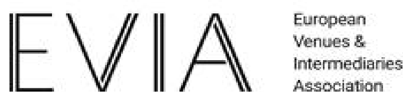

BMR Trilogue – cross-industry request for extension of the third country benchmarks transition period (20 November, 2020)

The 14 associations representing all parts of EU financial markets endorsing this paper believe it is critically important that **the transition period for third country benchmarks under Article 51 of the Benchmarks Regulation (BMR) should not be allowed to expire at the end of 2021. We urge the European Parliament and Council to agree in trilogue negotiations to extend this transition period to end of 2025**, allowing time for a comprehensive review of this regime.

For this reason we support Article 51.5 as amended by the Council General Approach on BMR.

1. Background

Article 51(5) of the BMR provides that, unless the Commission has adopted an equivalence decision in relation to a particular third country, a third country administrator has been recognised or a third country benchmark has been endorsed, EU supervised entities may only use a third country benchmark in financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the relevant benchmark prior to 31 December 2021.

As a result, as the text of the BMR currently stands, EU supervised entities will no longer be able to reference third country benchmarks in new financial instruments, financial contracts or measurements of the performance of an investment fund on or after 1 January 2022, unless an equivalence decision is adopted regarding the relevant third country, or the administrator or benchmark otherwise appears on ESMA's register.

However, in its adopted General Approach[1] regarding a proposal for a Regulation amending the BMR, the Council proposed an amendment to Article 51 which would extend this transitional period until 31 December 2025.

We strongly support this proposed amendment for the reasons discussed further below.

2. Concerns regarding expiry of the transitional period at the end of 2021

ISDA set out the key concerns of its members regarding the expiry of the transitional period in its response[2] to the European Commission's Consultation on the Review of the EU BMR at the end of 2019. The Joint Associations' members are still concerned by these issues and we summarised them again below for reference.

- **Lack of ability for EU supervised entities to rely on non-EU benchmarks qualifying under the existing third country regimes**:
  - **Limitations of the equivalence regime**: Equivalence is not a scalable solution. The vast majority of non-EU jurisdictions have not introduced regulation equivalent to the BMR. Where jurisdictions have introduced regulations, they typically only cover systemically important interest rate benchmarks and (occasionally) FX benchmarks. This means that the equivalence decisions made by the Commission in practice only cover a narrow range of benchmarks. For example, the equivalence decision in respect of Singapore currently only allows EU supervised entities to use the Singapore Interbank Offered Rate and the

[1] https://data.consilium.europa.eu/doc/document/ST-11049-2020-ADD-1-REV-1/en/pdf

[2] https://www.isda.org/a/cSrTE/ISDA-Consolidated-Response-to-BMR-Review.pdf

Singapore Dollar Swap Offer Rate and not other Singaporean benchmarks, such as the Straits Times Index.

- **Limitations of the recognition regime**: Recognition requires third country administrators to apply to their "member state of reference"[3]. This is a complex regime, relying on administrators having access to trade volume or licensing data which does not currently exist in any reliable form. Recognition also requires appointment of a legal representative (an EU entity to absorb responsibilities and liabilities (up to 10% of global annual turnover) if breaching BMR requirements). While this may be less of a concern for third country administrators with affiliates in the EU, it is a significant concern for administrators with no EU affiliate who will have to rely on an unrelated third party to provide this service. Even taking into account the guidance that ESMA has given via its FAQs, it may be challenging for third country administrators to find and agree appropriate arrangements with third parties to provide this service because of the requirement for the legal representative to perform the oversight function for the benchmark together with the administrator (which raises commercial and competitive concerns for the administrator) and to be accountable to the competent authority (or to ESMA, when it takes over) in this respect (which raises liability concerns for the legal administrator). In addition, for benchmarks on smaller markets and less widely-traded currencies (or for administrators who currently permit use of their benchmarks in the EU free of charge), reliance on the recognition regime will not be cost effective.

- **Limitations of the endorsement regime**: Endorsement requires a third country administrator to have its benchmarks endorsed by an EU administrator. The EU administrator must also "monitor effectively the activity of provision of the benchmark in the third country and manage the associated risks". Again, for non-EU administrators that do not have an EU affiliate to perform this role, this requirement presents significant concerns regarding governance and control over the benchmark. As with recognition, reliance on this regime is unlikely to prove cost effective for administrators in smaller markets or who currently provide their benchmarks free of charge. Non-EU administrators are likely to decide to restrict use of their benchmarks in the EU or start to charge a fee to EU users in order to recoup some of this expense.

- **Competitive disadvantage for EU supervised entities and corporates:** Prohibiting EU supervised entities from using non-qualifying third country benchmarks will put

[3] This aspect of the recognition regime will no longer apply as of 1 January 2022 when ESMA will assume the supervision of critical and third country recognised benchmarks.

them at a disadvantage compared to non-EU peers (such as UK firms benefiting from the extension of the transition period to the end of 2025, recently announced by the UK authorities), who will be able to continue using these benchmarks and will have access to non-EU markets and critical hedging tools that will be unavailable to EU supervised entities. It will also impede EU supervised entities' ability to execute contracts to support EU corporates (e.g., contracts referencing FX benchmarks not covered by the proposed spot FX benchmark exemption), significantly hampering corporates' risk management in important growth markets in the Asia Pacific region. This will have a disruptive effect on markets and on firms' business, at a time when EU supervised entities already face other significant financial regulatory reforms (e.g., LIBOR transition) and other external factors (including the ongoing pandemic). This could drive business involving non-EU markets outside of the EU.

