

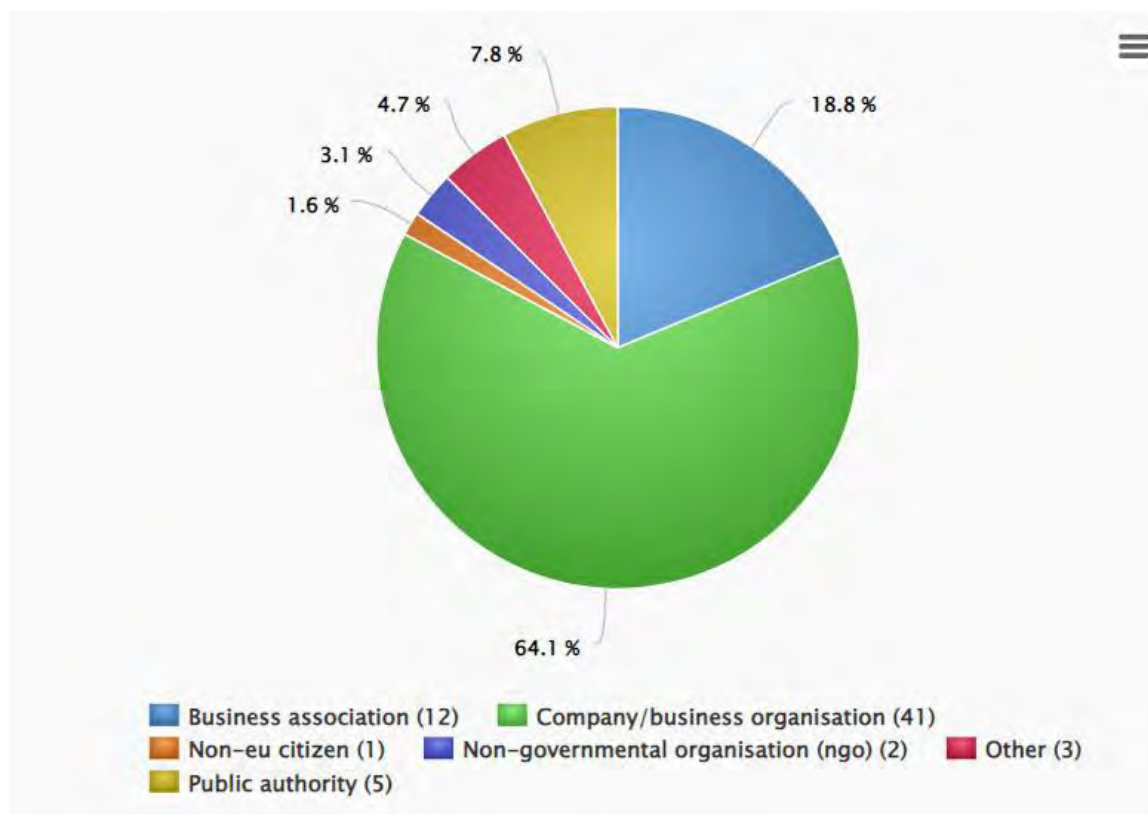
1. INTRODUCTION

This report gives an overview of the results of the targeted consultation on “the regime applicable to the use of benchmarks administered in a third country”, carried out between 20 May and 12 August 2022. 64 responses were received to the online questionnaire. All responses, including accompanying letters were considered. Percentages mentioned in this summary report are based on respondents who expressed an opinion on the relevant question.

