated activities within that framework so that regulatory arbitrage can be reduced. This is in line with the 2015 report by the IOSCO task force report on Cross-border Regulation and the objectives for equivalence stated therein.

1. Benchmark by Benchmark approach and constant need for Implementing Decisions

Both draft equivalence decisions follow a ‘benchmark by benchmark’ approach, by setting out the “recognised” designated benchmarks in the Annexes. In our view, this approach is impractical and unhelpful for end users as it reduces the scalability of equivalence decisions compared to a determination based either on regulated and supervised benchmark administrators (e.g. an ‘administrator by administrator’ approach) or on an assessment of the regime as a whole.

The Associations welcome the European Commission’s approach to the recognition of third-country benchmarks based on their compliance with the IOSCO principles. However, the proposed draft equivalence procedure anticipates an Annex setting out which benchmarks would be included under specific equivalence decisions. It is worth noting that some benchmark administrators publish new benchmarks every day or week. This means that any change to the scope, name or identity of benchmarks subject to equivalence will require a further amendment of the implementing decision. This creates significant operational and procedural obstacles which would hinder the ability of regulators and market participants to respond to market developments in a timely fashion and would contribute to further market uncertainty.

As an example, Article 28(2) requires users of benchmarks to nominate, where feasible and appropriate, fall-back rates to prevent negative implications from a cessation of a benchmark. There may be a very limited (or indeed only one) choice of fall-back for a particular benchmark, which may not generally be authorised under a home regime (as the administrator would only produce or publish a rate specifically for purposes of being a fall-back or successor rate). Adoption of the fall-back rate would therefore need expedited authorisation of the administrator in its home jurisdiction as well as equivalence under the EU rules.

While authorisation under Singapore or Australian laws is a matter for the MAS and ASIC respectively, a subsequent EU implementing decision updating the Annex of an existing equivalence decision would be an unnecessary delay which may jeopardise an EU supervised entity's ability to respond to a cessation event, restructure portfolios, hedge various risks and thus serve its clients in an efficient manner.

Article 30(2) of the BMR permits the European Commission to adopt an implementing decision in relation to the legal framework and supervisory practice of a third country more generally (rather than in relation to specific administrators or specific benchmarks under Article 30(3)). The Commission's draft equivalence decisions stipulate that the regimes for Significant Financial Benchmarks in Australia and Designated Benchmarks in Singapore are equivalent. Therefore, the Associations suggest that the Commission prepare equivalence decisions that would cover all current and prospective significant or designated benchmarks in a third country jurisdiction as appropriate. Otherwise, in the event that further benchmarks are determined to be significant or are designated (or if benchmarks are removed from the list), the Commission will need to review and amend its equivalence decisions on a continuous basis. If the Commission takes this approach with other equivalence decisions, it will need a process not just for monitoring significant changes to the relevant third country regime (which would merit a review of the equivalence decision) but also a process for monitoring exactly which benchmarks are significant or designated at any time and updating its equivalence decisions in response to changes in the relevant list of benchmarks. We understand that this latter process should be carried out by ESMA and reflected on its third country benchmarks register, rather than form part of the Commission's equivalence decision process.

Given that under Article 30(1) of the BMR, ESMA must maintain a list of third country administrators and benchmarks that can be used in the EU, the Associations suggest that an Annex to the draft equivalence decision is not necessary or, if it is to be included in the final decision, it should include an additional sentence to clarify that any benchmark administrator / benchmark subsequently authorised under Singapore / Australian rules and which appear in the ESMA register are in scope of the equivalence decision. This would mean that further implementing decisions are not needed, which would significantly streamline the EU (and EU entities' and clients') ability to adapt to market developments. Additionally, we note that implementing decisions, often take effect 20 days after their publication, a further delay to ensuring that EU entities are able to risk manage positions.

Such an arrangement should be possible given that ESMA, MAS and ASIC will complement the equivalence decisions with cooperation arrangements to ensure the effective exchange of information and coordination of supervisory activities as noted in Recital 26 and 22 respectively of the draft equivalence decisions. We would urge the Commission to expressly recognise this in the draft equivalence decisions in order to obviate the need for a Commission's decision every time a new benchmark is authorised in Singapore and Australia (or every time a benchmark is removed from the list of designated or significant benchmarks). This arrangement would not prejudice the Commission's power to undertake a specific review at any time, as noted in Recitals 28 and 24 respectively of the draft equivalence decisions.

The Associations would encourage the Commission to develop a solution that is workable for EU users, NCAs, ESMA and administrators- for example the ESMA third country benchmark register could include benchmark families rather than individual indices. This would be aligned with BMR disclosure requirements such as benchmark statements. This would also be more helpful for end users, as is demonstrated by lack of usability re the circa 65,000 S+P benchmarks currently on the register.

