Ref. Ares(2023)1494968 - 01/03/2023

European Commission

CALL FOR EVIDENCE
FOR AN INITIATIVE (without an impact assessment)

This document aims to inform the public and stakeholders about the Commission's work, so they can provide feedback and participate effectively in consultation activities.

We ask these groups to provide views on the Commission's understanding of the problem and possible solutions, and to give us any relevant information they may have.

⚠ You should **finalise this document at the earliest stages of the preparatory process**, so that best use can be made of feedback from stakeholders.

TITLE OF THE INITIATIVE	Review of the scope and third-country regime of the Benchmark Regulation
LEAD DG – RESPONSIBLE UNIT	FISMA C.3
LIKELY TYPE OF INITIATIVE	Regulation amending Regulation (EU) 2016/1011 ("Benchmark Regulation")
INDICATIVE TIMING	Q2-2023
ADDITIONAL INFORMATION	-

This document is for information purposes only. It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by this document, including its timing, are subject to change.

A. Political context, problem definition and subsidiarity check

Political context [max 10 lines]

Regulation (EU) 2016/1011 (the Benchmark Regulation, or BMR) regulates indices used as benchmarks in financial instruments and financial contracts. It contains rules on the use of non-EU benchmarks, which will apply from 1 January 2024. Under the rules, non-EU benchmarks can be used in the EU only if they comply with rules comparable to the BMR. However, while most major jurisdictions have implemented binding rules on the most relevant benchmarks, very few have regulated benchmarks as extensively as the EU. As a result, very few non-EU administrators have so far spent the necessary time and resources to obtain access to the EU market through recognition or endorsement, as this does not make economic sense for them.

Non-EU ('third-country') benchmarks are used widely throughout the EU in the financial sector and the real economy to measure markets, hedge risks and create investment exposure. When the new rules on the use of non-EU benchmarks come into force, it would deprive market participants in the EU of access to the majority of the world's benchmarks. This would put some of them at a significant disadvantage in global competition.

In 2021, this issue was addressed for the specific category of foreign exchange benchmarks.[1] Conscious that there was a broader problem, the European Parliament and Council of the EU tasked the Commission with a full review of the rules for non-EU benchmarks by mid-2023.

A secondary issue in this call for evidence is the supervisory status of non-EU benchmarks that are labelled as EU Climate Transition Benchmarks or EU Paris-Aligned Benchmarks, two categories (or 'labels') introduced in 2019 to promote sustainable investing). In light of potential modifications to the rules for the use of non-EU benchmarks, the supervisory status of non-EU benchmarks bearing EU Climate Benchmark labels will also need to be amended. There is however no intention to change the substantive requirements for the EU Climate Benchmark 'labels'.

In parallel but separate from this initiative, work is ongoing under the umbrella of the strategy for financing the

[1] Regulation (EU) 2021/168 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) 2016/1011 as regards the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation, and amending Regulation (EU) No 648/2012.

transition to a sustainable economy to assess the feasibility of creating an environmental, social and governance (ESG) label for benchmarks. A report was produced for the Commission on this end-2022,[2] with a report to Parliament and Council to follow in 2023.

Problem the initiative aims to tackle [max 25 lines]

This initiative has aims to tackle the following problems.

1) Ensuring continued access to benchmarks worldwide for EU businesses and investors

The rules for the use of non-EU benchmarks in the EU are overly restrictive in light of the level of benchmark regulation chosen by jurisdictions other than the EU. By prohibiting the use of non-EU benchmarks by default, the system would effectively cordon off the EU market from available benchmarks. As a result, EU businesses and investors are faced with the prospect of a less diverse, less innovative and more expensive set of benchmarks to use for hedging, investment, etc. This problem is driven by the restrictive rules on the use of non-EU benchmarks, coupled with a lower than anticipated level of regulation, especially for non-interest-rate benchmarks in jurisdictions outside the EU. An exacerbating factor is that most benchmarks are locally anchored, measuring a local market or economic reality. This means that these benchmarks cannot easily be replaced by an EU benchmark that measures that same market or economic reality – as the data to construct it are often (quasi-)proprietary to a single non-EU market participant.

2) Promoting EU benchmark labels as an open standard under EU supervision

The labels for EU climate transition benchmarks and the EU Paris-aligned benchmarks (EU CTBs and EU PABs) come with a set of minimum requirements regarding benchmark methodology and disclosures. Currently, non-EU administrators offering benchmarks in the EU under the transitional arrangements can use these labels without supervision of the labels' specific rules. This initiative will ensure that non-EU administrators can continue to provide labelled benchmarks, subject to EU supervision of all label-related BMR provisions.

