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BANKING AND FINANCE

Public consultation: Review of the EU benchmark regulation

Fields marked with * are mandatory.

1. Introduction

This consultation is also available in German and French.

About this consultation

The EU Benchmark Regulation (the 'Regulation', the 'Benchmark Regulation' or the 'BMR')[1] has been in application since 1 January 2018. Administrators of EU benchmarks have to apply for authorisation or registration by 1 January 2020. For administrators of critical benchmarks and third country benchmarks, the transitional period expires on 31 December 2021.

According to Article 54 of the Regulation the European Commission has to review and submit a report to the European Parliament and to the Council on the Regulation by 1 January 2020. The review must, in particular, cover the following topics:

a. the functioning and effectiveness of the rules applicable to critical benchmarks, the mandatory administration and mandatory contribution rules and the definition of a critical benchmark;

b. the effectiveness of the authorisation, registration and supervision regime applicable to benchmark administrators, the benchmark colleges as well as the appropriateness of supervision of certain benchmarks by a Union body;

c. the functioning and effectiveness of Article 19(2) on certain commodity benchmarks, in particular the scope of its application.

In addition, subsequent to the political agreement on climate-related benchmarks, the Commission will also be required to submit, by 1 April 2020, a report on the operation of third-country benchmarks in the Union, including on the recourse that third country benchmark administrators have had to endorsement, recognition or equivalence. That report will have to also analyse the consequences of the extension of the transitional period for critical and for third country benchmarks until 31 December 2021.

The Commission will also take into consideration the answers received in this consultation to feed into the reflections aimed at fostering the international role of the Euro.

This consultation seeks the views of stakeholders on the issues identified below.

[1] In this consultation, "the Regulation" or the "Benchmark Regulation" refers to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-benchmark-review@ec.europa.eu.

More information:

- on this consultation
- on the consultation document
- on the protection of personal data regime for this consultation

About you

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* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- (•) English
- Estonian
- Finnish
- French

- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Ayesha

* Surname

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ayesha.z.ghafoor@barclays.com

* Organisation name

255 character(s) maximum

Barclays Europe

* Organisation size

Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

72390466359-39

* Country of origin

Please add your country of origin, or that of your organisation.

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
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- Mauritius
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- Monaco
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea

- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
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- Burkina Faso
- Burundi
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- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Mongolia
- Montenegro
- Montserrat
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- Nepal
- Netherlands
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- Taiwan
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- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay

- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
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- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

* Field of activity or sector (if applicable):

at least 1 choice(s)

- [ ] Accounting
- [ ] Auditing
- [ ] Banking
- [ ] Benchmark administration
- [x] Benchmark use
- [ ] Contribution to benchmarks
- [ ] Credit rating agencies
- [ ] Insurance
- [ ] Pension provision
- [ ] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- [ ] Market infrastructure operation (e.g. CCPs, CSDs, Stock exchanges)
- [ ] Social entrepreneurship
- [ ] Other
- [ ] Not applicable

* At the benchmark level, I am giving my contribution as a:

- Benchmark administrator
- Benchmark contributor
- (•) Benchmark user
- Other

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- ○ **Anonymous**
  Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- ◉ **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

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2. Critical benchmarks

The Regulation introduces specific rules that only apply to critical benchmarks. Once the European Commission adds a benchmark to the list of critical benchmarks, the competent authority has increased powers to ensure the representativeness and continuity of the critical benchmark. This includes powers to require mandatory administration of a critical benchmark and/or mandatory contributions to a critical benchmark.

As part of the political agreement on the so-called “climate change” benchmarks, the co-legislators agreed to extend the time limit for mandatory administration of and contributions to critical benchmarks from 24 months to five years. The political agreement on the ESAs review (publication of the Regulation in the OJ expected in Q4 2019). entrusts ESMA, as of 1 January 2022, with the supervision of EU critical benchmarks. (EU critical benchmarks are defined in Article 20(1)(a) BMR).

The continued reform of critical benchmarks raises several issues:

IBOR reform

On the basis of current estimates, contracts will be referencing IBOR rates at least until 2050. Certain contracts referencing IBOR rates might be impossible to change (e.g. mortgages or bonds with a 100% noteholder agreement clause). Should a critical IBOR rate cease, there is a risk of disruption to parties whose contracts reference this IBOR rate.

Competent authorities might, however, be confronted with the situation that an IBOR rate no longer represents the market or economic reality it is intended to measure (e.g. due to

one or several contributors' plans to withdraw from an IBOR panel). In terms of Article 23 of the Regulation, the IBOR rate will then lose the "capability" to measure its underlying market.

In these circumstances, Article 23(6)(d) of the Regulation already empowers competent authorities to require a change to the methodology or to other rules of a critical benchmark when it risks becoming unrepresentative of its underlying market. As private sector benchmark administrators might prove reluctant to change benchmarks materially of their own volition (e.g. they might fear litigation by parties that would be disadvantaged by a change), regulatory powers to request the necessary changes might need to be strengthened.

Stakeholders are therefore invited to assess if competent authorities' powers to require a change of methodology in a critical benchmark should be reinforced and, if so, in what way.

