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Nasdaq's position on the Benchmark Regulation (BMR)

Nasdaq welcomes the opportunity to provide views on the BMR regime. The European Commission's consultation is a good moment to reflect on the scope of the framework and possibly achieve better international alignment overall.

Nasdaq's perspective is that of both a registered EU benchmark administrator under BMR Article 34 and a third country benchmark administrator currently preparing to endorse its third country benchmarks in preparation for the approaching end of the transitional period. Moreover, Nasdaq is also a benchmark user of derivative instruments highly reliant of the third country benchmarks. Thus, our views reflect this broad perspective on benchmarks.

Level-playing field between EU/EEA and third countries

Firstly, Nasdaq stresses the importance of creating a level-playing field with the same standards when reviewing the existing regulation. This is in order to avoid circumvention and potential competitive disadvantages. In this regard, equal standards should be set and access to both EU benchmarks and third country benchmarks should be given to benchmark users. Thus, if the scope of regulatory requirements is changed for third country benchmarks, it should equally be altered for EU benchmarks.

Third country benchmark regime & IOSCO principles

Moreover, we stress the importance of continued access to third country benchmarks for users in the EU after the end of the transitional period set out in the BMR, as we experience demand for those benchmarks by users. Any changes to the current regime, should take this demand – and reliance of the EU users on third country benchmarks – into account. The exclusion of third country benchmarks would also limit the depth of choices for EU investors and could in turn either discourage potential EU investors or leave them with less suitable benchmark choices, which is not desirable.

If the third country benchmark regime remains, it is our view that overall, non-significant and significant benchmarks of a non-EEA third country administrator that are compliant with IOSCO principles, as evidenced by a valid annual external audit certification, should be deemed equivalent and not subject to BMR deviations or additional requirements.

The IOSCO principles are sound and also allow for appropriate application for various types of benchmarks and administrators. For non-EU administrators and benchmarks, it would hence make sense to as far as possible allow entities complying with IOSCO to also operate within the EU.

Provided that the current third country regime remains, the responsibilities between the EU administrator, who endorses a benchmark, and the third country administrator should be further clarified.

As an example, very little guidance is currently given through BMR Article 33, ESMA's Q&As and through ESMA's Final Report on technical advice under the Benchmark Regulation with regard to the documentation and application requirements for endorsements, and concerning the ongoing responsibilities of the endorsing as well as third country administrators after a successful

endorsement application.

Principle of proportionality

Nasdaq also believes that sufficient proportionality is needed both when applying the current regime and when considering changes thereto.

As an example, from a global perspective IOSCO has recognised that benchmarks based on regulated data should be subject to a proportionate approach. BMR acknowledges that regulated data benchmarks are less prone to manipulation compared to those based on input data contributions. Nevertheless, experience with its application has shown that the framework does not differ much from that of other types of benchmarks.

This is also the case with regard to the practical application of the regime for non-significant benchmarks. Thus, Nasdaq reiterates that non-significant benchmarks should be subject to a proportional approach as well. Currently, only small alleviations for non-significant benchmarks are in place compared to other benchmarks. It is worth reminding that non-significant benchmarks are categorised as such, following an assessment concluding that there would not be a significant or adverse impact were the benchmark no longer to be provided. The calibrated regime has been put in place after considerations of which requirements may not be necessary for non-significant benchmarks. Having that in mind, the requirement in BMR Article 26(3) to explain why an administrator of non-significant benchmarks makes use of calibrations, i.e. the possibility not to apply certain BMR requirements, seems unnecessary and disproportionate.

We believe that the overall compliance requirements are still disproportionate. We would therefore support changes to better reflect the benchmarks' respective risk profiles in terms of the reliability of regulated market data and the limited impact of non-significant benchmarks.

Commodity benchmarks

With regard to commodity benchmarks, we encourage to consider changing the de minimis threshold for commodity benchmarks to double the current threshold value. Especially in the commodities sector there are many niche benchmarks. One example from Nasdaq's business is the salmon benchmark, which is used by a smaller number of users, for whom this benchmark however is essential. Given the smaller circle of users, the business value is limited, and the BMR compliance costs provide a heavy burden for such benchmarks. The risks with the effects of raising the de minimis threshold are very limited, considering the smaller circles of use of these niche benchmarks.

Regulated data benchmarks with input data from third country regulated markets

Input data from third country regulated markets in general provides for the same assets in terms of quality (transaction based or firm bid offer data generated under the rules and surveillance of a regulated market) and broad availability of the data. Benchmark administrators within and outside the EU offer regulated data benchmarks based on data generated on third country trading venues in order to provide global investable benchmarks. This ensures sufficient choice for investors within the EU and enables them to benefit from market developments in third countries in a reliable, efficient and cost effective way. In case benchmark administrators cannot for benchmarks based on data from third country trading venues benefit from the proportionate treatment designed for regulated data benchmarks, governance costs for the administrators significantly increase - also to the detriment of European end-users.

In order to further support the development of benchmarks using input data from third countries for

the use within the EU, it is imperative that global indices that use data from non-EU trading venues are regulated as regulated data benchmarks. In this regard, IOSCO equivalence should be factored in.

Benchmark register

We believe that for administrators authorised or registered in the EU, the benchmark register should list benchmarks instead of or in addition to administrators. Currently, the information on benchmarks is available from ESMA at request, and we understand requests are indeed made frequently. Nasdaq believes this information is valuable, and enhancing the benchmark register would provide additional transparency to users.

Need for legal certainty

Lastly, we stress the importance of obtaining legal certainty regarding the third country regime in light of the approaching end date of the transitional period under the BMR. Preparations for the entry into force of the third country benchmark regime are presumably already in motion for numerous entities, entailing non-trivial preparatory governance costs. We, therefore, encourage the European Commission to keep the consultation and potential review process transparent and swift with the aim of providing legal certainty as soon as possible. Alternatively, we encourage to award an extension of the transitional period until 2025 in order to allow sufficient time for a thorough and comprehensive revision process, which is also supported by FESE.