

Review of the EU Benchmarks Regulation

European Commission review will inform potential future legislative change.

Key Points:

- The European Commission is seeking views on various aspects of the regime, and asking for feedback on areas in which improvements could be made by 6 December 2019.
- Although suggested changes are outlined in some areas, in many areas the Commission asks for stakeholders' views and feedback, providing an important opportunity for comment.

On 11 October 2019, the European Commission published a [consultation](#) on its review of the EU Benchmarks Regulation (BMR). Comments are requested by 6 December 2019, and the European Commission will use the responses to prepare a report to the European Parliament and Council. The report, which is due by 1 January 2020, will assess whether there is a need to amend the BMR, and may also be accompanied by proposed legislative changes to the regime.

The consultation focuses primarily on topics which the BMR itself mandates to be reviewed, such as the regime for critical benchmarks and the regime applicable to EU benchmark administrators. However, it also addresses some additional topics, such as the rules for third-country benchmarks, noting that the Commission will be required to submit a report on third-country benchmarks by 1 April 2020.

Given the ongoing difficulties around the scope, in particular the seemingly very wide definition of benchmarks that is catching indices that should arguably be outside scope, the issues noted in the market in complying with the input data obligations, and the large compliance uplift required even for non-significant benchmarks, all market participants are urged to participate, either directly or via industry bodies.

Critical benchmarks

The Commission notes several issues in relation to the reform of critical benchmarks. In particular, in the context of IBOR reform, the Commission considers that several changes may be required to the rules concerning critical benchmarks to address situations in which a critical benchmark is no longer considered representative.

First, the Commission explains that powers to require a change of methodology in a critical benchmark may need to be reinforced, given that administrators may be reluctant to make all of the necessary changes in a situation in which the benchmark risks becoming unrepresentative of its underlying market. Second, the Commission notes that the BMR permits an administrator to opt to cease the provision of a critical benchmark (rather than change the methodology) if the administrator becomes aware that the benchmark is no longer representative. While national regulators can compel the administrator to continue publication, they cannot require the necessary changes to the methodology in this scenario. Therefore, the Commission considers whether, in such circumstances, it might be appropriate for national regulators to also be able to require a change of methodology.

In relation to the orderly cessation of critical benchmarks, the Commission asks whether it might be appropriate for administrators' cessation plans to be subject to approval by national regulators, in order to ensure that the plans are sufficiently robust and meet requirements. The Commission also asks whether supervised users of critical benchmarks should be required to draw up contingency plans to cover instances in which a critical benchmark ceases to be representative of its underlying market, not only to cover the situation in which there is a material change to, or cessation of, the benchmark.

Finally, the Commission asks whether the supervision of critical benchmarks by colleges of supervisors is considered appropriate, and whether any changes to this model would be desirable.

Third-country benchmarks

The BMR currently provides that, after 31 December 2021, no third-country benchmark can be used in the EU unless one of the mechanisms (recognition, endorsement or equivalence) outlined in the BMR to allow such use has been adopted. The Commission acknowledges that the use of certain third-country benchmarks is widespread and economically important, especially for currency or interest rate hedging. It highlights the issue that FX spot rates for currencies that are not fully convertible may not be eligible as a reference rate for non-deliverable forwards once the transitional period for third-country benchmarks expires. The Commission does not propose any solutions itself; rather it asks stakeholders to explain the extent to which this issue would affect them, and to explain how they would propose to address the issue.

Recognising that for many third-country benchmarks none of the routes permitting use in the EU provide sufficient legal certainty for continued use in the EU once the transitional period has expired, the Commission seeks views as to how the third-country regime might be improved. Again, although the Commission acknowledges issues with the regime, and recognises that there is not enough of an incentive for many third-country administrators to wish to ensure continued use of their benchmarks in the EU, it does not propose any specific solutions but rather asks for general feedback on improvements that could be made.

Authorisation and registration

The Commission is seeking views on whether national regulators should be given the power to suspend or withdraw authorisation in respect of one or more individual benchmarks, rather than only being able to suspend or withdraw the administrator's authorisation or registration in its entirety. This would mean that, if only one particular benchmark is non-compliant, the use of the rest of the administrator's benchmarks would not be affected. Similarly, the Commission asks whether national regulators should be able to permit continued use of non-compliant benchmarks in legacy contracts in situations when authorisation has been withdrawn, not only when authorisation has been suspended.

Scope

Noting the broad scope of application of the BMR (although it has different regimes for different types of benchmarks, its application is not limited to certain types of benchmarks only), and the fact that other jurisdictions have limited their benchmark regulatory regimes to the most critical or systemic financial benchmarks, the Commission is seeking feedback on scope. In particular, the Commission asks for feedback on how to address benchmarks that are not significant in terms of their use in the EU, and benchmarks that by their nature are less prone to manipulation.

The Commission also asks for feedback on the calibration of the regime for non-significant benchmarks, and on the specific thresholds for the various categories of benchmarks.

The ESMA register

Feedback from users of benchmarks has indicated that ESMA's register could be improved. Specifically, the Commission reports that users have found issue with the fact that the ESMA register does not list all of the benchmarks provided by EU administrators that have obtained authorisation or registration.

Although the Commission acknowledges that this can be problematic (particularly for global administrators who only have EU authorisation in respect of a sub-set of their benchmarks), it also explains that it would be challenging to maintain an up-to-date list of all benchmarks, given that the portfolios of larger administrators change frequently. The Commission is seeking views on general satisfaction with the register, and whether users would like to see a complete list of benchmarks. This is an important area for firms to provide feedback, since the register should be a key source of diligence when identifying whether a third-country administrator's benchmarks are available for use in the EU.

Benchmark statements

Accepting that benchmark statements vary and that the information they contain often overlaps with information disclosed in the methodology, the Commission is seeking views on how useful the benchmark statement has proved to be as a comparison tool. The Commission also asks for views as to how the statement might be improved, and whether the option to publish the statement at benchmark level or family level should be maintained, given the discrepancies this creates.

Climate-related and commodity benchmarks

In light of the two new types of climate-related benchmarks being brought in by amendments to the BMR, the Commission is gathering views as to how such benchmarks might be supervised. The Commission suggests that national regulators should be able to monitor use of these benchmarks, and have the power to prevent supervised users from referencing a climate-related benchmark if it does not meet the rules applicable to climate-related benchmarks, or the investment strategy referencing that benchmark is not aligned with the benchmark. The Commission asks stakeholders whether this set of powers would be sufficient to ensure effective supervision, or whether additional powers might be necessary.

In relation to commodity benchmarks, the Commission is asking for feedback on whether the current conditions under which a commodity benchmark is subject to the "normal" BMR requirements (as opposed to the lighter-touch regime for commodity benchmarks) are appropriate, and whether the *de minimis* threshold for commodity benchmarks is set at an appropriate level.

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