Furthermore, competent authorities might also wish to exercise the power to require a change of methodology in other circumstances, such as when an administrator intends to cease providing a critical benchmark.

Where, for instance, an administrator is aware that a benchmark is no longer representative, it has the option under Article 11(4) BMR to change the methodology (or the input data or contributors) to rectify any shortcomings. But the administrator is not obliged to do so and can, instead, opt to cease the provision of the benchmark altogether.

In certain circumstances the immediate cessation of a critical benchmark may not be the best option to preserve market stability. Therefore, alongside the power to compel the administrator of a critical benchmark to continue publication, it might be useful for the competent authority to have, also in these circumstances, the power to require the necessary changes to the benchmark's methodology.

Question 1: To what extent do you think it could be useful for a competent authority to have broader powers to require the administrator to change the methodology of a critical benchmark?

Please rate from 1 (not useful at all) to 5 (very useful)

- ○ 1 (not useful at all)
- ○ 2
- ○ 3
- ◉ 4
- ○ 5 (very useful)
- ○ Don't know / no opinion / not relevant

Question 1.1: Please explain your reply to question 1.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Barclays considers that it would be useful to broaden competent authority powers. We are supportive of broader powers enabling the competent authority to request a change in methodology where the benchmark is at risk of being unrepresentative of the underlying market (as foreseen by Article 23 (6)), especially given the impact critical benchmarks might have on the financial stability of the Union.

In order to mitigate against market disruption, any modification made by the competent authority should aim to result in a commercially equivalent outcome, and, where possible, should refer to an authorised index. Any change should be made transparent to the market and in sufficient time to allow for an orderly transition to the new methodology.

Additionally, we would suggest permitting the competent authority to compel continued administration of the benchmark for longer than 5 years, where necessary, for the orderly functioning of the market, in particular for legacy exposures that cannot be amended. We have seen similar challenges with LIBOR referencing FRNs issued prior to July 2017.

Question 2: Do you consider that such corrective powers should apply to critical benchmarks at all stages in their existence or should these powers be confined to:

a) situations when a contributor notifies its intention to cease contributions?

- Yes
- No
- Don’t know / no opinion / not relevant

b) situations in which mandatory administration and/or contributions of a critical benchmark are triggered?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 2.1: Please explain your reply to question 2 a) and 2 b).

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We consider that it would be useful for a competent authority to be able to trigger a requirement for a critical benchmark administrator to change its methodology whenever there is a material risk that the benchmark will be at risk of being unrepresentative, e.g. following a material change to the underlying interest that the benchmark seeks to measure or in the population of contributors.

Question 3: Are there any other changes to Article 23(6)(d) BMR relative to the change of methodology for critical benchmarks that might be desirable to improve the robustness, reliability or representativeness of the benchmark?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

Question 3.1: Please explain your reply to question 3.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Although not directly in Article 23(6)(d), two potential areas of improvement that could be considered related to Article 23(6)(d) are:

(a) Consider increasing the frequency of the administrator's determination of representativeness in Article 23(2) from 2 years to 1 year.

(b) Consider permitting the NCA to compel administration of a critical benchmark under article 21 for longer than 5 years where necessary to prevent market disruption, given the extended maturity if certain legacy exposures.

Orderly cessation of a critical benchmark

Article 28(1) BMR requires **benchmark administrators** to publish a procedure setting out how they will act in the event of changes to or cessation of one of their benchmarks. Such contingency plans should ensure that administrators plan ahead and share their planning with users. The aim is to avoid disruption to users and financial markets when benchmarks cease to be published or are materially changed.

Where feasible and appropriate, cessation plans need to designate appropriate alternatives. Such plans are particularly important for systemically important (critical) benchmarks. It might therefore be useful to further detail these requirements for critical benchmarks, e.g. by making them subject to approval of the national competent authority.

Article 28(2) BMR aims to ensure that **supervised entities other than benchmark administrators** are prepared for the cessation or material change of a benchmark. It might be necessary to expand on existing requirements for critical benchmarks, e.g. to cover the instance where an existing benchmark is found to be no longer representative of its underlying market, or to increase supervisory powers in such a case.

Question 4: To what extent do you think that benchmark cessation plans should be approved by national competent regulators?

Please rate from 1 (completely disagree) to 5 (fully agree)

- 1 (completely disagree)
- 2
- 3
- 4
- 5 (fully agree)
- Don’t know / no opinion / not relevant

Question 4.1: Please explain your reply to question 4.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We consider Article 28(2) to be proportionate.

Question 5: Do you consider that supervised entities should draw up contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 5.1: Please explain your reply to question 5.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Article 13 of the BMR and CDR (EU) 2018/1641 require that the rationale for a material change shall include instances where the representativeness of the benchmark may be in doubt. Contingency plans are required for material changes and it seems disproportionate and unnecessary to impose a new or further obligation on supervised entities to identify these instances and draw up additional plans. Users will have contingency plans for situations other than cessation, but the trigger point for the use of these plans should be driven by supervisory authorities. If use of contingency plans are not driven by public statements made by supervisory authorities, the risk is that contingency plans could be triggered by firms at different times, leading to confusion within the market.

