

## Response to the European Commission Proposal to Amend the European Benchmark Regulation

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Cboe Global Markets (“Cboe”) through its subsidiaries, is a leading provider of indices, as well as regulated market infrastructure, market data and analytics, and clearing and investment solutions. Cboe appreciates the opportunity to provide feedback on the European Commission proposal to amend the European Benchmark Regulation (the “Proposal”) and welcomes the opportunity to discuss the response.

- Cboe Global Indices, LLC (“CGI”) encompasses our U.S. index administration business. As a U.S. index provider, we are committed to the best practice guidelines published by the Index Industry Association (<https://www.indexindustry.org/ii-best-practice-guidelines/>) and to adopting practices consistent with the IOSCO Principles for Financial Benchmarks.
- Cboe Europe Indices B.V. (“CEIBV”), our EU index administration business, is registered with the Netherlands Authority for the Financial Markets in accordance with Article 34(4) of the EU Benchmark Regulation. We presently have around 60 benchmarks subject to the EU Benchmark Regulation that cover European countries, European regional, and European and UK Sector exposures.

We welcome the review of the EU benchmark regulation (“BMR”) and support the proposed descoping of BMR to enable a more fit for purpose regulatory framework that enables European participants to readily access benchmarks in the EU and globally. Cboe is committed to working within the required regulatory environment relating to benchmarks in the EU (as evidenced by our authorization as EU benchmark administrator), and we agree that continued access to benchmarks worldwide for EU businesses and investors is very important. As such, we take the opportunity to join the dialogue presented by the Proposal.

First, we encourage policymakers to adopt these amendments well before the December 2025 deadline applicable to third country benchmark administrators. To the extent these amendments are not adopted in 2024, third country administrators and national competent authorities may be forced to invest time and resources in application/supervisory processes that will become moot upon finalizing this Proposal.

Second, we recommend European policymakers strongly consider the technical enhancements set forth below. While Cboe is very supportive of the purpose of the amendments, there are aspects of the Proposal that will create a level of uncertainty for benchmark administrators providing benchmarks into the EU. This uncertainty may reduce the number and type of benchmarks provided into the EU, defeating the purpose of these amendments. Our hope would be to see the Proposal simplified to a point where it is objectively clear to all at any time, which indices would be in scope of the regulation or not.

As discussed more fully below, Cboe provides the below feedback and technical recommendations:

- Significant Benchmark Threshold: We agree and support the EUR 50 billion threshold, as proposed, for per se designation of a benchmark as significant.

- ESMA/NCA Designation Criteria: Include additional objective criteria for ESMA/NCA to designate a benchmark as significant (e.g., a EUR 20 billion threshold below which an index may not be designated and above which an index may, but is not required, to be designated).
- Designation Process: To enable consistent application of ESMA/NCA designation criteria across the EU and more fulsome due diligence processes, we recommend policymakers adopt: a) a more formal role for ESMA when ESMA advice is not aligned with an NCA designation decision; b) require NCA/ESMA to notify an administrator that a benchmark is under review prior to receiving the draft designation decision; c) extend the period by which administrators must respond to a draft designation decision from 15 working days to 90 working days.
- Re-authorization: Allow simplified re-authorization for a period of 5 years.
- Endorsement: Maintain the endorsement mechanism and consider a mechanism to promote endorsement.
- Spot FX Benchmarks: Retain the existing Commission exemption process for spot FX Benchmarks.
- EU CTB/PAB: EU and non-EU administrators should be able to offer EU Climate Transition Benchmarks (“CTBs”) and Paris-aligned Benchmarks (“PABs”) (collectively (CTB/PABs)).

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### **1. Significant benchmark threshold**

We support the continued determination of a significant benchmark to be where the benchmark administrator has concluded that the index is referenced by financial instruments and contracts, or used as a performance benchmark, by more than a total of EUR 50 billion in reference assets. This is an important, clear, and objective criteria that helps ensure that indices that are in scope of BMR are those that have a meaningful connection to the EU.