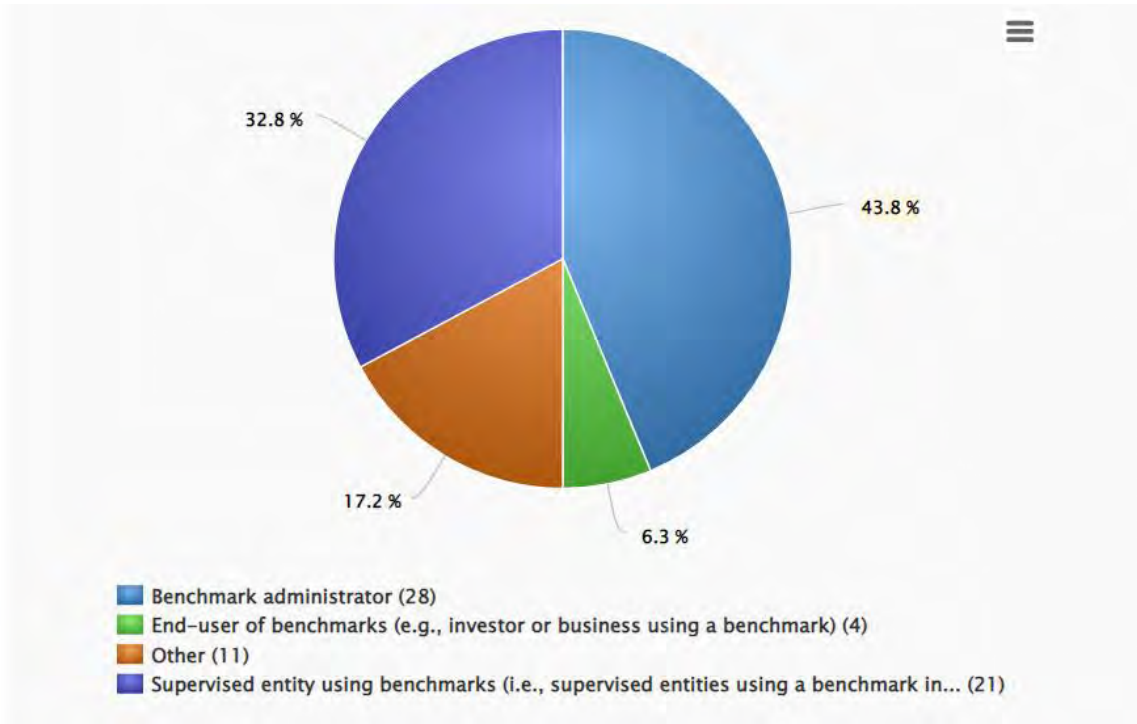
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2. OVERVIEW OF THE RESPONDENTS

A total of 64 valid contributions were received. Companies/business organisations (64.1%; 41) were the biggest group followed by business associations (18.8%; 12).



Benchmark administrators account for the largest share of contributions at 43.8% (28 out of 64) followed by supervised entities using benchmarks (32.8%; 21 out of 64). End-users of benchmarks are represented by only 6.3% (4 out of 64) and others (not specified) account for 17.2% (11 out of 64).



3. SUMMARY OF RESPONSES

3.1. Questions specific to benchmark administrators

To the questions whether an organisation was planning to change its status under BMR in light of the entry into application of the rules for third country benchmarks as they currently stand, many stakeholders (41.2%; 7) answered the question in the positive. Significant minorities of stakeholders (35.3%; 6) either don't know yet or have no such plans (23.5%; 4).

There was no clear view on the question to what extent administrators in their provision of benchmarks in the EU experience competition from benchmarks administered outside the EU, as only few respondents responded to that question:

Very strong competition: (12.5%; 1)

Moderate competition: (12.5%; 1)

Some competition: (37.5%; 3)

No competition: (12.5%; 1)

Don't know/no opinion: (12.5%; 1)

A large majority (62.5%; 10) of the respondents who indicated the significance of the provision of benchmarks in the EU as a proportion of their revenue derived from the provision of benchmarks worldwide, cited 0-20% as the percentage.

3.2. Questions specific to supervised entities using benchmarks

3.2.1. *EU supervised entities rely on third country benchmarks in a significant manner*

Of the **benchmark users** who responded to this questionnaire, none responded that their activities did **not** rely on non-EU benchmarks at all – though there may be selection bias at play here (16 out of 20 users reported that their activities were moderately, strongly or

exclusively reliant on non-EU benchmarks). The questionnaire asked respondents to list non-EU benchmarks in use in the EU. We are currently working to compile a list, where possible including data on the extent of use.

