



**EUROPEAN COMMISSION**

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

Securities markets

Financial 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-thirdcountry\\_en](https://ec.europa.eu/info/publications/finance-consultations-2022-benchmarks-thirdcountry_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 prejudice 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-thirdcountry\\_en](https://ec.europa.eu/info/publications/finance-consultations-2022-benchmarks-thirdcountry_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](mailto: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](#)<sup>1</sup> 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 disclosures](#) applicable to all benchmarks. Most of those measures apply since 10 April 2020. A [second review of this regulation](#)<sup>2</sup>, 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](#)<sup>3</sup>, 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.

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<sup>1</sup> [Regulation \(EU\) 2019/2089](#)

<sup>2</sup> [Regulation \(EU\) 2021/168](#)

<sup>3</sup> 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](https://ec.europa.eu/info/publications/finance-consultations-2019-benchmark-review_en)

## About you

**My role in relation with benchmarks is**

- **Benchmark administrator**
- **Supervised entity using benchmarks (i.e., supervised entities using a benchmark in the sense of the BMR)**
- End-user of benchmarks (e.g., investor or business using a benchmark)
- Other

**[If benchmark administrator is selected]: My organisation's status under BMR is currently**

- Authorised under Article 34(1)(a) BMR
- **Registered under Article 34(1)(b) BMR**
- Recognised under Article 32 BMR
- Endorsed under Article 33 BMR
- Endorsed under Article 33 BMR
- Other

**[If supervised entity is selected]: My organisation's status under BMR is currently**

- credit institution (as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013)
- an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU
- an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC
- a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC
- a UCITS or, where applicable, a UCITS management company as defined in Article 1(2) of Directive 2009/65/EC
- an alternative investment fund manager (AIFM) as defined in point (b) of Article 2(1) of Directive 2009/65/EC
- an institution for occupational retirement provision as defined in point (b) of Article 4(1) of Directive 2011/61/EU
- a creditor as defined in point (a) of Article 6 of Directive 2003/41/EC
- a non-credit institution as defined in point (b) of Article 3 of Directive 2008/48/EC for the purposes of credit agreements as defined in point (c) of Article 3 of that Directive
- **a market operator as defined in point (10) of Article 4 of Directive 2014/17/EU for the purposes of credit agreements as defined in point (3) of Article 4 of that Directive**
- a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012
- a trade repository as defined in point (2) of Article 2 of Regulation (EU) No 648/2012
- **an administrator as defined in point (6) of Article 2(1) of Regulation 2016/1011**

## CONSULTATION QUESTIONS

### 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

We consider that the rules are not fit for purpose as they pose a significant obstacle for supervised entities to secure access to third country benchmarks. That is particularly an issue where there is no appropriate substitute EU benchmark, which is a relevant scenario in relation to commodity benchmarks. This results in a competitive disadvantage for supervised entities.

For EEX, certain products and market areas would not be sustainable if the rules on third country benchmarks entered into force. This would reflect 30 billion notional value as well as the loss of all dry bulk freight trading in Europe. Please note that since the agreement with Nasdaq NFX for EEX to take over all of the interest in Nasdaq's dry bulk freight futures, EEX has made Europe the most liquid exchange for dry bulk freight futures trading. The closest as well as only competitor is SGX and would not have any problems with the third country regime as it is located outside of the EU. Also EEX wood pellet futures or LNG products would lose the respective underlying benchmarks.

2. More specifically, would you be in favor 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

We are in favor of such a regime, provided that a level playing field is ensured by applying the same regime to all internal market participants (already recognized third country administrators, EU based administrators and non-recognized third country administrators).

Generally, our view is that the regime would benefit from a more proportionate approach towards benchmark providers. However, this approach should apply to EU benchmark administrators as well as to third country benchmark administrators to ensure a level playing field. In this spirit, we would propose not to introduce a specific framework for third-country benchmarks under which only "strategic" benchmarks fall under the BMR. Rather, we would propose to de-scope the BMR, making it applicable only to critical benchmarks. The BMR needs to ensure appropriate consumers/investors protection while maintaining a level playing field for benchmark administrators. A de-scoping would

reduce unnecessary administrative burden while allowing the administrators and the regulator to focus on relevant risk.

Alternatively, a total exemption of commodity benchmarks from the BMR could be considered. Another option would be to revisit the exemption for small commodity benchmarks under Art. 2 (2) (g) BMR, which currently requires commodity benchmarks to be contributor based. We consider that this exemption should apply to all types of benchmarks regardless of the underlying input data. In addition, the threshold for the notional value of currently 100m EUR should be significantly increased.

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?

Comments on each criterion as per below:

Criterion	Totally against	Somewhat against	Neither against nor in favour	Somewhat in favour	Totally in favour	Explanation / justification
Notional amount/values of assets referencing the benchmark globally		X				Use of a benchmark in the EU as such does not trigger the applicability of the BMR to the third country benchmark administrator. Rather, the need for a third country administrator arises if it wants to attract supervised entities as benchmark users, because these entities can otherwise not use the benchmark (Art. 29(1) BMR). If the notional amount/values of assets referencing the benchmark globally are taken into account, third country benchmarks might come into the scope of application of the BMR even where there are only very few EU-based users. If applicability of the BMR is triggered in such circumstances, third country benchmark administrators might not see a business case for providing the benchmark to EU-based entities in the first place, or only provide the benchmark to non-supervised entities. Accordingly, notional amount/values of assets referencing the benchmark in the EU should be relevant.

