

Deutsche Börse Group Response to the European Commission's call for evidence "Review of the scope and third-country regime of the Benchmark Regulation"

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Contact: Marco Winteroll, Group Regulatory Strategy, Deutsche Börse Group

A. Introduction

Deutsche Börse Group (DBG) welcomes the opportunity to participate in the European Commission's call for evidence on a review of the third-country regime of the EU's Benchmark Regulation (BMR). As an international exchange organisation and market infrastructure provider, DBG's business areas cover the entire financial market transaction process chain. In the BMR context, this means that DBG includes both benchmark administrators (providers) and supervised entities (users). The review of the BMR directly affects the following of DBG's business lines:

- STOXX Ltd. ("STOXX") is a recognized third-country benchmark administrator under the BMR. STOXX and DAX indices are licensed to more than 500 companies worldwide to serve as underlyings for funds, structured products and derivatives. As of end-2022, estimated assets under management in STOXX and DAX-based ETFs stood at approx. 98bn EUR.¹ STOXX has chosen a proactive approach to BMR compliance and obtained recognition under Article 32 in July 2019. On 1 January 2022, ESMA became the competent authority responsible for the direct supervision of STOXX Ltd.
- Eurex Frankfurt AG ("Eurex") is a supervised entity under the BMR. As a derivatives exchange, Eurex also relies on third-country benchmarks as underlying when specifying derivatives contracts for financial instruments such as equity index or interest and fixed income derivatives. Once these financial instruments are designed and thereafter traded, the underlying benchmarks may be used in valuations (determination of the amount payable) of these products. These valuations are used to support the operation of Eurex Deutschland, a regulated market within the meaning of Title III of Directive 2014/65/EU ("MiFID II").
- In addition to operating two EU-registered benchmark administrators, European Energy Exchange ("EEX") also fulfils the definition as a supervised entity under the BMR. As an energy exchange, EEX uses third-country benchmarks for similar purposes as Eurex (product development, support of function as a market operator).

The following comments are based on DBG's extensive experience with the BMR covering both the supervised entity (user) and the administrator perspective.

¹ Source: Morningstar / AUM as of 31.12.2022.

B. Comments

We support the objectives of the EU BMR, including the third-country regime, as it improves the governance of benchmarks and ensures that benchmarks which are used in the EU are robust, reliable, representative, and not prone to manipulation. It is important that the BMR continues to ensure adequate consumers' and investors' protection. Hence, indiscriminate deregulation exempting virtually all third-country benchmarks (e.g. by reusing the criteria for "critical" benchmarks) should be avoided.

However, we acknowledge that the entry into force of the third-country regime was repeatedly postponed due to concerns around unintended market impacts. A recalibration of the BMR's scope in relation to third-country benchmarks could reduce unnecessary administrative burdens and access restrictions, allowing administrators and regulators to focus on relevant risks. In order to achieve an appropriate balance between investor protection and regulatory costs while also balancing access to third-country benchmarks and the need for fair competition between benchmark administrators, any potential descoping proposal should adhere to the following principles.

1. Sensible criteria for the designation of a benchmark as "strategic"

We understand that the European Commission is considering to limit the application of the third-country regime to benchmarks to be designated as strategic or systemic to the EU. In order for such a regime to function, it would be vital that the designation process is transparent and that the criteria to identify "strategic" benchmarks are defined, applied and assessed in a clear and proportionate manner. For this purpose, we recommend to take into account the value of assets referencing the benchmark within the EU in order to reflect EU market participants' exposure to such benchmarks. Such a threshold for a "strategic" designation should be appropriately calibrated and not exceed the current threshold for "significant" benchmarks under the BMR.

In case the European Commission chooses to make reference to the type of benchmark as a complementary way of designating a third-country benchmark as strategic, the specificity of third-country commodity benchmarks and, in particular, their non-substitutability should be considered. Restricting access to such benchmarks by designating them as strategic will impair liquidity in multiple commodity markets (e.g. products referencing dry bulk freight, wood pellet and LNG benchmarks) for which there is no appropriate substitute EU benchmark and where the third-country administrator is unlikely to become BMR-compliant. Liquidity in assets referencing such benchmarks would move onto exchanges located outside the EU and deprive EU-based users of access to such benchmarks. In most cases, EEX is the sole EU user of the respective third-country benchmarks resulting in a weak incentive for the respective third-country administrators to become BMR-compliant. Furthermore, we disagree with the concept of classifying commodity benchmarks as strategic on the basis of volatility or discretionary criteria. Where commodity benchmarks are prone to natural volatility, such behaviour would not justify a designation as "strategic" and associated access restrictions. Instead of such an approach, we would recommend to broaden the exemption for small

commodity benchmarks under Art. 2(2)(g) BMR by removing the conditionality “based on submissions from contributors” and substantially increasing the notional value of currently 100m EUR such that only the most broadly referenced third-country commodity benchmarks remained subject to the BMR. The removal of the above condition ensures that other types of commodity benchmarks, such as those based on data that is publicly available (even if behind a paywall) but does not directly originate from a source as defined in Art. 3(1)(24)(a) BMR, are eligible for an exemption.

2. Equal rules and uniform supervision for benchmark administrators regardless of location

To ensure a level playing field and avoid unfair competition, any descoping proposal should apply to all administrators regardless of whether they are already recognized or not and of where they are located. If the scope of the third-country regime is restricted to strategic benchmarks, the scope of the EU benchmark regime should be amended along the same lines. It would be logical to link this classification to supervision thereby ensuring that ESMA supervises both EU and third-country administrators of “strategic” benchmarks (in addition to the non-strategic benchmarks subjected to regulation under the opt-in mechanism described below). Unequal treatment could lead to third-country administrators being seen as second-tier to comparable EU administrators, thereby potentially penalizing third-country administrators, especially those who have already made investments to comply with the BMR and obtain recognition.

3. Opt-in mechanism

The recalibration of the scope should be combined with the introduction of an opt-in mechanism at benchmark level. Such a mechanism would allow administrators which are already supervised under the BMR to benefit from a quality label attached to the benchmark, if they voluntarily decide to comply with the BMR and be subject to supervision in a relation to a non-strategic benchmark. We would suggest that such mechanism should allow administrators to opt in by simply uploading the relevant benchmark in the ESMA register, without having to go through an application process. This would definitely reduce the administrative impact on ESMA. In addition, administrators would also benefit from a reduced “time to market”.

4. No undue limitations for the provision of EU labels

Consistent with points 1) and 2), effective supervision is far more important than location in ensuring that the provision of a benchmark complies with regulatory requirements. As all administrators should be subject to the same regime regardless of where they are located, there is no justification for prohibiting third-country administrators from offering CTB, PAB, the currently contemplated ESG benchmark or any other EU label. We therefore welcome that the current and any potential future EU-designed labels in the scope of the BMR remain accessible for non-EU administrators. It is in the best interests of the EU and EU investors to continue to allow third-country administrators to use EU ESG labels for their benchmarks, provided that they comply with the ESG label BMR requirements.