asifma

Growing Asia's Markets

18 April 2018

Mr. Steven Maijoor
European Securities and Markets Authority
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07, France

Dear Mr. Maijoor,

ASIFMA would like to once again thank you for your participation in our roundtable session in Hong Kong on 16 January 2018.

As discussed in that meeting, ASIFMA and its members are deeply concerned about the impact of the EU Benchmark Regulation (**BMR**) on the Asia-Pacific region. As set out in ASIFMA's previous papers on the potential impact of the BMR, including those co-authored with Herbert Smith Freehills, the BMR is likely to have a significant impact on the Asia-Pacific region, including both a reduction in the number of benchmarks offered in the Asia-Pacific region and a reduction in the number of benchmarks that EU supervised entities can use. This reduction will affect not only the Asia-Pacific region but also the EU, through its impact on EU supervised entities and investors.

ASIFMA believes that a reduction in the number of benchmarks available to EU supervised entities will reduce market liquidity while increasing fragmentation and concentration risk. Further, it will significantly hinder the ability of European Union (EU) banks, companies and investment institutions to hedge interest rate and other risks, and reduce the ability of EU supervised entities and investors to access certain markets, particularly if that market's primary benchmark is not compliant with the BMR. While it is difficult to quantify European exposure to benchmarks administered in the Asia-Pacific region, ASIFMA has estimated that European-domiciled funds using Asian-administered benchmarks had about EUR 34.7 billion in assets under management as of October 2017.

In 2017, ASIFMA undertook a survey that identified at least 55 benchmarks across key Asia-Pacific markets (including Japan, Hong Kong and South Korea) that could be affected by the introduction of BMR. ASIFMA believes it will be very challenging for the administrators of these benchmarks to obtain registration by 1 January 2020.

ASIFMA's concerns are driven by several factors. First, there are significant practical difficulties associated with each of the three options for registration available to third country benchmark administrators. In this regard, ASIFMA would welcome guidance from ESMA (and the European Commission (**EC**) where necessary) on certain key matters associated with these options. Second, as the EC has not yet endorsed a number of the final draft technical standards submitted by ESMA in March and June 2017, there is considerable uncertainty around the implementation of the BMR following its entry into application on 1 January 2018 (particularly given your 26 February 2018 comments that the transitional period will not be extended past 1 January 2020). Third, this lack of clarity has been amplified by uncertainty as to the prospects of the EC's proposed amendments to the mandate of the European Supervisory Authorities (**ESAs**) (**ESAs Review Proposal**), which among other changes, proposes to establish ESMA as the supranational competent

authority responsible for recognition and approval of endorsement of third country administrators and benchmarks.

Given the challenges summarised above, this letter sets out a number of recommendations as to the steps ASIFMA believes it would be helpful for ESMA to take to reduce the impact of the BMR on the Asia-Pacific region specifically and more broadly on benchmark administrators outside of the EU.

ASIFMA's recommendations

As ESMA is aware, the BMR provides third country administrators with three mechanisms to allow for the use of their benchmarks in the EU: equivalence, endorsement, or recognition.

Equivalence

Article 30 of the BMR provides that a benchmark administrator may obtain registration as a result of the adoption of an implementing decision by the EC as to the equivalence of a third country's legal framework and supervisory practice with the BMR.

Given that very few, if any, Asia-Pacific countries yet regulate benchmarks, legislative change will be needed in a number of jurisdictions for administrators in those jurisdictions to rely on equivalence.

In order to provide guidance for regulators and legislators considering the introduction of benchmark regulation in their jurisdiction, ASIFMA recommends that ESMA provide:

1. Confirmation that ESMA and the EC will, in accordance with the EC's 2017 guidance on equivalence determinations,[1] apply a risk-based approach and the principles of proportionality to equivalence determinations in the context of the BMR. ASIFMA notes that while the potential impact of the BMR on EU-Asia Pacific cross border flows may be significant, the impact of Asia Pacific benchmarks on the EU financial system is minimal;
2. More detailed guidance as to what criteria the EC will consider in determining whether the relevant legislation or regulation is equivalent to the BMR;
3. Further details of the process by which a third country would apply for equivalence, including guidance as to the likely timeframe for an application and what will be required from third country regulators. In addition, it would be helpful if ESMA could provide guidance as to its role in the application process compared to that of the EC and how third country regulators should liase between the two bodies.