Basis for EU action (legal basis and subsidiarity check) [max 10 lines]

Legal basis

The legal basis for this EU initiative is Article 114 of the Treaty on the Functioning of the European Union (TFEU). The aim of EU action is to improve the functioning of the internal market.

Practical need for EU action

This initiative revises the existing rules set out in a Regulation, and passes the 'subsidiarity test': there is a need for EU action and EU action brings added value.

Necessity for EU action. The problems described above cannot be solved by the Member States acting alone, since they relate to adjustments in a field where existing legislation is already harmonised at EU level (the BMR). The only way for Member States to address the issues is through EU legislation.

EU added-value. Coordinated action is needed to allow EU market participants to use globally available benchmarks, so they are not at a disadvantage compared with their peers outside the EU.

B. What does the initiative aim to achieve and how [max 25 lines]

Likely impacts

Economic impacts

This initiative aims to ensure that EU benchmark users, including banks, investment funds, businesses and investors are still able to use all relevant benchmarks provided outside the EU. This will offer them a greater number of more diverse opportunities for investment and hedging, and will place them on an equal footing with their peers outside the EU. Without this initiative, there is a risk that EU benchmark users would lose access to certain non-EU benchmarks for which no good EU-based alternative exists, and would generally have to draw on a more limited and more expensive set of benchmarks.

[2] Insert link when report is published

The proposed initiative will safeguard the competitiveness of EU benchmark administrators – subject to the EU BMR – against potential competitors from outside the EU who target the EU market. This will be accomplished by ensuring that the most economically relevant benchmarks for the EU market are subject to EU supervisory scrutiny. In addition, the proposal will contain anti-circumvention rules to curtail any incentives for EU-based benchmark administrators to relocate with a view to avoiding EU rules. It will achieve this by making formerly-EU-based benchmark administrators automatically subject to the designation-based third-country regime.

Social impacts
This initiative is not expected to have any social impacts.

Environmental impacts
No direct environmental impacts are expected.
As a positive secondary, indirect environmental impact, the initiative may lead to a higher degree of trust in climate-related benchmarks that use the EU CTB and EU PAB labels. In turn, this could be expected to promote capital flows into sustainable investments.

Impacts on human rights

No direct impacts on human rights are expected.

Impacts on simplification and/or administrative burden

Removing administrative requirements for most non-EU benchmarks used in the EU will reduce the administrative burden for the administrators of these benchmarks. Similarly, EU users of non-EU benchmarks will no longer have to check in the relevant ESMA register whether a specific non-EU benchmark has obtained approval for use in the EU.

Future monitoring

With the relevant national authorities, the Commission has been monitoring implementation of the BMR via the European Securities and Markets Authority (ESMA). It will continue to do so.

C. Better regulation

Impact assessment [max 10 lines]

The proposed amendments to the third-country regime are technical and targeted in nature. They will complete a benchmark regulatory regime already in operation in EU, the main principles of which are not being called into question. The focus of the review is to prevent unintended inward discrimination against EU benchmark users (businesses and investors) as a result of the rules for the use of non-EU benchmarks. These rules are not yet in force and have been postponed several times. Without this initiative, the planned rules would cut benchmark users off from using certain non-EU benchmarks. As a consequence, EU businesses and investors might have fewer investment and hedging opportunities, or might be forced to seek them from non-EU intermediaries. This problem was already identified and assessed in the impact assessment for the 2020 review of the BMR and addressed in the subsequent legislative proposal for one specific category of benchmarks (foreign exchange (FX) benchmarks). In a forthcoming staff working document, the previous analysis will be expanded to cover all non-EU benchmarks and further explain the need for and impacts of the proposed initiative.

Consultation strategy [max 10 lines]

The Commission is consulting to expand its existing knowledge base by obtaining more detailed information on this specific issue from a broader set of stakeholders than those who give input spontaneously.

These stakeholders include benchmark administrators from EU and non-EU countries, EU banks, investment firms and asset managers (benchmark users), and EU businesses and investors (benchmark end-users).

A 12-week targeted consultation was held between 20 May and 12 August 2022.

2022 consultation document and responses
Feedback statement

Why we are consulting?

The Commission is consulting to expand its existing knowledge base by obtaining more detailed information on this specific issue from a broader set of stakeholders than those who make submissions spontaneously.

Target audience
EU benchmark administrators Non-EU benchmark administrators currently active on the EU market under the BMR’s transitional provisions EU benchmark users: banks, investment funds, asset managers EU benchmark end-users: investors, businesses Public authorities