Commission Implementing Decision (EU) 2019/1274 of 29 July 2019 on the equivalence of the legal and supervisory framework applicable to benchmarks in Australia in accordance with Regulation (EU) 2016/1011 of the European Parliament and of the Council (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2019/1274

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on the equivalence of the legal and supervisory framework applicable to benchmarks in Australia in accordance with Regulation (EU) 2016/1011 of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014[(1)], and in particular Article 30 thereof,

Whereas:

(1) Regulation (EU) 2016/1011 introduces a common framework to ensure the accuracy and integrity of indices used as benchmarks in financial instruments and financial contracts, or to measure the performance of investment funds in the Union.

(2) That Regulation applies as of 1 January 2018 and non-Union administrators benefit from a transitional period allowing for the use of third-country benchmarks in the Union. Following the expiry of the transitional period, a benchmark or a combination of benchmarks provided by an administrator located in a third country may only be used in the Union where the benchmark and the administrator are included in the register maintained by the European Securities and Markets Authority ('ESMA') following the adoption of an equivalence decision by the Commission, or a recognition or endorsement by competent authorities.

(3) The Commission is empowered to adopt implementing decisions stating that the legal and supervisory framework of a third country with respect to specific administrators or specific benchmarks or families of benchmarks are equivalent to the requirements under Regulation (EU) 2016/1011. When assessing such equivalence, the Commission takes into account whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles for financial benchmarks or, where applicable, with the IOSCO principles for Oil Price Reporting Agencies ('PRAs'), and that such specific administrators or specific benchmarks or families of benchmarks are subject to effective supervision and enforcement on an on-going basis in that third country.

(4) Benchmarks such as the Australian Bank Bill Swap Rate and the S&P/ASX 200 Index are administered in Australia and used in the Union by a number of supervised entities. As a result, the Commission undertook an assessment of the benchmarks regime in Australia.

(5) The legislative framework for establishing, supervising and administering benchmarks in Australia comprises a licensing scheme and confers powers on the Australian Securities and Investments Commission ('ASIC'). It also requires administrators of significant benchmarks to obtain a benchmark administrator licence from ASIC. For benchmarks that are not declared significant by ASIC, the legislative framework in Australia allows administrators to opt-in to the national regulatory framework by applying for a licence from ASIC in accordance with section 908BD of the Corporations Act and, as a result, renders them subject to ASIC rules for administrators and contributors.

(6) ASIC Licensees are subject to the conditions of the licence as well as a range of legislative requirements. Legally binding requirements for administrators are set forth in the Corporations Act 2001 ('Corporations Act'), the ASIC Financial Benchmark (Administration) Rules 2018 and the ASIC Financial Benchmark (Compelled) Rules 2018. The ASIC Regulatory Guide 268 entitled- Licensing regime for financial benchmark administrators ('RG 268') — provides further guidance for benchmark administrators. Part 7.5B of the Corporations Act (as amended by the Treasury Laws Amendment (2017 Measures No 5) Act 2018) implements the legislative framework for the regulation of financial benchmarks.

(7) In accordance with section 908AC of the Corporations Act, ASIC may, by legislative instrument, declare a financial benchmark to be a significant benchmark. Only those benchmarks meeting the criteria laid down in the Act can be designated as significant benchmarks. ASIC shall be satisfied that: (i) the benchmark is systemically important to the Australian financial system; or (ii) there is a material risk of financial contagion, or systemic instability, in Australia if the availability or integrity of the benchmark is disrupted; or (iii) there would be a material impact on retail or wholesale investors in Australia if the availability or integrity of the benchmark is disrupted.

(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 the administrators of those benchmarks listed in the latest applicable version of the ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420. This decision does not cover administrators of financial benchmarks that qualify for exemption from the scope of Regulation (EU) 2016/1011 in accordance with Article 2(2) of that regulation.

(9) ASIC may grant a licence to a benchmark administrator with regard to one or several financial benchmarks. ASIC must consider the factors set out in section 908BO(2) of the Corporations Act when deciding whether to grant a licence, impose, vary or revoke conditions on a licence, vary a licence, or suspend or cancel a licence. A person is considered to be committing an offence if it administers (or holds out that

they administer) a significant benchmark but does not hold a benchmark administrator licence specifying the financial benchmark.

(10) ASIC adopted the ASIC Financial Benchmark (Administration) Rules 2018 ('Administration Rules') under section 908CA of the Corporations Act and the ASIC Financial Benchmark (Compelled) Rules 2018 ('Compelled Rules') under section 908CD of the Corporations Act. The Administration Rules lay down requirements for benchmark administrator licensees and contributors including governance and oversight requirements, outsourcing requirements, requirements to guard against conflicts of interest, benchmark design and method requirements and input data requirements. The Compelled Rules regulate the mandatory generation or administration of a significant benchmark or mandatory submissions to a significant financial benchmark.