Colleges

Currently, three critical benchmarks are supervised by a college set up in accordance with Article 46 of the Regulation: Euribor, EONIA and LIBOR.

For Euribor and EONIA, both administered by the European Money Markets Institute (EMMI), there is a single college. These colleges, apart from the competent authority of the administrator and ESMA, comprise the competent authorities responsible for the supervision of each of the members of the panel of the respective critical benchmark and of the competent authorities for the Member States for which the critical benchmark in question is of particular importance.

Question 6: To what extent do you consider the system of supervision by colleges as currently existing appropriate for the supervision of critical benchmarks?

Please rate from 1 (not appropriate at all) to 5 (very appropriate)

- ○ 1 (not appropriate at all)
- ○ 2
- ○ 3
- ○ 4
- ◉ 5 (very appropriate)
- ○ Don't know / no opinion / not relevant

Question 6.1: Please explain your reply to question 6.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The system of supervision by colleges, as it currently exists, is appropriate for the supervision of EU critical benchmarks.

3. Authorisation and registration

Authorisation, suspension and withdrawal

Article 35 of the Regulation addresses the situation when it may become necessary to suspend or withdraw a benchmark administrator's authorisation or registration and thus prevent the use of its benchmarks, either permanently or for the duration of a suspension.

The provision to suspend or withdraw operates at administrator level – so exercising this power might result in preventing use of all benchmarks provided by the administrator except those to which Article 35(3) of the Regulation may be applied. It could prove disruptive to prevent the use of all benchmarks of a particular administrator when only

one of them has become non-compliant. Given this, and the fact that Article 51(4) BMR only covers use of a non-authorised benchmark during a transitional period, it may necessary to clarify that a competent authority should have the option to suspend or withdraw authorisation or registration in respect of one or more individual benchmarks, without having to suspend the authorisation for the administrator itself. This would allow continued use of all other BMR-compliant benchmarks of that particular administrator.

Question 7: Do you consider that it is currently unclear whether a competent authority has the powers to withdraw or suspend the authorisation or registration of an administrator in respect of one or more benchmarks only?

Please rate from 1 (very unclear) to 5 (very clear)

- (•) 1 (very unclear)
- ( ) 2
- ( ) 3
- ( ) 4
- ( ) 5 (very clear)
- ( ) Don't know / no opinion / not relevant

Question 7.1: Please explain your reply to question 7.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

It is unclear as to whether a competent authority has the powers to withdraw or suspend the authorisation or registration of an administrator in respect of a single benchmark. The wording of the provision only refers to withdrawals and suspensions by reference to the administrator rather than in relation to specific benchmarks. Therefore, on a plain reading of Article 35, it would appear that the withdrawal / suspension would be in relation to the administrator and, consequently, to all benchmarks administered by that administrator.

We would be supportive of a national competent authority having the ability to withdraw / suspend authorisation or registration of only one or more benchmarks in circumstances where the NCA deems it appropriate to do so, as this would avoid unnecessary market disruption in relation to other benchmarks not affected by the relevant circumstances.

Continued use of non-compliant benchmarks

Article 35(3) of the Regulation provides for the possibility that immediate cessation of use of a benchmark in existing contracts may not be appropriate and makes provision for legacy use of individual benchmarks to continue where an administrator's authorisation has been suspended. In such a case, the competent authority may suspend the authorisation/registration of the administrators while allowing the provision of the benchmark and its use until the decision of suspension has been withdrawn.

During that period of time, the use of such a benchmark by supervised entities is permitted only for financial contracts, financial instruments and investment funds that already reference the non-compliant benchmark.

It might be useful for a competent authority also to have this possibility of allowing the continued provision and use of a non-compliant benchmarks for legacy contracts where the authorisation is withdrawn (and not only suspended).

Question 8: Do you consider that the current powers of NCAs to allow the continued provision and use in existing contracts for a benchmark for which the authorisation has been suspended are sufficient?

Please rate from 1 (totally insufficient) to 5 (totally sufficient)

- 1 (totally insufficient)
- 2
- 3
- 4
- 5 (totally sufficient)
- Don’t know / no opinion / not relevant

Question 8.1: Please explain your reply to question 8.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We view it as appropriate that NCAs should have the ability to allow the continued provision and use of a given benchmark in existing contracts. However, article 35(3) of the Regulation (and by extension, the delegated regulation related to Article 51(6)) is not entirely clear in terms of when an NCA would exercise its discretion to permit the continued use of a given benchmark for existing contracts, in part because this would be determined on a case-by-case basis. This may lead to uncertainty in the market as to whether an existing benchmark can continue to be used, notwithstanding the suspension to authorisation or registration.

We believe that NCAs should be given wide discretion to permit the continued use of a benchmark for legacy positions in order to minimise market disruption, including in cases of withdrawal. As discussed below, we do not consider that the current wording of article 35(3) to be sufficiently broad to allow for this.

The Commission would also like to receive stakeholders’ opinion on the powers of competent authorities to permit the continued use of non-compliant benchmarks under Article 35(3) and under Article 51(4).