The reasons cited for using a non-EU benchmark instead of an EU alternative are diverse, with the most cited being that the use of that benchmark is an **established practice**, that the user has a long-standing or broad **business relationship** with the benchmark administrator, or that **no EU alternative** is available for a specific benchmark. Client demand also plays a role, with clients sometimes seeking exposure to a specific (often brand name) non-EU benchmark. In certain instances, non-EU benchmarks are also perceived to be leaders in their specific market segment. Finally, certain niche markets are intrinsically linked to a specific non-EU benchmark, such as the dry bulk freight market which relies on indices produced by the Baltic Exchange, based in London.

Although several **benchmark users** report using mainly or exclusively benchmarks that currently already satisfy the criteria of the BMR third country regime, or report that they are confident the administrators of benchmarks they use will take the required steps in time, there continues to be significant uncertainty around the future availability of many non-EU benchmarks. In many cases (58%; 11 out of 19), administrators whose benchmarks are not yet BMR-compliant have not yet systematically informed their EU users of their intentions to comply.

A large majority (75%; 15 out of 20) anticipates that not all third-country benchmarks that they might wish to use in offering financial services and products in the future will remain available for use in the Union through equivalence, recognition or endorsement under the current BMR third-country chapter. Only some stakeholders (25%; 5 out of 20) think otherwise.

EU supervised entities indicate that they lack visibility whether third country administrators will apply for recognition or endorsement in the EU. EU supervised entities have not been contacted by any third country benchmark administrator in relation to their plans with their plans with regard to the end of the transitional period. EU supervised entities expect that some benchmarks that are used in the EU will no longer be available for use at the end of the transitional period. They do also not expect a substitute EU benchmark to be available for use in the Union. Respondents to the consultation note that the procedures for recognition and endorsement are complicated. Respondents believe that in particular smaller third-country benchmark administrators will likely not have an incentive to become BMR compliant.

A large majority of respondents (75%; 15 out of 20) do not believe that the current grandfathering provisions in the BMR, Article 51 (5), will suffice to ensure that benchmark users have access to all indices that they need for managing their portfolio of financial products and services. Only some stakeholders (15%, 3 out of 20) believe that the grandfathering provisions will suffice.

The reasons are that despite the grandfathering provisions some administrators may choose to stop publishing their index as a result of the burden to become BMR compliant or restrict the use under their licensing arrangement to dissuade or prohibit any use in the EU. Another reason mentioned was that grandfathering provisions only apply to transactions entered into prior to end 2023, making no particular allowance for new hedging deals.

A very large majority believes (89%; 16 out of 18) that there will be an impact (severe, medium or some) of the entry into application of the rules on third country benchmarks in the BMR on their activities, or that some of their activities might become unsustainable. Only few (11%; 2 out of 18) stakeholders indicated that there will be no impact or negligible impact on their activities.

A large majority of benchmark users responding (76.5%; 13 out of 17) anticipates competitive disadvantages vis-à-vis competitors that are not supervised entities within the scope of the BMR if the third country “market-access” rules for benchmarks enter into application without changes in 2024.

On ESG benchmarks, only a third of the supervised entities using benchmarks who responded to the questionnaire (6 out of 18) indicated that their organisation uses benchmarks advertising ESG features that are administered in a third country. A large majority of the supervised entities using benchmarks (12 out of 18) does not use or does not know whether their organisation uses benchmarks advertising ESG features that are administered in a third country.

3.3. Questions specific to end-users of benchmarks

End-users of benchmarks indicated some to strong reliance on benchmarks administered by third country entities – although the sample size for this category is small. Respondents (4 out of 5) stated that they mainly use third-country benchmarks for hedging purposes. Other purposes are investment and the use for variable-rate credit facilities.

As reasons for using non-EU benchmarks, end-users cite the lack of equivalent EU benchmarks (3) or that it is an established practice (1) and.