(11) In drafting the Administration Rules, ASIC had regard to the IOSCO 'Principles for Financial Benchmarks' as required under section 908CK of the Corporations Act. In addition, ASIC considered the legal and supervisory frameworks with respect to benchmarks in third countries including Regulation (EU) 2016/1011, as well as other Australian financial licensing regimes.

(12) The explanatory statement to the Administration Rules outlines how ASIC's Administration Rules and Compelled Rules reflect the IOSCO Principles. More specifically, the Administration Rules state that Rule 2.1.2 corresponds to the IOSCO Principles on governance arrangements for financial benchmarks. Rule 2.1.3 corresponds to the IOSCO Principles on the oversight of third parties that are involved in generating or administering each financial benchmark specified in the licensee's benchmark administrator licence. Rule 2.1.4 corresponds to the IOSCO Principles on conflicts of interest for administrators of financial benchmarks. Rule 2.2.1 corresponds to the IOSCO Principles on benchmark design. Rule 2.2.2 corresponds to the IOSCO Principles on data sufficiency and internal controls over data collection. Rule 2.2.3 corresponds to the IOSCO Principles on the content of the methodology used to make financial benchmark determinations. Sub-rule 2.2.4(1) corresponds to the IOSCO Principles on changes to the methodology used to make financial benchmark determinations. Rule 2.3.1 corresponds to the IOSCO Principles on the control framework for administrators as it relates to the management of risk, as well as core requirements of other Australian licensing regimes. Rule 2.4.1 corresponds to the IOSCO Principles on planning for the transition or cessation of a licensed benchmark. Rule 2.5.1 corresponds to the IOSCO Principles on a 'Submitter Code of Conduct'. Finally, Rule 2.6.1 corresponds to the IOSCO Principles on transparency of benchmark determinations.

(13) In addition, ASIC provides regulatory guidance (RG 268) for entities subject to the Administration Rules and the Compelled Rules. It sets out ASIC's interpretation of the law and gives practical guidance of how entities may meet their obligations under the law.

(14) The Commission therefore concludes that the binding requirements with respect to the administrators of significant benchmarks as designated in the ASIC Corporations

(Significant Financial Benchmarks) Instrument 2018/420 are equivalent to the corresponding requirements under Regulation (EU) 2016/1011.

(15) Article 30 of Regulation (EU) 2016/1011 also requires that the requirements are subject to effective supervision and enforcement on an on-going basis in the third country.

(16) Benchmark administrators licensed in Australia are subject to ongoing supervision and oversight by ASIC. Section 908AF of the Corporations Act provides that ASIC is responsible for supervising financial benchmarks that are licenced. ASIC is also responsible for enforcing benchmark administrators' compliance with their obligations under the Corporations Act, the Administration Rules and the Compelled Rules, and in this respect, it conducts periodic assessments of compliance by benchmark administrators with their licence obligations.

(17) Section 908BQ of the Corporations Act and rule 2.8.1 of the Administration Rules require benchmark administrators to notify ASIC of certain matters, including where the licensee has failed to comply with or may no longer be able to comply with any of their regulatory obligations. ASIC is able to assess licensees' compliance with the Corporations Act and the Administration Rules, in accordance with sections 908BR and 908BS of the Corporations Act and rules 2.8.2 and 2.8.3 of the Administration Rules. ASIC may also ask for a report on any matter in accordance with Section 908BV of the Corporations Act, and ask for an audit statement on the licensee's report on those matters. Section 908BW of the Corporations Act empowers ASIC to produce assessment reports, share those reports with certain Australian Government agencies where necessary, and publish such reports.

(18) Should a benchmark administrator fail to comply with their regulatory obligations, under section 908BT of the Corporations Act, ASIC may issue a licensee with a written direction to take specific actions that ASIC believes will ensure the licensee's compliance with those obligations. If the licensee fails to comply with that written direction, ASIC may bring the matter to a court, which may then order that the licensee comply with ASIC's guidance. Under sections 908CH and 908CI of the Corporations Act, ASIC may issue infringement notices or accept commitments from administrators who have failed to comply with their regulatory requirements. Section 908CG of the Corporations Act provides a framework whereby an administrator who is alleged to have not complied with the Administration Rules may, as an alternative to civil proceedings, pay a penalty, undertake or institute remedial measures (including education programs), or accept sanctions other than the payment of a penalty. ASIC may also suspend or cancel a licence in certain circumstances under sections 908BI and 908BJ of the Corporations Act.

(19) The Compelled Rules enable ASIC, if it considers it to be in the public interest, to compel a licensee to continue to generate or administer a significant benchmark, or generate or administer a significant benchmark in a particular way, including by changing the method used to generate or administer a significant benchmark. The Compelled Rules also enable ASIC to compel a contributor to contribute data or information to a licensee for the generation or administration of a significant