

Europäische Kommission
Generaldirektion Finanzstabilität,
Finanzdienstleistungen und Kapitalmarktunion

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BEREICH Integrierte Aufsicht
GZ FMA-LE0001.230/0007-INT/2022
(bitte immer anführen!)

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WIEN, AM 30.06.2022

EK-Konsultation: Targeted consultation on the regime applicable to the use of benchmarks administered in a third country

Sehr geehrte Damen und Herren,

bezugnehmend auf die öffentliche Konsultation der Europäischen Kommission

„Targeted consultation on the regime applicable to the use of benchmarks administered in a third country“

erlauben wir uns Ihnen anbei die offizielle Stellungnahme der Österreichischen Finanzmarktaufsichtsbehörde (FMA) zukommen zu lassen.

Die Stellungnahme wurde zur leichteren Auswertung auch in das ECAS-EU-Survey-Tool unter Verwendung des Links auf der Seite <https://ec.europa.eu/info/consultations/finance-2022-benchmarks-third-country_en> eingegeben.

Wir ersuchen höflich um Berücksichtigung unserer Anregungen und stehen für Rückfragen sehr gerne zur Verfügung.


Finanzmarktaufsichtsbehörde
Bereich Integrierte Aufsicht

Für den Vorstand

Dr. Christoph Kapfer, LL.M. MBA
Abteilungsleiter

Dr. Christoph Seggermann

elektronisch gefertigt

Signaturwert	DbzCY5CAFLU/f0n8g4qx2VHBJfeybb0jDl2qI/aRP5OjfU/fXlJrOjIjfoAC94CHTLh999nWZv75p6CbrYgP SaN5nBghxJTQifkNZO9cQRM/46mb/Iu+eBRzQEMnJlRBCrW5mBQXwCWDIW+2TTHHAp8py+6MfFiyA2ICMoP4 T6xsHyy86uKq99CrUPEXxlBSywU3W+rofxVB3MuTw3d4iflEG0vW2H58Q5Fgs3ZHYWm0cNIMbZ67QggVKmzg UT4umlfTK0gjh1BbahI85ZmU+IwMbmM6j23eEKC5aplIXk/MltsS9GD/ZPoFlmpAD074Zs2ykTN300i5HmA JOTXXA==	
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	Datum/Zeit-UTC	2022-07-04T13:14:16Z
	Aussteller-Zertifikat	CN=a-sign-corporate-light-02,OU=a-sign-corporate-light-02,O=A-Trust Ges. f. Sicherheitssysteme im elektr. Datenverkehr GmbH,C=AT
	Serien-Nr.	532114608
	Methode	urn:pdfsigfilter:bka.gv.at:binaer:v1.1.0
Prüfinformation	Informationen zur Prüfung des elektronischen Siegels bzw. der elektronischen Signatur finden Sie unter: http://www.signaturpruefung.gv.at	
Hinweis	Dieses Dokument wurde amtssigniert. Auch ein Ausdruck dieses Dokuments hat gemäß § 20 E-Government-Gesetz die Beweiskraft einer öffentlichen Urkunde.	



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Financial markets
Securities markets

CONSULTATION DOCUMENT

TARGETED CONSULTATION ON THE REGIME APPLICABLE TO THE USE OF BENCHMARKS ADMINISTERED IN A THIRD COUNTRY

Disclaimer

This document is a working document of the Commission services for consultation and does not prejudice the final decision that the Commission may take.

The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

The responses to this consultation paper will provide important guidance to the Commission when preparing, if considered appropriate, a formal Commission proposal.

You are invited to reply **by 12 August 2022** at the latest to the **online questionnaire** available on the following webpage:

https://ec.europa.eu/info/publications/finance-consultations-2022-benchmarks-third-country_en

In line with the [Commission's objective of “an economy that works for people”](#) this targeted consultation aims to gather views of stakeholders on a possible enhancement of the rules for the use in the Union of third country benchmarks. We are particularly interested in the views of administrators of benchmarks, both those located in the EU and outside the EU, of supervised entities in the EU using benchmarks and of businesses and investors who are end-users of benchmarks for investment, hedging or other purposes. Other stakeholders are also welcome to take part in this consultation. This consultation does not prejudge any outcome nor prevent the Commission from considering alternative options.