The lack of such guidance at present poses significant difficulties for regulators and administrators in third countries in determining whether benchmarks regulation in these third countries is likely to be considered equivalent by 1 January 2020. Without guidance on these points, ASIFMA is concerned that regulators cannot make informed decisions as to if, how or when to introduce benchmarks legislation in their country. Similarly, a lack of guidance on these points hampers administrators' ability to determine if equivalence is a feasible option for registration of their benchmarks.

Endorsement

Article 33 sets out the process by which third country administrators may use endorsement to obtain registration of their benchmarks within the EU.

ASIFMA's understanding is that very few European firms are at present considering offering their services as endorsing entities and that this reluctance is driven by the liability an endorsing entity would face for non-compliance with the BMR by the benchmark administrator it has endorsed. As such, and as noted in ASIFMA's previous joint papers with Herbert Smith Freehills (previously provided to ESMA), endorsement

[1] European Commission, *EU equivalence decisions in financial services policy: an assessment* (2017).

may be of limited use as a mechanism by which third country administrators can seek registration, except in circumstances where the administrator is part of a corporate group with an EU presence.

However, ASIFMA considers that even those administrators that are part of such a corporate group are in need of additional guidance from ESMA in order to make endorsement a feasible option. In particular, ASIFMA recommends that ESMA provide guidance as to:

1. The process for identifying a suitable endorsing entity;
2. The nature of the expertise ESMA expects the endorsing entity should have; and
3. The process by which an administrator and/or its endorsing entity may apply to the endorsing entity's national competent authority (NCA) for endorsement.

Recognition

Article 32 sets out a complex process by which a third country administrator may seek recognition. While ASIFMA's 2017 survey (in conjunction with Herbert Smith Freehills) of administrators in the Asia-Pacific region indicated that many administrators in this region are likely to pursue recognition in jurisdictions where neither equivalence nor endorsement are viable approaches for January 2020. We understand that administrators' pursuit of this option has been hampered by a lack of guidance on certain key matters. We therefore recommend ESMA provide guidance on the following:

1) The role of compliance with IOSCO Principles: Article 32 provides that administrators seeking to obtain recognition must comply with the BMR and may do so by complying with the IOSCO Principles for Financial Benchmarks or IOSCO Principles for PRAs (collectively, the **IOSCO Principles**). This is on the proviso that this compliance with the IOSCO Principles is equivalent with the BMR's requirements, excluding those set out in articles 11(4), 16, 20, 21 and 23 of the BMR. However, no guidance has, as of yet, been issued as to what administrators must demonstrate in order to be deemed compliant with the IOSCO Principles, nor the process by which they must do so. Similarly, no guidance has been issued as to how an independent external auditor is to assess compliance. We recommend that ESMA provide a sample evaluation form for use by an external auditor in assessing compliance, as well as suggestions as to the types of supporting documentation which could be used to demonstrate compliance with the IOSCO Principles.

2) Clarification as to the legal liability of a legal representative: One of the key matters on which guidance is needed is in relation to the legal liability of a legal representative. While article 32(3) provides that legal representatives "shall be accountable to the competent authority of the member state of reference," it is unclear what form this accountability will take (and, importantly, how this liability differs from that of an endorsing entity). This lack of guidance has had a chilling effect on the willingness of parties to offer their professional services as "legal representatives" for the purposes of recognition. Without parties willing to act as legal representatives, this particular option for registration will be of limited use to third country administrators. It would also be helpful for administrators / legal representatives to be provided with guidance on how, if at all, this legal representation should be documented for the purposes of the application process.

