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Response to: ESMA – Fees for Benchmarks Administrators under BMR – Call for Input (November 2020)

Q1: Do you agree with the approach for determining the recognition fees for third country administrators?

- *The approach for determining recognition fees seems logical; however, the stated costs appear to be higher than expected. Whilst the elapse time from initial submission to approval or rejection could reasonably be 3 to 4 months in duration (and may even be longer), in our view this would appear to be an over-estimate in terms of the actual work effort (in terms of working hours spent) required to process an application.*
- *It is particularly important to note that third country administrators range from small, specialist firms to large multi-national entities. The proposed EUR 65,000 fee may prove simply too significant for a number of providers, exceeding any profit or revenue resulting from the commercialisation of the relevant benchmark.*
 - *As an example, we are currently engaged with a top 20 global exchange, whose revenues derived from the usage of their benchmarks within the EU is below EUR 100,000 per annum.*
- *If the combination of up-front recognition costs and ongoing per annum fees are set at too high a level this will incentivise late applications for authorisation, as third country administrators will seek to minimise their costs. This will result in a backlog of authorisations for ESMA to process in mid to late 2025. As such, some form of discounted fee structure for early applicants (perhaps with a cut-off in mid to late 2024) may prove sufficient incentive to seek authorisation early (thus preventing a backlog).*
- *Worse still several third country administrators may look to cease any offering within the EU; this compromising EU investor's ability utilise a broad range of benchmarks.*

Q2: Do you think that the recognition fee should include a proportionality element? Please elaborate.

- *The requirement to pay a EUR 65,000 fee up-front, with no certainty regarding the success of the application seems to be rather punitive and will deter a number of applications.*
- *We believe that a more accessible alternative is to split the authorisation process into clear, distinct phases, each with a separate fee component. Progression from one phase of the authorisation process to the subsequent phase would require the corresponding fee to be settled (upon the start of that phase). A proposal regarding the phasing is outlined below:*
 - 1. Initial discussions, informal submission & review (including feedback).*
 - 2. Formal submission and review (including feedback).*
 - 3. Decision on authorisation.*
 - 4. Resubmission process & review (where the initial application fails).*

Q3: Do you agree with the approach for determining the authorisation fee for critical benchmarks? Please elaborate.

- *No response provided.*

Q4: Do you think that a different authorisation fee should apply when ESMA has to establish a college of supervisors for the critical benchmark? Please elaborate.

- *No response provided.*

Q5: Do you agree with the proposed first-year fee arrangements?

- *We believe that ESMA should be actively supporting and encouraging applications from third country administrators, this action will enable EU investors to use a broader range of third country benchmarks.*
- *The imposition of significant recognition and first year supervisory fees will drastically reduce the numbers of third country administrators that seek authorisation, thus limiting the benchmarks that EU investors are able to utilise.*
- *There should be the option to split out payment of these first-year supervisory fees and settle these either on a monthly or quarterly basis over the course of the first year, in order to provide a more manageable payment cycle.*

Q6: Do you agree with the proposed definition of annual supervisory fee for administrators of a critical benchmark supervised by ESMA? Please elaborate.

- *No response provided.*

Q7: Do you agree with the proposed definition of annual supervisory fee for recognised third country administrators? Please elaborate.

- *Any annual supervisory fee should be composed of two elements:*
 - *A minimum fee applicable to all third country administrators.*

- *A variable fee element reflecting the revenues earned from benchmark usage within the EU only.*
- *The current proposal of a minimum annual fee of EUR 30,000 is overly prohibitive, particularly for smaller, niche third country administrators as it is likely to exceed revenues attributable to the usage of their benchmarks within the EU.*
- *The net result will be that third country administrators prevent their benchmarks being utilised within the EU, thus restricting EU based investors in terms of those products available to them.*

Q8: Do you agree with the proposed approach to determine the applicable turnover? Please elaborate.

- *We see the suggested approach as problematic in certain areas:*
 - *Firstly, only the revenues derived from usage within the EU should be deemed relevant, and thus this is the only revenue information that should be provided to ESMA.*
 - *Secondly the requirement to have the data externally audited on an annual basis will introduce yet further significant costs for third country administrators. Our suggestion is that ESMA has the right to request an audit of revenue data provided. If a significant discrepancy there were to be found (between the data initially provided and the audited data), authorisation could be suspended or terminated for the relevant third country administrator.*
- *There is a risk that certain, more sophisticated, third country administrators may look to game the system by shifting revenues between various entities in order to reduce their fee burden.*

Q9: Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.