2. Inclusion of exempt central bank rates in the draft equivalence decisions

We would also welcome confirmation from the Commission as to why its equivalence decision covers a central bank administered rate (the Australian Interbank Overnight Cash Rate) when central bank rates are exempt from the BMR under Article 2 (a) of the BMR. In particular, we are concerned that this could give rise to confusion regarding whether or not third country central bank rates are automatically exempt under Article 2(a), which is further specified in ESMA's Q&A 4.1.

The Associations would welcome further clarity on this point.

3. Transparency for market participants and EU users

The Associations very much welcome the opportunity to comment on these draft equivalence decisions, particularly given their importance for all market participants. As a general point, we would like to recommend that the Commission continue to follow an inclusive approach when developing benchmark equivalence decisions in order to provide stakeholders with the opportunity to provide input regarding the potential impact of the decisions before being finalised.

We would also welcome transparency regarding the template/exact criteria that the Commission are using when making benchmark equivalence decisions, as this would help third country authorities and administrators plan and prepare for potential equivalence with the EU.

Proposed amendments for the implementing decision for Singapore

Recital 9

(9) MAS has designated two financial benchmarks by means of the Securities and Futures (Designated Benchmarks) Order 2018 issued pursuant to section 123B of the SFA. ~~This decision is limited to those benchmarks, which are also listed in the Annex to this Decision.~~

Recital 17

(17) It can therefore be concluded that the binding requirements with respect to ~~the~~ benchmarks **administrators authorised pursuant to section 123F of the SFA** ~~listed in the Annex to this Decision~~ are equivalent to the requirements under Regulation (EU) 2016/1011.

Recital 24

(24) The Commission therefore concludes that the binding requirements with respect to ~~the~~ benchmarks— **administrators authorised pursuant to section 123F of the SFA** ~~listed in the Annex~~ are subject to effective supervision and enforcement on an on-going basis.

New Recital 30

(30) In order to ensure public transparency on which benchmarks and administrators are authorised pursuant to section 123F of the SFA and so fall within scope of this Decision, ESMA shall ensure the timely entry of such benchmarks and administrators in the register referred to in Articles 30(1) and 36 of Regulation (EU) 2016/1011 once the processes referred to Article 30(1)(c) and (d) of that Regulation are completed.

Article 1

For the purposes of Article 30 of Regulation (EU) 2016/1011, the legal and supervisory framework of Singapore applicable to financial benchmark administrators ~~applicable to the two financial benchmarks listed in the Annex to this~~

~~Decision~~ that are authorised pursuant to the Securities and Futures Act of Singapore shall be considered to be equivalent to the requirements laid down in Regulation

(EU) 2016/1011 and to be subject to effective supervision and enforcement on an ongoing basis.

Article 2

This Decision shall enter into force 1 ~~20~~ days after its publication in the Official Journal of the European Union.

Proposed amendments to the implementing decision for Australia

Recital 8

(8) ASIC has declared a number of financial benchmarks to be significant benchmarks by means of the ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420. ~~This decision is limited to those benchmarks, which are also listed in the Annex to this Decision.~~

Recital (14)

The Commission therefore concludes that the binding requirements with respect to ~~the significant benchmarks~~ **administrators authorised pursuant to section 908BO(2) of the Corporations Act** ~~in the ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420~~ are equivalent to the corresponding requirements under Regulation (EU) 2016/1011.

Recital (20)

(20) The Commission therefore concludes that the binding requirements with respect to ~~the benchmarks~~ **administrators authorised pursuant to section 908BO(2) of the Corporations Act** ~~listed in the Annex~~ are subject to effective supervision and enforcement on an on-going basis.

New Recital 26

(30) In order to ensure public transparency on which benchmarks and administrators are authorised pursuant to section 908BO(2) of the Corporations Act and so fall within scope of this Decision, ESMA shall ensure the timely entry of such benchmarks and administrators in the register referred to in Articles 30(1) and 36 of Regulation (EU) 2016/1011 once the processes referred to Article 30(1)(c) and (d) of that Regulation are completed.

Article 1

For the purposes of Article 30 of Regulation (EU) 2016/1011, the legal and supervisory framework of Australia applicable to financial benchmarks ~~listed in the Annex to this Decision~~ that are declared significant benchmarks by means of the ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420 shall be considered to be equivalent to the requirements laid down in Regulation (EU) 2016/1011 and to be subject to effective supervision and enforcement on an ongoing basis.

Article 2

This Decision shall enter into force 1 ~~20~~ days after its publication in the Official Journal of the European Union.