Please note that in order to ensure a fair and transparent consultation process **only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.**

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published in accordance with the privacy options respondents will have opted for in the online questionnaire.

Responses authorised for publication will be published on the following webpage: https://ec.europa.eu/info/publications/finance-consultations-2022-benchmarks-third-country_en

Any question on this consultation or issue encountered with the online questionnaire can be raised via email at fisma-benchmark-review@ec.europa.eu.

INTRODUCTION

The [EU Benchmark Regulation](#) (the ‘Regulation’, the ‘Benchmark Regulation’ or the ‘BMR’) has been in application since 1 January 2018 and has been modified twice. [This regulation was first revised](#)¹ to introduce [two climate-related labels for benchmarks](#) (EU Paris-aligned benchmarks (EU PABs) and EU climate transition benchmarks (EU CTBs)), as well as [ESG](#)

¹ [Regulation \(EU\) 2019/2089](#)

[disclosures](#) applicable to all benchmarks. Most of those measures apply since 10 April 2020. A [second review of this regulation](#)², in application since 13 February 2021, was carried out, among others, to extend the transitional period for third country benchmarks and introduced a statutory replacement mechanism to ensure a smooth transition in the IBOR area.

Building on a [consultation conducted in the autumn of 2019](#)³, the Commission is seeking views on further potential improvements in the functioning of the BMR, specifically as regards the rules applicable to non-EEA benchmarks (also: third-country benchmarks) and the impact on market participants of the full entry into application of the third country regime as of 1 January 2024. To that end, the Commission is carrying out a targeted consultation.

The Commission also reminds that other aspects of the BMR are subject to ongoing reflection, notably in the area of sustainability. This includes a study currently being carried out by an external contractor on the feasibility, minimum standards and transparency requirements of an EU ESG Benchmark, on which the Commission will provide a follow-up after its delivery at end-2022.

CONSULTATION QUESTIONS

QUESTIONS SPECIFIC TO BENCHMARK ADMINISTRATORS

[...]

QUESTIONS SPECIFIC TO SUPERVISED ENTITIES USING BENCHMARKS

[...]

QUESTIONS SPECIFIC TO END-USERS OF BENCHMARKS

[...]

QUESTIONS TO ALL TYPES OF RESPONDENTS

1. Do you believe that the rules applicable to the use of benchmarks administered in a third country, which will fully enter into application as of January 2024, are fit-for-purpose? If not, how would you propose to amend the BMR's third country regime?

- Those rules are appropriate
- Those rules are overall appropriate, but minor adjustments are needed
- Those rules are not fit-for-purpose, and should be reviewed
- No opinion

Please explain:

In general, we see the current rules for third country administrators and benchmarks as appropriate. The current third country regime ensures that the strict rules for the provision of benchmarks are valid for all benchmarks, which are provided in the European Union. All

² [Regulation \(EU\) 2021/168](#)

³ The consultation ran from 11 October until 31 December 2019 and received 86 responses. The consultation document and the responses received can be found at https://ec.europa.eu/info/publications/finance-consultations-2019-benchmark-review_en

stakeholders can more or less rely on the fact that benchmarks provided in the EU follow the same quality standards.

Every change to the third country regime affects EU administrators and creates an unlevel playing field to the severe detriment of European entities. Changes have to be implemented very carefully and only after a detailed cost-benefit analysis.

Many important third country benchmark providers (like MSCI Ltd.) were recognised under Article 32 BMR and were listed in the ESMA benchmark register via UK. After Brexit, most of these already recognised third country providers did not apply for recognition again. Other important third country index providers like Stoxx Ltd. are already recognised and included in the ESMA benchmark register before the end of the transitional period.

So it seems that the regulatory burden of the BMR is not a problem, but third country providers wait for legal clarity until the end of the transitional period in 2023.

For that reason, we assess the current framework for third country administrators and benchmarks as appropriate. An overhaul of the regime before the end of the transition period is not expedient.

2. More specifically, would you be in favour of a framework under which only certain third country benchmarks, deemed ‘strategic’, would remain subject to restrictions of use similar to the current rules? Under this hypothesis, the use by EU supervised entities of all other third country benchmarks than those ‘strategic’ benchmarks would be in principle free, without any additional requirement attached to the status of the administrator.