Question 9: Do you consider that the power of competent authorities to permit continued use of a benchmark when cessation of that benchmark would result in contract frustration are appropriate?

Please rate from 1 (not appropriate at all) to 5 (very appropriate)

- (●) 1 (not appropriate at all)
- ( ) 2
- ( ) 3
- ( ) 4
- ( ) 5 (very appropriate)
- ( ) Don't know / no opinion / not relevant

Question 9.1: Please explain your reply to question 9.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

To encourage market certainty, it is critical that competent authorities have the ability to permit the continued use of a benchmark where cessation would result in market disruption or would otherwise be detrimental to clients, end-investors. However, we note that it is unclear in what precise circumstances a local regulator would permit the continued use of a non-compliant benchmark and what factors in the delegated regulation related to Article 51(6) would be weighed more heavily, e.g. whether continued use would be permitted if an alternative/substitute benchmark were available, but the specific contractual terms do not provide for substitution.

It is also important that NCAs are empowered to ensure that the grandfathering provision set out in Article 51 (4) is given its proper effect. We also have concerns regarding the use of the word frustrate in Article 51(4). We do not consider this to be the appropriate terminology, as it is not broad enough to cover the possible scenarios of market disruption which regulators will seek to mitigate. We would suggest that Article 51(4) be broadened out to include consideration of the detrimental impact of termination of the contracts on the end investors and wider market.

For structured note products (and related OTC derivatives entered into hedge structured note payments) with a broader retail noteholder base, it may not be possible to obtain the requisite amount of client consents for substitution of a benchmark (at least for pre-existing programmes, some of which have maturity dates running over 2030) where the existing benchmark continues to be published. This creates significant regulatory, reputational and litigation risks for financial institutions; the ability to use non-compliant benchmarks would create flexibility in such circumstances.

Answer continued via pdf uploaded at the end of consultation.

4. Scope of the Benchmark Regulation

The impact assessment supporting the original proposal for the Benchmark Regulation did not delineate the scope of the Regulation to specific categories of benchmarks, such as critical benchmarks or to specific underlying markets which are particularly vulnerable to manipulation. To the contrary, the assessment at the time was that "*the vulnerability and importance of a benchmark varies over time. Defining*

the scope by reference to important or vulnerable indices would not address the risks that any benchmark may pose in the future" (Paragraph 7.1.4. "Scoping: targeting critical or important benchmarks"). This means that the Regulation is applicable to all types of benchmarks regardless of their underlying markets. As a consequence, as soon as an index is used in a way that responds to the definition of 'use of a benchmark', it becomes a benchmark and is therefore within the scope of the Regulation.

The Regulation introduces differentiation between benchmarks (e.g., commodity benchmarks and regulated data benchmarks are subject to a different set of rules than, e. g., critical benchmarks). Administrators of significant benchmarks (benchmarks fulfilling the conditions laid down in Article 24(1)) can opt-out from the application of a limited number of detailed requirements of the Regulation[2]. Non-significant benchmarks (not fulfilling the conditions laid down in Articles 20(1) and 24(1)) are subject to a less detailed set of rules, whereby administrators are able to choose not to apply some requirements of the Regulation. In such a case, the administrator needs to explain why it is appropriate to do so by means of a compliance statement that is published and provided to the administrator's competent authority[3].

The Commission is empowered to review, every two years, calculation methods that are used to determine the threshold for critical and significant benchmarks.

Over the course of the last years several jurisdictions have begun codifying the IOSCO principles by creating authorisation requirements for financial benchmarks. In the exercise of assessing third-country jurisdictions with the aim of granting equivalence, the Commission's services note that such third countries have opted for an approach whereby regulation and supervision is limited to the most critical or systemic financial benchmarks administered in their respective jurisdictions. The decision as to whether a benchmark is critical or systemic rests with the relevant competent authority.

The Commission's services are now seeking feedback from stakeholders on how to deal with benchmarks that (i) are not significant in terms of their use in the Union or (ii) certain types of benchmarks that are less prone to manipulation e.g., regulated data benchmarks.

Question 10: Do you consider that the regulatory framework applying to non-significant benchmarks is adequately calibrated?

Please rate from 1 (not well calibrated at all) to 5 (completely adequately calibrated)

- ○ 1 (not well calibrated at all)
- ○ 2
- ◉ 3
- ○ 4
- ○ 5 (completely adequately calibrated)

- Don’t know / no opinion / not relevant

Question 10.1: Which adjustments would you recommend? Please explain your reply to question 10.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the regulatory framework to be broadly workable. However, if we were to suggest adjustments, we would recommend refining Article 26(2). This is because of the difficulty in tracking assets attributable to a benchmark - it would useful if there was a specific timeframe for the administrator to contact the relevant authority. For this reason, “immediately” may not be practicable and so lacks sufficient certainty.

In addition, it would help if the regulation was adjusted to state the exact details of what additional information might be required.

