

12 August 2022

Mr Tilman Leuder
Head of Unit
Directorate-General for Financial Stability, Financial Services and Capital Markets Union
European Commission
1049 Brussels
Belgium

Submitted via file upload

Dear Tilman,

**TARGETED CONSULTATION ON THE REGIME APPLICABLE TO THE USE OF BENCHMARKS
ADMINISTERED IN A THIRD COUNTRY ("THE CONSULTATION")**

MSCI is a leading provider of critical decision support tools and services for the global investment community. On 5 March 2018, MSCI Limited was granted authorisation by the UK's Financial Conduct Authority as a benchmark administrator.¹ We would like to thank the European Commission ("Commission") for considering the application of the EU Benchmark Regulation ("BMR") in respect of benchmarks administered in a third country. We have three primary comments which should be read together with the responses to the questionnaire in the Consultation.

1. The new category of benchmarks should be clearly defined

MSCI supports the review of the scope of the BMR. If the Commission introduces a new category of benchmarks, we would request that sufficient certainty is provided in any proposal so that it is clearly defined which benchmarks will be considered as "strategic or "systemic" and what the framework will be for the ongoing determination of the new benchmark category. We would propose that the Commission consider using a risk-based approach in developing the new category of benchmarks and consider which benchmarks may present systemic risk to the EU capital market.

The definition for the new category of benchmarks should include: (1) the type of use of the benchmark (as currently defined in the BMR); (2) the type of benchmark; and (3) the substitutability of the benchmark. A substitutable index should not be considered strategic or systemic.

**2. Amendments to the BMR should not result in multiple supervisory authorities
supervising a benchmark administrator**

We understand that the intention of the Consultation is limited to review of the regulatory framework for third-country benchmarks. However, if the Consultation leads to the review of the

¹ <https://www.msci.com/index-regulation>

regulatory framework for EU benchmark administrators, we would request that it not result in the supervision of a benchmark administrator by both ESMA and a national competent authority.

3. Support for the extension of the transition period to 31 December 2025

Owing to the uncertainty with respect to the administration of the third country regime under the BMR, and the potential for material change, we would request that the Commission extends the transition period to 31 December 2025, regardless of whether it proposes any amendments to the BMR as a result of the Consultation. Corporate actions that will be required following the conclusion of the Consultation will have a significant lead time and may involve human resources considerations, registration and company incorporation. An extension to end-2025 will provide benchmark administrators with sufficient time to implement any changes to their organisational structure and ensure the uninterrupted provision of services to EU regulated institutions.

Our responses to the targeted consultation are attached as Annex.

We welcome ongoing engagement with the Commission and look forward to discussing the outcome of the Consultation.

Yours sincerely,

/s

Neil Acres
Managing Director
Global Head of Government and Regulatory Affairs

Annex – MSCI response to the targeted consultation on the regime applicable to the use of Benchmarks Administered in a Third Country

Question 1.1 Is your organisation 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? (Select one that applies)

- **Yes**
- No
- Don't know / no opinion / not applicable

Please explain your answer to Question 1.1

As MSCI is currently a third country benchmark administrator vis-à-vis the EU, and per current BMR requirements, we would need to apply for endorsement or recognition in the EU for our indices to be available for regulatory use in the EU.

Question 1.2 How significant is the provision of benchmarks in the EU, as a proportion of your revenue derived from the provision of benchmarks worldwide? (Select one that applies)

- 0-20%
- **21-40%**
- 41-60%
- 61-80%
- 81-100%
- Prefer not to say
- Don't know / no opinion / not applicable

Question 1.3 To the extent possible, provide the aggregate notional amounts/values (unit: EUR 1,000) (or an estimate thereof) for the use of your organisation's third country benchmarks in the Union in each of the following settings. If the breakdown is not available, please provide the total value:

	Foreign exchange	Interest rate	Equity commodity	Other (please specify)	Total
Issuance of a financial instrument which references an index or a combination of indices					
Determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices					
Being a party to a financial contract which references an index or a combination of indices					

	Foreign exchange	Interest rate	Equity commodity	Other (please specify)	Total
Providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party					
Measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees					
Other (please specify)				Equity, Fixed Income and Blended Indexes estimated benchmark reference value as at May 2022 EUR 2,760 BN*	
Total				100%	

Question 1.4 Please provide a list of all your benchmarks or family of benchmarks for which you are aware that they are used by EU supervised entities.