4. QUESTIONS TO ALL TYPES OF RESPONDENTS

4.1. The third-country chapter of the BMR requires fundamental review

There is broad support for the reform of the BMR third country regime towards a narrower scope, covering only a designated set of benchmarks. Almost three quarters of respondents (74%, 42 out of 57) agree that the rules are currently not fit for purpose, with notably all benchmark users subscribing to this statement. A minority of respondents (12%; 7 out of 57) believe that the rules are appropriate overall, but minor adjustments are needed.

If the rules for third-country benchmarks were to change, respondents point out that the level playing field between EU and third-country benchmarks should be maintained.

Among benchmark administrators, there is a clear divide between the administrators that have made the effort to comply with BMR already and those who currently have not taken those steps, with the former category supporting the current, restrictive third country regime and the latter opposing it. All but one of the respondents who were of the opinion that the current rules are fit for purpose are BMR-compliant benchmark administrators.¹ Also supervisors including ESMA, NL AFM and FR AMF have spoken up in favour of a narrower, risk-based approach to the supervision of the use of non-EU benchmarks in the EU.

An even stronger majority supports the more concrete suggestion of determining the scope of the third-country rules by way of designation of certain indices as strategic, with 75% of respondents (45 out of 60) either somewhat or totally in favour of this suggestion. A few stakeholders (17%; 10 out of 60) somewhat opposed or totally opposed and very few stakeholders (8.3%; 5 out of 60) neither opposed nor were in favour of this approach. It must be noted, however, that not all respondents agree with terming the in-scope benchmarks 'strategic', as the term can be taken to imply a political motivation rather than an objective evaluation of the importance of a certain benchmark for the EU market. Several respondents noted that they would prefer if in-scope benchmarks were simply termed 'designated'.

Respondents argue that a designation-based approach would be more proportionate. Some respondents caution not to jeopardize the level playing field. In their view, any removal of the scope of the BMR should apply to both EU and non-EU administrators.

5. DIVERGING VIEWS ON CRITERIA FOR DESIGNATION

The consultation put forward a non-exhaustive list of 9 factors that could be taken into account to decide whether a benchmark needs to be designated as strategic. This yielded relative majorities² in favour of the following factors:

- Notional amount / value of assets referencing the benchmark in the EU (38 out of 53 totally in favour or somewhat in favour)
- Type of benchmark (interest rate, commodity, equity, etc.) (32 out of 51 totally in favour or somewhat in favour)

Other factors did not receive a (clear) majority, such as:

- Regulatory status of administrator in home jurisdiction (24 out of 52 totally in favour or somewhat in favour)
- Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU) (25 out of 52 totally in favour or somewhat in favour)
- Type of use (determination of the amount payable under a financial instrument, providing a borrowing rate, measuring the performance of an investment fund) (14 out of 52 totally in favour or somewhat in favour)

¹ The other is the Austrian FMA, cautioning only that a more lenient regime for non-EU administrators might skew the playing field against EU administrators.

² I.e., the number of respondents selecting the options 'totally in favour' or 'somewhat in favour' was larger than the number of respondents selecting 'totally against' or 'somewhat against'.

- Notional amount / value of assets referencing the benchmark worldwide (15 out of 52 totally in favour or somewhat in favour)
- Core activity of the administrator (bank, trading venue, etc.) (10 out of 52 totally in favour or somewhat in favour)
- Use of EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks) (8 out of 49 totally in favour or somewhat in favour)
- Type of user (investment fund, credit institution, CCP, etc.) (9 out of 51 totally in favour or somewhat in favour)

Respondents made several alternative suggestions of factors to take into account in determining whether a benchmark warranted designation. One respondent suggested to take into account the influence of a benchmark on financial stability, market integrity and the real economy in the EU. Another respondent favoured the criterion of whether an index relies on contributions of input data. Finally, one respondent suggested to designate benchmark administrators with commercial interest or purpose and a threshold above EUR 1 000 000 in index data licence revenues⁷

With none of the other suggested factors having received clear approval or rejection, we note that 40 out of 64 respondents would agree with the Commission being granted powers to designate benchmarks on a case-by-case basis, with only 6 respondents against (5 non-EU benchmark administrators and 1 asset management industry trade association).