3. Support for extension of the Article 51(5) transitional period

In the absence of a holistic reform of the third country regime of the Benchmarks Regulation, it is critical that the transitional period be extended beyond the end of 2021. **We are thus strongly supportive of the Council proposal to extend this period until 31 December 2025**.

While this extension does not fix the problems we have identified above, it does give the EU authorities the time needed to review the third country regime. It would also allow additional time for the Commission to identify other third countries which may be able to benefit from an equivalence decision. We are aware of a number of jurisdictions where the regulator is considering introducing targeted regulation of certain local benchmarks, but these may not be available in time for an equivalence determination before the end of 2021. While we appreciate that the Commission cannot extend the transitional period until all third country jurisdictions have decided whether or not they intend to introduce benchmark regulation, more time is needed at the very least until the process is complete in the third country jurisdictions that have already announced that they are considering this.

We are strongly of the view that any extension to the transitional period should be effected now as part of the current BMR Review, rather than either through emergency legislation closer to the end of the transitional period or through rolling short term extensions to the transitional period (as this approach would not give the necessary certainty to EU supervised entities regarding continued use of these benchmarks) or through a later review of the BMR. The next review is scheduled for 31 December 2022, by which point the transitional provisions will already have expired. In any event, while the review is scheduled for 31 December 2022 we would expect legislation arising from the review to come into effect some time after that date (e.g., potentially 18 months – 2 years later).

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About EACT

The European Association of Corporate Treasurers (EACT) is a not-for-profit organisation bringing together as its members national treasury and finance professional associations (NTAs) in Europe. The EACT gathers 23 NTAs from 19 European Union countries, Switzerland and Russia. They bring together about 14,000 members, representing 6,500 groups/companies. Our mission is to be the voice of this community in Europe. We do this by representing the financial professionals of the real economy vis-à-vis European authorities and institutions. More information about EACT is available on our website: www.eact.eu. You can also follows us on LinkedIn.

About EAPB

The European Association of Public Banks (EAPB) gathers over 30 member organisations which include promotional banks such as national or regional public development banks and local funding agencies, public financial institutions, associations of public banks and banks with similar interests from 17 EU Member States and countries, representing directly and indirectly the interests of over 90 financial institutions towards the EU and other European stakeholders.

About EBF
The European Banking Federation is the voice of the European banking sector, bringing together national banking associations from across Europe. The EBF is committed to a thriving European economy that is underpinned by a stable, secure and inclusive financial ecosystem, and to a flourishing society where financing is available to fund the dreams of citizens, businesses and innovators everywhere.

About EFAMA
EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 60 Corporate Members and 24 Associate Members. At end Q2 2020, total net assets of European investment funds reached EUR 17.1 trillion. These assets were managed by more than 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and 29,100 AIFs (Alternative Investment Funds). Including discretionary mandates, third-party regulated asset managers managed EUR 24.9 trillion in Europe at end Q2 2020
More information available at www.efama.org or follow us on Twitter @EFAMANews or LinkedIn @EFAMA.

About EMTA
EMTA, formed in 1990, is the principal trade group for the Emerging Markets trading and investment community and is dedicated to promoting the orderly development of fair, efficient and transparent trading for Emerging Markets instruments and to helping integrate the Emerging Markets into the global capital markets.

About ESBG
ESBG helps savings and retail banks in 20 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 900 banks, which together employ more than 650,000 people driven to innovate at 50,000 outlets. ESBG members have total assets of €5.7 trillion, provide €1 trillion corporate loans (including SMEs), and serve 160 million Europeans seeking retail banking services. ESBG members are committed to further unleash the promise of sustainable, responsible 21st century banking.

About EVIA
The European Venues and Intermediaries' Association promotes and enhances the value and competitiveness of Wholesale Market Venues, Platforms and Arranging Intermediaries by providing members with co-ordination and a common voice to foster and promote liquid, transparent and fair markets. It maintains a clear focus and direction, building a credible reputation upon 50 years of history, by acting as a focal point for the industry and providing clear direction to their members when communicating with central banks, governments, policy makers, and regulators.

Its core strength is the ability to **consolidate views** and data and act as a common voice for an industry operating in a complex and closely regulated environment, by acting as a central point for the industry and providing clear communication with central banks, governments, policy makers, and regulators.
It provides **specific standards** and maintains a clear focus and direction for the participant s and stakeholders across the market ecosystem, building upon a credible reputation from over 50 years of experience.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.
FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

About GFXD

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24 global foreign exchange (FX) market participants, collectively representing the majority of the FX inter-dealer market. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

About ICI Global

ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI's membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$33.8 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.

About ICMA

ICMA is the trade association for the international capital market with over 600 member firms from more than 60 countries, including issuers, banks, asset managers, central banks,

infrastructure providers and law firms. It performs a crucial central role in the market by providing industry-driven standards and recommendations for issuance, trading and settlement in international fixed income and related instruments. ICMA liaises closely with regulatory and governmental authorities, both at the national and supranational level, to help to ensure that financial regulation promotes the efficiency and cost effectiveness of the capital market.
www.icmagroup.org

About Insurance Europe
Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out almost €1 100bn annually — or €2.9bn a day — in claims, directly employ over 900 000 people and invest nearly €10 200bn in the economy.

About ISDA
Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 925 member institutions from 75 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

About LMA
The LMA is the trade body for the syndicated loan market in Europe, the Middle East and Africa. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 750 organisations across EMEA and consists of banks, non-bank investors, law firms, rating agencies, borrowers and service providers.