Alternatively, please provide the number of such benchmarks

MSCI equity benchmark family MSCI blended benchmark family MSCI fixed income benchmark family

Question 1.5 Have overall compliance costs – including additional one-off and ongoing supervisory/registration fees incurred in the EU – acted as a deterrent for you to seek (or not to seek) compliance with the BMR, or slowed down the process towards compliance with the current third country regime? (Select one that applies)

- No, compliance costs (including supervisory/registration fees) did not influence our decision to seek (or not to seek) compliance with the BMR third country regime
- **Yes, compliance costs (including supervisory/registration fees) have slowed down our decision to seek compliance with the BMR third country regime**

- Yes, compliance costs (including supervisory/registration fees) have forced us to renounce to our project to seek compliance with the BMR third country regime
- Don't know / no opinion / not applicable

Please explain your answer to Question 1.5, distinguishing if relevant operational/organisational costs and financial costs such as supervisory/registration fees

MSCI was authorised as an EU benchmark administrator prior to Brexit and remained hopeful that an equivalence determination could be made by the EU regarding the UK regulatory framework. We did not wish to incur additional compliance costs pending further clarity around the treatment of third-country benchmarks in the EU.

Question 1.6 If you have already started taking measures to seek compliance with the current third country regime, anticipating its application as of 31 December 2023, please provide an estimation of the costs incurred by such measures

MSCI has consulted external counsel and the costs applicable in the last 12 months are in excess of EUR100 000 for basic legal advisory work on options under the third country regime. We expect this to increase significantly in preparation for the current end-2023 deadline.

Questions to all types of respondents

Question 2.1

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? (Select one that applies)

- 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**
- Don't know / no opinion / not applicable

Please explain your answer to Question 2.1

We support the proposal to identify benchmarks that will require supervisory review prior to being used in the EU by regulated entities. If the scope of the third country benchmark administrators regime is amended, the scope of the regulation of EU regulated benchmarks generally should also be amended. As per our cover letter, we would propose that the EU introduces a risk-based approach to the determination of the new category of benchmarks with a focus on those benchmarks that pose a systemic risk to the functioning of the EU capital market.

Question 2.2 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. (Select one that applies)

- 1 - Totally opposed
- 2 - Somewhat opposed
- 3 - Neither opposed nor in favour
- 4 - Somewhat in favour
- 5 - Totally in favour**
- 6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.2

Although MSCI will continue to subscribe to the IOSCO Principles for Financial Benchmarks in the administration of its indices, removing the third country regulatory burden could reduce the regulatory complexity for these indices to be used in the EU.

Question 2.3 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?

	1 (totally against)	2 (somewhat against)	3 (neither against nor in favour)	4 (somewhat in favour)	5 (totally in favour)	Don't know - No opinion - Not applicable
Notional amount/values of assets referencing the benchmark globally	X					
Notional amount/values of assets referencing the benchmark in the EU		X				
Type of use (determination of the amount payable under a financial instrument, providing a borrowing rate, measuring the performance of an investment fund...)					X	
Type of user (investment fund, credit institution, CCP, trade repository, etc.)	X					
Core activity of the administrator (bank, trading venue, asset manager, benchmark administrator, etc.)	X					

	1 (totally against)	2 (somewhat against)	3 (neither against nor in favour)	4 (somewhat in favour)	5 (totally in favour)	Don't know - No opinion - Not applicable
Regulatory status of administrator in home jurisdiction	X					
Type of benchmark (interest rate benchmark, commodity benchmark, equity benchmark, regulated-data benchmark, etc.)					X	
Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU)					X	
EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks)			X			
Other						

Please explain your answer to Question 2.3

Considering use of the benchmark (as one does today per BMR) as the base entry criteria, and thereafter the role that the relevant benchmark plays within the EU financial markets, coupled with the absence of a reasonable substitute benchmark, could signify a benchmark as systemic.