### **2. Designation requires objective criteria**

As proposed, if a benchmark does not satisfy the EUR 50 billion threshold, ESMA and national competent authorities (NCA(s)) may still designate a benchmark for BMR oversight based solely on qualitative criteria (e.g., the benchmark has no, or very few, appropriate market-led substitutes; and significant and adverse impacts would result in the Member State if the benchmark ceases). Solely relying on these qualitative criteria for designation results in a high degree of uncertainty for benchmark providers. Third country administrators may be reluctant to offer indices into Europe because of the uncertainty as to if, or when, their indices might be designated as significant. EU administrators, especially administrators currently authorised in the EU, but who will fall outside of authorisation per the Proposal as they do not have significant benchmarks (when calculated by threshold) will similarly be on a constant cliff edge that may deter administrators from offering EU indices.

To reduce uncertainty and ensure the BMR review results in a robust and dynamic market that allows index administrators to provide non-significant indices into Europe, there should be clearer, objective criteria applied to the designation mechanism. It’s critical that the administrative burden and cost of BMR be clearly understood ex ante. A framework that may not apply now, but may be reintroduced at any moment in the future – based on criteria that are unclear to an administrator and cannot be planned for – does not encourage an index administrator to create new indices. This would result in even further costs for small administrators and should be avoided.

As such, we propose that an objective criteria be added to the qualitative criteria so that the designation can only be made if the qualitative criteria are met and the benchmark administrator has

concluded that the index is referenced by financial instruments and contracts, or used as a performance benchmark, by more than a total of EUR 20 billion in reference assets.

### **3. Designation process improvements**

Per the Proposal, prior to an NCA designating a benchmark as significant, ESMA must be consulted and issue advice relating to the NCA's intended designation. Although this is an attempt at consistency of national designations, the text appears to leave the final determination solely in the hands of the relevant designating NCA, who need not necessarily apply any advice from ESMA received during the consultation process. There is also no dispute resolution process in the event that a benchmark administrator disagrees with an NCA's designation (e.g., on the basis that there are sufficient market led substitutes). We are concerned that this will result in an unlevel playing field and unfair competition because some smaller administrators will have the regulatory costs burden to mandatorily adhere to the benchmark regulation, whilst others with similar indices in the EU, will not. Such inconsistencies in application should be avoided by a change to the Proposal in order to remove the high level of discretion currently afforded to individual NCAs. We would recommend a more formal role for ESMA in the ultimate designation decision. At the very least we believe a comply or explain regime should be in place in the event ESMA disagrees with individual NCA designation decisions.

As proposed, there are also very short time periods afforded to the benchmark administrator (i.e., 15 working days from the date of notification of the draft decision) and home NCA to respond to draft designation decisions within the designation process. The benchmark administrator should receive notice that the NCA/ESMA is reviewing a benchmark prior to receiving the draft decision and should be afforded a more practical time frame to respond (e.g., at least 90 working days instead of 15 working days).

Separately, a website publication by the NCA or ESMA to refrain from using a benchmark could have a negative reputational impact leading to economic losses and is disproportionate to a failure to initiate proceedings under Article 24a (5) within the prescribed timeframe. Accordingly, there should be a short remedial period provided after the expiry of the initial application timeframe prior to a publication envisaged in Article 24a (5).

We further propose to add an explicit 3-month review process when ESMA is proposing to designate a third country benchmark at the request of an NCA, for symmetry with the process where an NCA may make a designation in relation to an EU administrator.

Our understanding of the Proposal is that once the designation has occurred, supervised entities may continue to use the relevant benchmark throughout the period of the application process, as long as that application process has been initiated within the 60 working day period. Clearly the time required by the home member state to consider an application may be significant, particularly in the case where objective criteria is not applied per the current Proposal, and therefore we consider the ability to continue to use the benchmark during that period imperative.

### **4. Re-authorisation**

Article 51 appears to indicate that existing benchmark administrators would need to be re-authorised/re-recognized (presumably per benchmark) if a benchmark is designated as significant. We are supportive of a simplified re-authorisation procedure for currently authorised benchmark administrators. Such a procedure importantly recognizes that currently authorised benchmark administrators (such as Cboe) have invested a great deal of resources into their BMR compliance. In our view, the re-authorisation procedure can be improved by allowing each benchmark administrator to submit a list of benchmarks (within their current authorization) which are within scope per the Proposal. This should be sufficient to transition to the new regime. Additionally, where a currently

authorised/recognised benchmark administrator determines that it wishes to remain in scope voluntarily, it may be helpful to adopt a mechanism to facilitate that, which could be as simple as the benchmark administrator notifying its home NCA/ESMA, depending on its authorization/recognition. This flexibility may be beneficial for EU administrators that currently provide non-significant benchmarks.