- Totally opposed
- Somewhat opposed
- Neither opposed nor in favour
- Somewhat in favour
- Totally in favour

Please explain:

Such a total shift from the current benchmark regime would create an unlevel playing field between EU and third country benchmark providers. There is no reason, why EU administrators should adhere to the BMR framework when only “strategic” third country benchmarks are being regulated. In the end, this change incentivise EU benchmark providers to relocate to a third country in order to avoid the BMR framework. This proposal is a severe dilution of the whole BMR framework. We strongly oppose the proposal.

3. Under the hypothesis set out in the question above, there would need to be criteria to determine whether a third country benchmark should be designated as ‘strategic’. Which of the following criteria should be used, in your view, to identify ‘strategic’ third country benchmarks?

Criterion	Totally against	Somewhat against	Neither against nor in favor	Somewhat in favour	Totally in favour	Explanation/ justification
Notional amount/values of assets referencing the benchmark globally				X		Typically, there will not be a huge difference in the importance of a benchmark on a global or on a European basis.
Notional amount/values of assets referencing the benchmark in the EU					X	From a risk based point of view the values of assets in the EU, which reference the benchmark, is the best criterion.
Type of use (determination of the amount payable under a financial instrument, providing a borrowing rate, measuring the performance of an investment fund...)			X			The current BMR does not make a difference between the types of use, so we do not see a reason for deviation.
Type of user (investment fund, credit institution, CCP, trade repository, etc.)		X				The importance should be linked to the instrument, not the type of user.
Core activity of the administrator (bank, trading venue, asset manager, benchmark administrator, etc.)	X					
Regulatory status of administrator in home jurisdiction			X			
Type of benchmark (interest rate benchmark, commodity benchmark, equity benchmark, regulated-data benchmark, etc.)				X		The less regulated the underlying market is, the higher the importance of a regulation of the benchmark administration.

Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU)				X		Substitutability of a benchmark should be a criterion due to the fact that it is from less strategic importance, if there are alternatives to a certain benchmark.
EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks)			X			
Other: please specify						

4. Under the hypothesis where the current third country regime would be reformed or repealed, please indicate the degree to which you agree with each of the following statements:

a) The European Commission should be granted powers to designate certain administrators or benchmarks as ‘strategic’ on a case-by-case basis.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We strongly oppose any dilution of the BMR framework to the detriment of European benchmark providers. In principal, we agree to grant the power of designation to the European Commission, but the designation process has to be quicker than the current designation process for critical benchmarks or equivalence decisions by the European commission. In theory, designation of the European Commission seems like an appropriate approach, however, the practical experiences are only partially convincing.

We would like to reiterate our concerns to such a huge change to the scope of the BMR (see our answer to question 2).

b) ESMA should be given the task to supervise those third country ‘strategic’ benchmarks.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We agree with the approach (similar to the current third country recognition and supervisory regime) that ESMA should supervise third country benchmarks in order to ensure a uniform application of the BMR, which is important to avoid supervisory arbitrage.

We would like to reiterate our concerns to such a huge change to the scope of the BMR (see our answer to question 2).

c) ESMA should also be tasked with the supervision of EU-based benchmarks that qualify as ‘strategic’.

- Do not agree at all
- Do not agree
- Neither agree nor disagree

- Agree somewhat
- Agree completely

Please explain your answer:

We agree to the approach (similar to the current regime for critical benchmarks) that ESMA should supervise strategic benchmarks as they are from importance for the entire European market.

We would like to reiterate our concerns to such a huge change to the scope of the BMR (see our answer to question 2).

d) The EU internal scope of regulation of EU benchmarks should also be amended along similar lines, to only comprise certain types of strategic benchmarks, notably with a view to avoid circumvention or unlevel playing field.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

As stated in the answers above we are strictly against a complete overhaul of the current BMR scope after only a short period of time.

