IRSG
INTERNATIONAL REGULATORY STRATEGY GROUP

IRSG briefing on third country provisions in Benchmarks Regulation

The inclusion of a strict equivalence regime in the original Commission proposal would lead to European market participants and investors being denied access to benchmarks administered in third countries. While many jurisdictions have reformed regulation of critical benchmarks, we are not aware of any jurisdiction having proposed regulation with the same breadth of scope at the proposed EU regulation. This, therefore, makes it unlikely that other jurisdictions will be found equivalent to EU legislation. As noted in the ECB's opinion, many important investment products in the Union, particularly in derivatives and investment funds, reference non-Union benchmarks. In consequence, a wide range of products referencing such third country administered benchmarks would have to be withdrawn and the potential impact of such a move on financial stability could be significant, as well as forcing market participants and investors to sell off assets referencing these benchmarks or modify contracts, which would not only have cost implications for EU entities but would also prevent market participants and investors from effectively managing and diversifying their risks globally, making them less competitive vis-à-vis third country competitors.

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We welcome the recognition in both the latest Italian Presidency compromise text and the draft report by rapporteur Cora van Nieuwenhuizen of the importance of striking the right balance between ensuring a level playing field and keeping Europe open in the EU Benchmarks Regulation.

While both texts include important measures to address the use of third country benchmarks in the Union, we feel that that the current measures still fall short of a workable solution for benchmark users in Europe.

The proposed new recognition regime is a welcome step to allow third country firms to choose to register and comply with the Regulation without being established in the EU. This proposal is also helpful as registration in one Member States gives access to the rest of the Union (i.e. a passport).

However, there are still some issues with this approach.

Firstly, it assumed that there are sufficient incentives for non-EU benchmark administrators to submit to the EU regime. This may be the case whether the benchmark administrator has a paying customer base within the EU, i.e. by licensing their indices to EU participants, so long as the administrative burden is not too high (for example, the requirement for an EU legal representative may be too burdensome for smaller benchmark administrators). However, there are a number of benchmarks to which EU users want access that are freely available and therefore there will be little incentive for the non-EU benchmark administrator to register in the EU.

Secondly, the draft report includes the need for an appropriate cooperation arrangement between the relevant competent authority or ESMA and the third country authority,

Finally, we note that currently there are transitional arrangements for EU benchmark administrators only (Article 39). We believe that these transitional arrangements should also apply to non-EU benchmark administrators, to give them time to implement the relevant changes.

<u>Our proposed solution</u>

- Delete the requirement for a cooperation arrangement between the NCA/ESMA and the third country authority.
- Include a solicitation test for non-critical third country benchmarks so that supervised entities that initiate use of a non-critical third country benchmark can continue to do so without the need for the third country benchmark administrator to be registered in the EU, so long at the third country benchmark administrator has self-certified that it is IOSCO compliant and this has been subject to an external compliance audit.
- Extend the transitional arrangements currently applied to EU benchmark administrator (Article 39) to non-EU benchmark administrators as well.

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