- *The approach for determining supervisory fees whilst logical creates unintended consequences.*
- *For those third country administrators that apply early (within the period 2021 to 2024) will be subject to the following:*
 - *Recognition fee.*
 - *First year supervisory fee.*
 - *Ongoing annual fees.*
 - *Supervisory fees (related to ESMA preparatory work).*
- *This combination of fees will prove prohibitive to a significant number of third country administrators and is likely to result in several benchmarks being withdrawn from the EU market.*
- *The fee structure will incentivise late applications for authorisation, as third country administrators will seek to minimise their costs. This will result in a backlog of authorisations requiring review. (We reference this concern in question one).*
- *Furthermore, those third country administrators that apply for early recognition will, in effect be penalised financially for their early adherence to EU BMR standards.*

Q10: Do you agree with the proposed timing of payment of recognition and authorisation fees? Please elaborate.

- *Initially only the recognition fees should be charged up-front and as per our response to question two we believe this fee should be further split into distinct phases.*
- *Only once an application for recognition has been successfully approved should further ongoing and supervisory recognition fees be levied on the third country administrator.*

Q11: Do you agree with the proposal to not reimburse administrators in case they decide to withdraw their application for recognition / authorisation before the end of the assessment by ESMA? Please elaborate.

- *We would agree that the application fee should not be refunded where an applicant withdraws from the process.*

Q12: Do you agree with the proposed timing of payment of annual supervisory fees? Please elaborate.

- *No response provided.*

Q13: Do you agree with the proposed approach defining the reimbursement of costs to a national competent authority in case of delegation of tasks by ESMA under Article 48m of BMR? Please elaborate.

- *No response provided.*

General Commentary: *Whilst we are supportive of this consultation exercise, and the broader efforts of ESMA regarding Benchmark regulation there are elements of this proposal that provide us with cause for concern.*

- *The overall level of fees proposed are burdensome, particularly for smaller, niche providers. As an example, for those third country administrators that apply early (in the period 2021 to 2024) will be subject to the following fees:*
 - *Recognition fee – EUR 65,000.*
 - *First year supervisory fees – A proportion of EUR 65,000 (time based).*
 - *Ongoing annual fees – EUR 30,000.*
 - *Supervisory fees (related to ESMA preparatory work) – Further variable cost (revenue based)*
- *If we assume conservative figures of:*
 - *First year supervisory fees of EUR 32,500 (approximately 6 six months between approval and year end)*
 - *Supervisory fees (related to ESMA preparatory work) of EUR 5,000 per annum*
 - ***The total fees due over three years are EUR 172,000.***
- *This figure does not consider the internal costs (to the third country administrator) of the initial application and the ongoing supervision and compliance effort. Nor are any required audit costs considered.*

- *As such we estimate that the total cost of an application for recognition is likely to be at least EUR 200,000 to EUR 250,000 over three years and will be significantly more for medium to larger third country administrators.*
- *In light of those costs we predict that a significant proportion of third country administrators would seek to pursue the following options:*
 - *Cessation of the relevant benchmarks within the EU.*
 - *Restricting EU investors ability to utilise a broad range of benchmark products.*
 - *Obtaining approval of the relevant benchmarks via endorsement rather than recognition (which appears not to have been considered within this exercise).*
 - *Under an endorsement model both ESMA and the relevant NCA's have an at arms-length relationship with third country administrators.*
 - *This inevitably reduces the levels of access, visibility and input/control of governance over those third country administrators, which would appear to be contrary the intent of the broader EU Benchmark Regulation.*
 - *Alternately EU Investors will look to leverage offshore products or vehicles / entities in order to gain exposure to those benchmarks that have not been authorised within the EU for use.*
- *None of these outcomes is desirable for ESMA, or for the broader EU Investment market. As such we would strongly advise the following actions:*
 - *A review of the fee model proposed, with a view to reducing the fees levied.*
 - *A focus on encouraging early application for recognition – be it through some form of fee reduction or rebate for years 2021 through to 2025, or an additional fee or levy on those third country administrators seeking recognition from 1 June 2024 onwards.*