Finally, when it comes to supervising strategic non-EU benchmarks, respondents agreed that this should be ESMA's role (42 out of 64 in favour, with 9 against). On the question whether to task ESMA also with the supervision of EU-based benchmarks that qualify as 'strategic', 38.6% (22 out of 57) also fully agree with this proposal, with a further 14% indicating that they somewhat agree (8 out of 57).

6. THE SCOPE OF THE THIRD COUNTRY RULES INTERACTS WITH THE INTRA-EU SCOPE OF THE BMR

As explained in the introduction, the BMR has to strike a balance between trying to level the playing field between EU and non-EU benchmark administrators and trying to do the same between EU and non-EU benchmark users. Hence, the questionnaire asked whether the internal scope of the BMR would require amendment along similar lines as the third country rules. Here, 80% of the respondents (44 out of 55) agree, with only 9% of the respondents against (5 out of 55). The suggestion that the BMR could function as a voluntary opt-in regime received mixed responses (27 out of 57 in favour, 19 out of 57 against). The most frequently cited reason respondents oppose opt-in is that it would not create a level playing field. Some respondents argue that the current rules have been in place for a relatively short period and that they do not see the need to adjust the current regulatory framework already now. In terms of consumer protection and benchmark supervision, the opt-in regime is also considered to be problematic.

7. EU BENCHMARK LABELS SHOULD BE AN OPEN STANDARD UNDER EU SUPERVISION

As a final topic, the questionnaire looked into the status of the labels for EU Climate Benchmarks (the labels for EU Climate Transition Benchmarks and EU Paris Aligned

Benchmarks introduced by the 2019 Climate Benchmark Regulation) as well as a potential label for an EU ESG Benchmark, notably as regards the accessibility of the labels to non-EU administrators and the supervision of the use of the labels.

Respondents broadly agreed that the labels should be open standards, accessible to EU as well as non-EU administrators (61.5%; 32 out of 52). Only a minority stakeholders (17.3%; 9 out of 52) expressed an opposite view for climate benchmarks. For potential ESG benchmarks, respondents think that an EU ESG benchmark label, if created, should also be accessible to third-country administrators (73.5%; 36 out of 49). Only 2 respondents disagree to opening up an EU ESG benchmark label to third-country administrators. The reason given is to ensure proper supervision of an EU ESG benchmark label.

As to the supervision of EU benchmark labels, there seems to be a slight preference for third country administrators using the labels to be under a form of direct supervision by ESMA (53%; 24 out of 45 agreeing fully or somewhat) rather than under an endorsement-like system whereby an EU administrator would assume regulatory responsibility for the use of the label (45%; 22 out of 49 agreeing fully or somewhat).

A clear majority of respondents do not agree that EU benchmark users should be required to only use benchmarks that comply with the EU labels' standards on a continuous basis. They further disagree that users should be required to gather the necessary information to verify that the benchmark's methodology is considered consistent with the EU standards, and for ceasing use of those benchmarks in case the labels are misused (70.4%; 38 out of 54).

On whether the creation of an EU ESG benchmark label would help enhance the quality of ESG benchmarks and whether a context where a significant share of those benchmarks are administered in a third country would influence their appraisal, respondents provided mixed views (36,2% do not agree vs 32% do agree and 32% neither agree nor disagree).

8. MARKET PARTICIPANTS REQUIRE ADVANCE NOTICE OF RULE CHANGES

Finally, a point not directly consulted on but raised spontaneously by a significant number of respondents is that preparations to comply with rules of this type need to start well ahead of their entry into application. For this reason, several respondents stressed that it is vital to be informed ahead of time of the Commission's intentions and expected timeline for rule changes. Specifically, several respondents also mentioned that the current timeline, with a report from the Commission to the European Parliament and Council due by 15 June 2023 would de facto require that the Commission exercise its power to further suspend the entry into application of the third country rules until 1 January 2026.