Additionally, the proposed simplified re-authorisation procedure is to be available to currently authorised, registered, endorsed, or recognized administrators for a period of 2 years. If re-authorisation would be needed, we believe the proposed 2-year period is insufficient, and an extension to a minimum of 5 years is suggested.

In general, areas of the text would benefit from additional clarity. For example, Article 36 suggests that a benchmark administrator can be authorised at company level, when in fact the Proposal only appears to allow for authorization per benchmark. Meaning that even if a benchmark administrator can appear on the Article 36 register, that would only ultimately relate to the in-scope benchmarks, and not all benchmarks that the particular benchmark administrator administers. Hence the mechanism described in this section 4 is important in order for the list of authorised benchmarks to be accurate from the start of the new regime proposed.

## **5. Endorsement**

We value and support the continued option of endorsement for third country benchmark administrators to provide in-scope benchmarks into the EU in the future. In fact, if a currently authorised EU benchmark administrator had a mechanism available to retain their status as authorised even where they would no longer have a benchmark in scope of the regulation per the Proposal, it may provide a viable path for the entity to become an endorsing entity for third country benchmarks. Without this type of mechanism, the only practical option for in-scope benchmark use in the EU by a third country benchmark administrator is recognition. However, this then creates a dual supervisory risk for companies with a global footprint. The EU benchmark administrator in a group may in the future become in-scope of the regulation and subject to the NCA supervision while the third country benchmark administrator in the same group would be supervised by ESMA. Thereby having 2 different supervisory authorities. The possibility of dual supervision should be avoided in the Proposal.

## **6. Spot foreign benchmarks exemption must be retained**

Per REGULATION (EU) 2021/168 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 February 2021, *in order to enable companies in the Union to continue their business activities while mitigating foreign exchange risk, certain spot foreign exchange benchmarks that are used in financial instruments to calculate contractual payouts and that are designated by the Commission in accordance with certain criteria should be excluded from the scope of Regulation (EU) 2016/1011.*<sup>1</sup>

We encourage policymakers to retain this provision to allow the Commission to designate a spot foreign exchange benchmark that is administered by administrators located outside the Union and the requirements of the provision are fulfilled.

As is the case currently and in the future, spot foreign exchange benchmarks may not be the subject of an equivalence assessment under the BMR. Without the continued exemption as currently included in the regulation, it is our view that EU supervised entities may remain at risk of losing access to spot foreign exchange benchmarks that they reference in derivative contracts that they offer corporate counterparts to help them manage their day-to-day hedging of currency risk. Our recommendation will help ensure that EU entities retain access to hedging tools against volatility of currencies, and we

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0168&from=EN> page 1, paragraph (2).

would caution against an assumption that spot foreign exchange benchmarks would not become in-scope of the regulation as set out in the Proposal, as over time, this volume may grow and additionally it may be designated as in-scope.

Fundamentally, maintaining the Commission's authority to exempt spot FX benchmarks will assist in preventing negative outcomes. Removing the language only increases the risks that there are negative outcomes (i.e., EU users lose access to an important spot FX benchmark in the future). We recommend maintaining the exemption.

#### **7. EU CTB/PAB labelled benchmarks in-scope**

We note that perhaps the inclusion of certain categories or labels of benchmarks to be in-scope by virtue of their ESG nature only (e.g., EU Climate Transition and EU Paris Aligned benchmarks), may stifle the development of these types of benchmarks by smaller administrators within the EU. The regulatory burden/cost of creating these types of benchmarks which would be in-scope of the regulation from the moment of their launch, is likely to be considered as too high for small administrators (who would now be out of scope per the Proposal), especially due to the changes to Article 51 (2). This means that a concentration of these benchmarks is likely to occur, with only the larger administrators (with large benchmarks) being able to provide these in the EU. This would negatively impact competition.

Additionally, requiring an EU benchmark administrator to administer these labelled benchmarks in the EU, is likely to have a similar outcome on competition. It is unclear why (where these benchmarks are deemed in-scope) a third country benchmark administrator cannot be duly supervised (as is currently the case) in relation to these benchmarks through recognition.

Furthermore, the Proposal is silent on whether the EUR 50 billion threshold per index, or the EU label takes precedence when applying the Proposal.

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We thank you for your consideration and remain available to discuss our response.