To avoid an unlevel playing for EU benchmarks, the third country regime must not be reduced to strategic benchmarks only.

e) The EU BMR could function as an opt-in regime, whereby both EU administrators and third-country administrators would benefit from a form of quality label attached to the BMR as they voluntarily decide to comply with the EU BMR and being subject to supervision. Under this hypothesis, the opt-in regime would be applicable to most benchmarks, while only certain benchmarks (e.g. above-mentioned ‘strategic’ benchmarks) would be subject to mandatory compliance with the EU BMR and supervision.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We do not think that such an “Opt-in-regime” works. The regulatory burden and the costs of the current BMR is quite substantial for benchmark providers and users. The benefit from a quality label is not as substantial as the burden, so we think that without the regulatory pressure of a mandatory regime administrators will not comply with the BMR.

As the market for benchmark administrators is well developed, there is little incentive for established players to receiving such a label. In general, the EU initiatives regarding the labelling (such as EuVECA, EuSEF, ELTIF) were less successful in general, as the general frameworks demand lower regulatory burden. The one label that worked is the UCITS framework, which is a market with multiple entities, funds and investors. Thus, it cannot be compared to the benchmark environment. Now creating an opt-in label for BMR is just being late to the party.

Concerning the BMR framework, the two ESG benchmark labels need to be assessed in full at a later stage in order to assess its success. However, this relates to a specific form of benchmark, not to the BMR framework as a whole. We assume that the incentives to provide labelled ESG benchmarks are potentially stronger than an opt-in to the whole BMR regime.

f) EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks) should not be accessible to third country administrators, and only be accessible to administrators supervised in the EU and subject to the BMR.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We do not see any reason to exclude third country administrators from the provision of EU benchmark labels, as long as they follow the rules of the BMR.

If EU benchmark labels were to remain accessible to third country administrators (which are not subject to EU supervision), and if the labelled benchmarks have not been designated as “strategic”, some safeguards should be put in place to maintain the reliability of those labels. Those safeguards should ensure that benchmarks administered in a third country and using an EU label effectively comply, on a continuous basis, with the relevant minimum standards attached to those labels. Regarding such benchmarks administered in a third country and using an EU label:

g) An EU administrator subject to EU supervision should be responsible for compliance of the third country labelled benchmark with the relevant standards (under a mechanism similar to the current endorsement framework).

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We do not have a preference, which third country framework (recognition or

endorsement mechanism) should apply, as long as the legal requirements of the BMR apply.

h) They should be directly supervised by ESMA (under a mechanism similar to the current recognition framework).

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

We agree to the approach (similar to the current third country recognition supervisory regime) that ESMA should supervise third country benchmarks to ensure a uniform application, which is important to avoid supervisory arbitrage.

i) EU benchmark users should be required to only use benchmarks that comply with the EU standards on a continuous basis. As a consequence, those users should be required to gather the necessary information to verify that the benchmark's methodology is consistent (on a continuous basis) with the EU standards, and for ceasing use of those benchmarks in case the labels are misused.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain your answer:

This proposal shifts the responsibility for the compliance with EU standards from the administrators to the users. This would create additional burden and costs for benchmark users. As the users of benchmarks typically are not the providers of benchmarks, there will be a lack of the necessary know-how for verifying the consistency of a benchmark methodology with the EU standards. There will be also a high risk for a diverse interpretation of the verification results among the different users, a uniform application of EU standards will be nearly impossible.

With [Regulation 2019/2089](#), the EU recently introduced a number of sustainability-related disclosures to benchmark administrators, especially for those benchmarks advertising ESG features. As mentioned in its [renewed sustainable finance strategy](#), the Commission is exploring the possibility to create an [EU ESG benchmark label](#), whose scope would simultaneously encompass environmental, social and governance pillars. This label would be an addition to the already existing climate- focused PAB and CTB labels, and would aim at bringing more clarity in the market for ESG benchmarks and further tackling “ESG-washing”.

5. Do you believe that creating an EU ESG benchmark label would help enhance the quality of ESG benchmarks? Would a context where a significant share of those

benchmarks are administered in a third country influence your appraisal?

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain:

We support an EU ESG benchmark label to increase transparency for investors and decrease the risk of “green washing”. As long as third country administrators stick to the BMR framework, there is no reason to prevent them from providing ESG benchmarks.

6. Should such an EU ESG benchmark label be created, should this label be accessible to third country administrators?

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Agree somewhat
- Agree completely

Please explain:

Please, see our answer to question 5 above.