Whilst from a non-critical benchmark administrator perspective we are comfortable with the current regime, we would note that the broad scope of the BMR in this respect is out of line with other similar regulation across the globe. Every major jurisdiction that we are aware of seeks to regulate administration of and contribution to systemic or critical benchmarks rather than on use of the benchmark. Adopting a similar approach could represent a more calibrated approach to the twin goals of consumer protection and financial stability.

Question 11: Do you consider quantitative thresholds to be appropriate tools for the establishment of categories of benchmarks (non-significant, significant, critical benchmarks).

Please rate from 1 (not appropriate at all) to 5 (completely appropriate)

- 1 (not appropriate at all)
- 2
- 3
- 4
- 5 (completely appropriate)
- Don’t know / no opinion / not relevant

Question 11.1: Please explain your reply to question 11.

If applicable, which alternative methodology or combination of methodologies would you favour?

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The qualitative levels are appropriate. However, it would be useful if there was clarity on how the levels are selected.

Question 12: Do you consider the calculation method used to determine the thresholds for significant and critical benchmarks remains appropriate?

Please rate from 1 (not appropriate at all) to 5 (completely appropriate)

- ○ 1 (not appropriate at all)
- ○ 2
- ○ 3
- ◉ 4
- ○ 5 (completely appropriate)
- ○ Don't know / no opinion / not relevant

Question 12.1: Please explain your reply to question 12. If applicable, please explain why and which alternatives you would consider more appropriate?

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Barclays does operate significant business lines outside the EU which do use third country benchmarks. In this respect, we understand that non-significant third country benchmark administrators struggle to ascertain relevant data to determine whether and how their benchmarks are used in the EU. To eliminate disproportionate compliance costs we suggest a rebuttable presumption that benchmarks not determined to be significant enough to merit supervision in their home jurisdiction be deemed to be non-significant in the EU unless ESMA determines, on either quantitative or qualitative grounds that the benchmark is significant for EU purposes. In particular, we recommend that the impact of such benchmark on financial stability for the EU or on consumers should be a factor that is expressly taken into account rather than relying purely on quantitative metrics, as when viewed from this perspective we think a much smaller proportion of third country benchmarks would be significant.

Question 13: Would you consider an alternative approach appropriate for certain types of benchmarks that are less prone to manipulation?

Please rate from 1 (not appropriate at all) to 5 (completely appropriate)

- ○ 1 (not appropriate at all)
- ○ 2
- ○ 3
- ○ 4
- ○ 5 (completely appropriate)
- ◉ Don't know / no opinion / not relevant

[2] Recital 41 provides that "*Due to the existence of a large variety of types and sizes of benchmarks, it is important to introduce proportionality in this Regulation and to avoid putting an excessive administrative burden on*

administrators of benchmarks the cessation of which poses less threat to the wider financial system. Thus, in addition to the regime for critical benchmarks, two distinct regimes should be introduced: one for significant benchmarks and one for non-significant benchmarks".

[3] Recital 42 clarifies that "*While non-significant benchmarks could still be vulnerable to manipulation, they are more easily substitutable, therefore transparency to users should be the main tool used for market participants to make informed choices about the benchmarks they consider appropriate for use. For that reason, the delegated acts in Title II should not apply to non-significant benchmark administrators*".

5. ESMA register of administrators and benchmarks

In accordance with Article 36 of the Regulation, ESMA maintains a register listing benchmark administrators that have either been authorised or registered in the EU as well as benchmarks and administrators approved for use in the Union through equivalence, recognition or endorsement. According to comments received from benchmark users, the functioning of the register could be improved, e.g. the register currently does not list the benchmarks provided by EU-authorised or -registered administrators, yet several administrators that operate worldwide have only applied for authorisation / registration with respect to a subset of the benchmarks they provide. This means that identification of the benchmarks authorised or registered may prove difficult.

However, for large administrators whose portfolio of benchmarks is subject to frequent changes, maintaining an up-to-date list of benchmarks approved for use in the Union could be challenging. The Commission is therefore seeking views on the functioning of and potential improvements to the register.

Question 14: To what extent are you satisfied with your overall experience with the ESMA register for benchmarks and administrators?

Please rate from 1 (not satisfied at all) to 5 (completely satisfied)

- (•) 1 (not satisfied at all)
- ( ) 2
- ( ) 3
- ( ) 4
- ( ) 5 (completely satisfied)
- ( ) Don't know / no opinion / not relevant

Question 14.1: If you are not satisfied with your overall experience with the ESMA register for benchmarks and administrators, please explain how could the register be improved.

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The register could be improved by: -

- The timeliness of publication of information on to the register; we have observed delays between the administrator publishing on their website vs ESMA register being updated
- Search criteria on the register could significantly be improved. For example, the current search is not user friendly, ability to search on date added to register would be useful, search on the key columns already in the register
- Audit trail of approval date would be useful, or anything to keep track of changes in the register
- Machine readable information over and above CSV file
- If an administrator is removed, we recommend that they should stay on register but be marked as removed for transparency
- Currently only lists EU administrators name but not compliant benchmarks, we propose that it should also list the benchmarks to ensure golden source
- Publish the status of applications for authorisation that are in flight

Question 15: Do you consider that, for administrators authorised or registered in the EU, the register should list benchmarks instead of/in addition to administrators?

