Using Voluntary EU-Compatible Certification and Limited IP Protection to Improve the Financial Index Market

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Indices, such as LIBOR, play a vital role in contracting and investing. Despite that, they are under-regulated and — because they are public goods — underproduced. This leads to heavy consumer reliance on just a few indices, which are vulnerable to manipulation (the cause of the LIBOR scandal). The EU has addressed the threat of index manipulation by tightly controlling the use of indices in the Eurozone and increasing regulatory supervision of index production. This kind of comprehensive regulation is likely to exacerbate underproduction. Given that — and given the US' distinct legal and political culture — an EU-style regulatory regime is not right for the US.

Instead, the US should implement a voluntary regulatory regime, focused on certifying indices for Eurozone and consumer-facing use. This regime would meet Eurozone regulatory standards, allowing US-certified indices to be used in EU transactions. Within the US, certified indices should have IP protection, but that IP protection should only be applicable to non-consumer use of certified indices. In contrast, consumer-facing contracts and investment products should be able to use certified indices freely.

This regime would have several benefits. As an opt-in regime, with a government- subsidized certification process, it would avoid exacerbating index underproduction — and might even encourage production. IP protection for certified indices would allow consumers to identify and choose certified, highly regulated indices. The expanded consumer use of certified (and highly regulated) indices would increase their appeal to non-consumer index users, and limit incentives for index manipulation. If financial entities chose to avoid certified indices, their use of alternative, non-certified indices would bifurcate the index market, limiting the effects of index manipulation and potentially making index manipulation (and malproduction) easier to detect. A notable change in one index, but not in another, would raise red flags about both indices, making post-hoc detection and regulation easier. Finally, the certification and regulation process would give regulators enough information to produce a certified index if necessary, reducing disruption to index users in the case of a failed or malproduced index."