3) Application process, forms and timeline for recognition: ESMA submitted a draft regulatory technical standard in relation to the application forms to be used by Member State NCAs to the EC in March 2017. However, this standard has yet to be endorsed, and as such there has been no formal guidance provided on the nature of the application process or the form to be used. This poses significant difficulties for third country administrators trying to identify the most appropriate registration option for their organisation. Similarly, the lack of guidance as to the timeline for recognition applications poses problems for administrators in understanding whether they are

likely to obtain registration by 1 January 2020. We therefore would ask that the EC adopt this draft regulatory technical standard as soon as practicable.

4) Guidance as to how administrators are to identify their 'Member State of reference': The ASIFMA-Herbert Smith Freehills survey indicated that only 18% of participants knew in which EU Member State instruments referencing their benchmarks had been admitted to trading for the first time. Similarly, only 18% of participants were aware of the location of EU supervised entities using their benchmarks. This makes it very difficult to identify an administrator's "Member State of reference," as set out in article 32(4) of the BMR. As such, ASIFMA recommends that ESMA provide guidance as to the process which should be followed by administrators who lack the necessary data to identify their "Member State of reference" in accordance with art 32(4).

Cooperation arrangements

Both equivalence and recognition options require there be cooperation arrangements between third country regulators and either ESMA (in the case of equivalence applications) or the NCA of the Member State of reference (in the case of recognition applications). However, despite the draft regulatory technical standard submitted by ESMA to the EC in June 2017 in relation to the requirements and process for entering into these cooperation arrangements, there has been no formal guidance provided on these arrangements, nor has the EC indicated when such guidance might be forthcoming. ASIFMA urges the EC to adopt this standard as a matter of priority, or otherwise establish dialogue (through ESMA) with APAC regulators to discuss possible cooperation arrangements.

Similarly, there are concerns that entering into cooperation arrangements that include ongoing supervisory obligations for third country regulators would be tantamount to de facto regulation of benchmark administrators. ASIFMA recommends that ESMA take steps to mitigate these concerns by providing guidance as to the content of these cooperation arrangements where the third country regulator does not have an existing responsibility to supervise benchmark administrators.

Further, article 32(5) of the BMR provides that recognition cannot be granted unless the NCA of the Member State of reference is not prevented from exercising its supervisory functions under the BMR by any laws of the relevant third country, or where applicable, by limitations in the supervisory or investigatory powers of the third country regulator. However, no guidance has been provided yet as to what these limitations might include.

Conclusion

For the reasons set out above, each of the options available to third country benchmark administrators for registration have significant issues associated with them. These issues, and the lack of progress to date from ESMA and the EC in relation to the issuing of guidance and approval of regulatory technical standards, have hamstrung administrators' efforts to identify the most appropriate option for their organisation to pursue. ASIFMA is concerned that the two-year transition period provided under the BMR has effectively been shortened by this lack of guidance, and that continued delay will increase the difficulty for any third country administrator in obtaining registration by 1 January 2020. This in turn creates uncertainty in the market as to the future status of third country benchmarks. This uncertainty is likely to disrupt the activities of EU supervised entities that rely on these benchmarks, and adversely impact EU investors. Given these issues, we ask ESMA to address the above concerns urgently. ASIFMA's view is that continued dialogue between EU regulators and Asian regulators could assist in addressing some of these concerns. ASIFMA would be happy to facilitate such discussions, if ESMA considers that such assistance would be helpful.

We welcome the opportunity for continued engagement with ESMA on this issue. If you have further questions or would otherwise like to follow up, please contact Wayne Arnold, ASIFMA's Executive Director

and Head of Policy and Regulatory Affairs, at warnold@asifma.org or +852 2531 6560. You may also reach out to Simon Lewis, AFME's Chief Executive Officer, at simon.lewis@afme.eu or +44 (0)20 3828 2747.

Sincerely,

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Chief Executive Officer
Asia Securities Industry & Financial Markets Association

Cc:

- Mr Olivier Guersent, Director General, European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union
- Mr Ugo Bassi, Director, Financial Markets, European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union
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