Please rate from 1 (completely disagree) to 5 (fully agree)

- ○ 1 (completely disagree)
- ○ 2
- ○ 3
- ○ 4
- ◉ 5 (fully agree)
- ○ Don’t know / no opinion / not relevant

Question 15.1: Please explain your reply to question 15.

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

It would provide greater transparency and help users comply if they are able to see the list of benchmarks for EU administrators.

The inclusion of timestamping for the audit trail, to show when benchmarks are added would also be useful.

6. Benchmark statement

Article 27(1) BMR requires administrators to publish a benchmark statement for each benchmark or, where applicable, for each family of benchmarks. The aim is to enable users of benchmarks to choose appropriate benchmarks and to understand the economic reality that the benchmark or family of benchmark is intended to measure and the risks

attached to the benchmarks. Benchmark statements should be of reasonable length but provide users with the key information needed in an easily accessible manner.

Different practices among administrators may however impede comparability among benchmark statements. While some administrators publish a benchmark statement for each benchmark, others publish it at family level, consolidating information thousands of benchmarks. In addition, the end objectives of the benchmark statement and its articulation with the benchmark's methodology are unclear. As a result, the benchmark statement overlaps to a certain extent with the information disclosed on the benchmark's methodology and may bring, in itself, little added-value.

The objectives of the benchmark statement were further specified in the regulation on climate-related benchmarks and ESG disclosures for all benchmarks. In particular, in order to enable market participants to make well-informed choices, Article 27(2a) of the Benchmark Regulation as amended will require the disclosure of ESG information for all benchmarks – except currency and interest rate benchmarks – in the benchmark statement. Furthermore, the format of the benchmark statement will be standardised for references to ESG factors.

Stakeholders are therefore invited to share their experience and use of the benchmark statement.

Question 16: In your experience, how useful do you find the benchmark statement?

Please rate from 1 (not useful at all) to 5 (very useful)

- ○ 1 (not useful at all)
- ○ 2
- ◉ 3
- ○ 4
- ○ 5 (very useful)
- ○ Don’t know / no opinion / not relevant

Question 16.1: Please explain your reply to question 16.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The benchmark statement is useful as an overall explanation of the purpose and operation of a broad family of benchmarks.

Question 17: How could the format and the content of the benchmark statement be further improved?

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The current format is satisfactory, however, it could be further improved by standardising the benchmark statement.

Question 18: Do you consider that the option to publish the benchmark statement at benchmark level and at family level should be maintained?

Please rate from 1 (should definitely be removed) to 5 (should definitely be maintained)

- ○ 1 (should definitely be removed)
- ○ 2
- ○ 3
- ○ 4
- ◉ 5 (should definitely be maintained)
- ○ Don't know / no opinion / not relevant

Question 18.1: Please explain your reply to question 18.

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

It is crucial that the option to publish the benchmark statement at the family level be maintained. This is because a provider such as Barclays administers a large number of individual indices in each family which, depending on use from time to time, may be deemed benchmarks (under the EU BMR or, as we prefer, under the broader IOSCO definition). Thus, if this option is not maintained, the volume of statements from the administrator would be vast, with much repetition, and potentially overwhelming for clients.

7. Supervision of climate-related benchmarks

In February 2019, the co-legislators reached a political agreement resulting in the creation of two new types of 'Climate-related Benchmarks' (the EU Paris Aligned Benchmark and the EU Climate Transition Benchmark). The Regulation also aims to improve transparency regarding Environmental, Social and Governance (ESG) factors by requiring ESG disclosures for all investment benchmarks (excluding interest rates and currency benchmarks). The objectives of the new rules are to orient the choice of investors who wish to adopt a climate-conscious investment strategy, and to address the

risk of greenwashing. The minimum standards as to the methodology of those two climate-related benchmarks and the content of ESG disclosures will be further detailed in delegated acts to be adopted by the Commission in early 2020. Benchmark administrators will be required to comply with those requirements by end-April 2020.

The Commission's services consider that competent authorities should have adequate powers to ensure that a variety of benchmark administrators and investment managers that wish to use climate-related benchmarks to offer investment products based on climate-related benchmarks adhere to the requirements of the Regulation.

This requires that the Regulation empowers competent authorities to verify that any supervised entity mentioned in Article 3(1)(17) of the Regulation only refers to a climate-related benchmark once two conditions are met: (1) the administrator of the climate-related benchmark has received certification that the index is compliant with the Regulation and (2) the investment strategy represented by the supervised entity's product is aligned with the appropriate climate-related benchmark.

This implies that the competent authority, when authorising an investment firm, UCITS management company or alternative fund manager to offer an investment product that references one of the two climate-related benchmarks, needs to verify (1) whether the chosen reference index complies with the requirements of the Regulation and (2) whether the investment strategy aligns with the chosen benchmark.

Competent authorities should be put in a position to exercise their surveillance over the climate-related benchmarks and have the power to prevent supervised entities from referencing a climate-related benchmark, if either (1) such benchmark does not respect the rules applicable to climate-related benchmarks or (2) the investment strategy referencing the climate-related benchmark is not aligned with the climate-related benchmark.