Question 2.4 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. (Select one that applies)

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 a)

We would not support a regulatory framework that determines a benchmark administrator as "strategic" or "systemic" because it is the benchmark that is deemed to be systemic rather than entire suite of benchmarks administered by the administrator. Therefore, an approach whereby the Commission is empowered to determine a specific benchmark as "systemic" against pre-determined criteria as set out under Level 2 legislation would be an appropriate framework.

b) ESMA should be given the task to supervise those third country 'strategic' benchmarks. (Select one that applies)

- 1 - Do not agree at all
- 2 - Do not agree
- 3 - Neither agree nor disagree
- 4 - Somewhat agree**
- 5 - Fully agree
- 6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 b)

MSCI agrees that ESMA would be the most suitable supervisor to oversee the use of "systemic" benchmarks in the EU where the administrator has no EU presence. However, it is important that the supervisory framework addresses the systemic risk introduced by the benchmark and does not seek to supervise the benchmark as if it was administered in the EU. Furthermore, depending on the outcome of the Consultation, we would caution against an approach where a benchmark administrator is subject to both supervision for indices administered in the EU by a national competent authority and by ESMA for the "systemic benchmark".

c) ESMA should also be tasked with the supervision of EU-based benchmarks that qualify as 'strategic'. (Select one that applies)

- 1 - Do not agree at all
- 2 - Do not agree
- 3 - Neither agree nor disagree**
- 4 - Somewhat agree
- 5 - Fully agree
- 6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 c)

We do not have a preference as to whether the new category of benchmark is supervised by ESMA or a national member state regulator. However, as per our cover letter, we would request the Commission to avoid a regulatory framework that would require supervision of the new category of benchmarks by ESMA and supervision of EU benchmark administrators by national member state regulators.

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. (Select one that applies)

- 1 - Do not agree at all
- 2 - Do not agree
- 3 - Neither agree nor disagree
- 4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 d)

If the scope of the third country benchmark regime were to be amended, the scope of the regulation of EU regulated benchmarks should also be amended.

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. (Select one that applies)

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 e)

If the Commission makes the determination to amend the requirements for third-country benchmark administrators, this should not be re-opened through an opt-in regime. The IOSCO Principles for Financial Benchmarks serves as an internationally-agreed set of principles to which benchmark administrators can opt-in, where appropriate.

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. (Select one that applies)

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 f)

It should not be a requirement for a benchmark administrator to be supervised in the EU for it to use an EU label. There are alternative means to ensure that the label is correctly applied, for example, requiring an independent external audit of the index against the EU requirements.

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). (Select one that applies)

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 g)

Introducing an endorsement regime for an EU-label would be unnecessary if an alternative to EU-supervision for entities assigning EU labels is found. It is important that international administrators are encouraged to assign EU labels, especially where they may have market recognition in other countries because this will further facilitate the investment by international investors into the EU capital market.

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

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 h)

We understand this question refers to EU labels. We are of the view that options exist for the assignment of labels to be overseen through non-supervisory bodies, such as external auditors.

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. (Select one that applies)

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.4 i)

We support the introduction of a regulatory framework for “systemic benchmarks” with no additional requirements for non-systemic benchmarks. If a benchmark is defined (and regulated) as a “systemic benchmark”, there should be no additional requirements for users to use those benchmarks.

Question 2.5 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?

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.5

Benchmark quality is unrelated to its publication under a specific label or administration in a particular location. The quality of the benchmark is strengthened through its adoption of the IOSCO Principles for financial benchmarks as Governance, transparency of the methodology of the index and mitigation of conflicts of interest all support the quality of a benchmark.

Question 2.6 Should such an EU ESG benchmark label be created, should this label be accessible to third country administrators?

1 - Do not agree at all

2 - Do not agree

3 - Neither agree nor disagree

4 - Somewhat agree

5 - Fully agree

6 - Don't know / no opinion / not applicable

Please explain your answer to Question 2.6

Please see our response to Question 2.1.