The Commission is seeking feedback from stakeholders on whether the above set of supervisory powers is sufficient to ensure an effective supervision of the new climate-related benchmarks.

Question 19: Do you consider that competent authorities should have explicit powers to verify:

a) whether the chosen climate-related benchmark complies with the requirement of the Regulation?

Please rate from 1 (completely disagree) to 5 (fully agree)

- 1 (completely disagree)
- 2
- 3
- 4

- 5 (fully agree)
- Don’t know / no opinion / not relevant

b) whether the investment strategy referencing this index aligns with the chosen benchmark?

Please rate from 1 (completely disagree) to 5 (fully agree)

- 1 (completely disagree)
- 2
- 3
- 4
- 5 (fully agree)
- Don’t know / no opinion / not relevant

Question 19.1: Please explain your reply to question 19 a) and 19 b).

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 20: Do you consider that competent authorities should have explicit powers to prevent supervised entities from referencing a climate-related benchmark, if such benchmark does not respect the rules applicable to climate-related benchmarks or of the investment strategy referencing the climate-related benchmark is not aligned with the reference benchmark?

Please rate from 1 (completely disagree) to 5 (fully agree)

- 1 (completely disagree)
- 2
- 3
- 4
- 5 (fully agree)
- Don’t know / no opinion / not relevant

Question 20.1: Please explain your reply to question 20.

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

8. Commodity benchmarks

Commodity benchmarks are subject to a specific set of rules under the Regulation, with requirements set out in Annex II to the Regulation replacing those in Title II. Annex II reflects the IOSCO Principles for Price Reporting Agencies (PRAs).

There are however certain instances when a commodity benchmark is subject to the 'normal' regime for benchmarks in Title II: if the benchmark is a regulated data benchmark or if the benchmark is based on submissions from contributors the majority of which are supervised entities. This second situation in particular has faced criticism from commodity benchmark providers.

In addition, Article 19(2) BMR sets out that commodity benchmarks are nevertheless subject to the requirements in Title II of the BMR if they meet the following two conditions:

- The commodity benchmark in question is a critical benchmark; and
- The underlying asset is gold, silver or platinum.

Currently, no commodity benchmark fulfils these criteria.

Finally, for commodity benchmarks, there is a *de minimis* threshold below which a benchmark is exempt from the Regulation. It operates on the two conditions that instruments referencing the benchmark can only be admitted to trading on a single trading venue and that the total notional amount of those instruments cannot exceed 100 million euro.

In respect of the quantitative element of this condition, commodity benchmark administrators have explained that seasonal effects may imply that a benchmark's usage may exceed the threshold at one point in time within the year and may stay below at another point in time within the same year.

Question 21: Do you consider the current conditions under which a commodity benchmark is subject to the requirements in Title II of the BMR are appropriate?

Please rate from 1 (not appropriate at all) to 5 (completely appropriate)

- 1 (not appropriate at all)
- 2
- 3
- 4
- 5 (completely appropriate)
- Don’t know / no opinion / not relevant

Question 21.1: Please explain your reply to question 21.

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 22: Do you consider that the compound *de minimis* threshold for commodity benchmarks is appropriately set?

Please rate from 1 (not appropriate at all) to 5 (completely appropriate)

- 1 (not appropriate at all)
- 2
- 3
- 4
- 5 (completely appropriate)
- Don’t know / no opinion / not relevant

Question 22.1: Please explain your reply to question 22.

2000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

9. Non-EEA benchmarks

The Benchmark Regulation stipulates that, from January 2022 onwards, EU supervised entities can only use benchmarks provided by administrators located in a third country if one of three conditions is met: (1) the European Commission has adopted an

equivalence decision; (2) the benchmark administrator has been recognised by an EU competent authority; or (3) the benchmark has been endorsed by an EU supervised entity.

The use of certain non-EEA benchmarks is widespread and economically important, especially for currency or interest rate hedging.

For example, the Benchmark Regulation covers foreign currency exchange (FX) spot rates when they are used in calculating the payments due for EEA listed non-deliverable forwards (NDFs) as long as these contracts are traded on an EEA trading venue. For most major currencies, FX spot rates that meet the criteria of the BMR are available. By contrast, once a currency is not fully convertible, the corresponding FX spot rates will reflect a variety of policy choices and would not be eligible for equivalence, recognition or endorsement.

FX spot rates for not fully convertible currencies may therefore no longer be eligible as a reference rate to calculate the payoff from an NDF once the extended BMR transitional period (31 December 2021) expires.

The question therefore arises whether the Regulation should cover the use of third-country benchmarks by supervised entities in non-deliverable FX forward contracts that are entered into in order to reduce risks directly relating to the commercial activity or treasury financing activity of non-financial counterparties.

Question 23: To what extent would the potential issues in relation to FX forwards affect you?

Please rate from 1 (not at all) to 5 (very much)

- ○ 1 (not at all)
- ○ 2
- ○ 3
- ○ 4
- ◉ 5 (very much)
- ○ Don’t know / no opinion / not relevant

Question 23.1: If the potential issues in relation to FX forwards would affect you, how would you propose to address these potential issues?

2000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The issues in relation to non-deliverable FX forwards would significantly affect our ability (and the ability of our European clients) to invest in and deal in affected markets. We think that non-deliverable FX forward contracts and related benchmarks should not be in scope of the BMR. The exemption should remain broad so that changes in such third country monetary or other policies or the identity of the relevant administrator

do not create cliff edges in respect of what rates EU supervised entities can use.

For instance, in India, the Reserve Bank of India transferred administration of the relevant NDF rate to a subsidiary in 2018, which would mean that such rate would no longer fall within the central bank exemption. Many other rates are also administered by non-central banks. In addition, it may be possible to call into question what a controlled currency is – we would recommend pegged currencies or non-convertible currencies also be included as in such circumstances the relevant central bank still maintains control over the relevant exchange rate (even if formal administration of a rate sits with a nominal subsidiary). For these reasons additional flexibility is needed and the NDF market's contribution to facilitating foreign direct investment in emerging markets (and increasing investment opportunities for EU entities) should be recognised.

Stakeholders argue that for many non EEA indices neither equivalence, recognition nor endorsement provide for legal certainty with regard to the continued use of most third-country benchmarks.

Equivalence

The European Commission is currently assessing which non-EEA countries have an equivalent regulatory and supervisory regime in place, focusing on those countries that have either adopted IOSCO compliant benchmark rules or are in the process of preparing such rules in place before 1 January 2022[4]. Should rules only cover part of the benchmark universe administered in those jurisdictions (i.e., systemic or critical benchmarks only), equivalence assessments will only comprise the benchmarks covered by the relevant rules. Equivalence might therefore not allow for a continued use of the majority of indices administered outside the Union.

Recognition and endorsement

Recognition of a third-country benchmark administrators requires those administrators to have a legal representative in the Union. Stakeholders argue that, in order for recognition to become effective, tasks and responsibilities of the legal representative would need to be clarified further.

In the absence of licensing income from EU users, many third-country benchmark administrators might not have the incentive to seek either recognition or endorsement of their benchmarks for use in the Union. This would mean that many third-country benchmarks could no longer be used in the Union after the expiry of the (extended) transitional period, by the end of 2021.

Question 24: What improvements in the above procedures do you recommend?

3000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

For both derivatives and structured notes which are issued in the EU and traded globally, only third country benchmarks which are systemic or critical benchmarks for purposes of EU markets should be in scope of the BMR. The BMR could provide that recognition, endorsement or equivalence for any particular jurisdiction or country is not necessary unless and until ESMA determines that any benchmark from such jurisdiction is significant or critical in the EU when considering use of such benchmark in the EU. In particular we recommend that the impact of such benchmark on financial stability for the EU or on consumers should be a factor that is taken into account. This is because EU financial service providers should be allowed to participate in financial global markets on a level playing field with non-EU service providers where there is no material detriment to EU consumers (e.g. the relevant rate is not used in retail products) or where disruption to the rate would not cause issues of financial stability (e.g. third country rates used to hedge investments made outside the EU).

Such an approach would represent a more calibrated approach to the goals of the BMR and the work being done by the Financial Stability Board to reduce market fragmentation in cross border markets and to increase cooperation among regulators.
We also recommend that additional clarity is provided on when a benchmark is "used" in the Union. The traditional regulatory perimeter of any given jurisdiction typically covers activities that (1) take place in that jurisdiction and so give rise to conduct risk, (2) may induce consumers in that jurisdiction to engage in investment activity or (3) may have a systemic impact on the financial market of that jurisdiction. Branches of EU supervised entities operating outside the EU and interacting with non-EU clients with non-EU benchmarks will generally not fall into any of the aforementioned grounds for regulation and so should not fall within the regulatory perimeter.

At present the broad definition of "use" set out in the BMR applies to operational processes re. payment calculations (i.e. "determining the amount payable") that occur in the EU even where the client, benchmark and branch are outside the EU or apply because a trade is booked into the head office under an accounting model even though the client, benchmark and branch are outside the EU.

A narrower definition of use would do much to alleviate issues of overreach and would create a level playing field for EU institutions with businesses outside the EU without undermining how the BMR applies to benchmarks which are systemic or critical in the EU and so impact EU financial stability or EU consumer interests.

[4] On 29 July, the Commission adopted the first decisions stating that the administrators of certain interest rates and foreign exchange rates in Australia and Singapore are subject to legally binding requirements equivalent to the requirements set out under the Benchmark Regulation.

10. Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

The maximum file size is 1 MB
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

801cea93-b10a-4fb2-8fde-5cccd6d88a95/Question_9_continued_EU_Review_of_BMR_Regulation.pdf

Useful links

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

More on this consultation (https://ec.europa.eu/info/publications/finance-consultations-2019-benchmark-review_e

Specific privacy statement (https://ec.europa.eu/info/law/better-regulation/specific-privacy-statement_en)

Consultation document (https://ec.europa.eu/info/files/2019-benchmark-review-consultation-document_en)

Contact

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