Notional amount/values of assets referencing the benchmark in the EU					X	The criteria is relevant for the systemic relevance of the benchmark, it is easy to measure and it provides a level playing field for all administrators who compete against each other on a global basis.
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 use cases do not necessarily make a difference in terms of systemic relevance
Type of user (investment fund, credit institution, CCP, trade repository, etc.)	X					The user profiles do not necessarily make a difference in terms of systemic relevance
Core activity of the administrator (bank, trading venue, asset manager, benchmark administrator, etc.)	X					The core activity of the administrator does not necessarily make a difference in terms of systemic relevance
Regulatory status of administrator in home jurisdiction	X					Even if an asset manager or an issuer of a structured product are supervised under a specific regulation, the requirements of these regulations are different from the BMR which again would be against our key ask to ensure that all administrators have a level playing field.
Type of benchmark (interest rate benchmark, commodity benchmark, equity)			X			The type of benchmarks is a qualitative element that takes into account the different level of risk associated with a benchmark. In particular,

benchmark, regulated-data benchmark, etc.)						<p>contributor-based benchmarks pose a higher risk than regulated data benchmarks in terms of input data integrity and/or transparency.</p> <p>However, the criterion “type of benchmark” does not resolve the proportionality issue. In this sense, we would propose that the whole BMR should simply be reduced to critical benchmarks under the current BMR as the risks related to non-critical benchmarks in terms of manipulation and errors are much smaller (noting also that for commodity benchmarks the differentiation between critical and non-critical benchmarks is the only relevant one, Art. 19 (1) subparagraph 2 BMR).</p> <p>In addition, reliance on the typology of benchmarks as a criterion is also an issue because there are certain gaps in the typology of benchmarks. The typology does not sufficiently take into account that there are benchmarks that are neither based on regulated data nor on contributions. These are benchmarks which are based on data that is publicly available (even if placed behind a paywall) but does not directly stem from a source mentioned in Art. 3(1)(24)(a) BMR. These benchmarks would appear to be less risky than contributor-based benchmarks due to the increased transparency as to the input data. As a result of that gap, commodity benchmark based on such publicly available information are subject to Annex II of the BMR, which would appear to be tailored for contributor-based benchmarks.</p>
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Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU)		X				Making the lack of substitutability a criterion that would in and of itself be sufficient for qualifying a benchmark as strategic would have the adverse effect that supervised entities do not get access to a specific third country benchmarks where they are – in the absence of an appropriate EU-based substitute – most reliant on access to that benchmark. In particular for commodity benchmarks, this is a relevant scenario.
EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks)				X		These labels require regulation by design since it implies a quality standard and a level of harmonization which needs to be guaranteed.
Other: please specify						The whole BMR should be simply reduced to critical Benchmarks.

In sum, instead of introducing a specific framework for third-country benchmarks under which only “strategic” benchmarks fall under the BMR, we would propose to de-scope the BMR, making it applicable only to critical benchmarks.

## QUESTIONS SPECIFIC TO SUPERVISED ENTITIES USING BENCHMARKS

### 1. To what extent does your activity rely on benchmark administered by third country entities?

Not at all – some reliance – moderate reliance – **strong reliance** – exclusive reliance

If your answer indicates some reliance on third country benchmarks, please provide, if available, notional amounts / values (unit: EUR 1 000) (or an estimate thereof) for your organisation’s use of third country benchmarks in each of the following settings. If the breakdown is not available, please provide the total value:

	Type of benchmark
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Type of use		Foreign exchange	Interest rate	Equity	Commodity	Other – please specify	Total
	issuance of a financial instrument which references an index or a combination of indices;				30 billion EUR		

**2. What is / are your organisation's reasons for using non-EU benchmarks? [more than one answer possible]**

- ☐ no particular reason
- ☐ established practice / established business relationship with benchmark administrator
- ☐ **no equivalent EU benchmark available**
- ☐ equivalent EU benchmark available, but not cost free or more expensive
- ☐ other – please specify

**3. Please provide a full list of all third country benchmarks your organisation uses as well as their administrators.**

Benchmark	Administrator	EEX Product(s) Referencing the Benchmark
Platts JKM LNG front month	Platts	EEX JKM LNG Natural Gas Month Future
Argus Wood Pellet cif NWE Index	Argus	EEX Wood Pellets CIF NWE (Argus) Future
Capesize Dry Bulk 5 Time Charter Average Freight Index	Baltic Exchange Information Services Ltd.	EEX Baltic Capesize 5TC Freight Future
Panamax Dry Bulk 4 Time Charter Average Freight Index	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax 4TC Freight Future
Panamax Dry Bulk 5 Time Charter Average Freight Index	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax 5TC Freight Future
Supramax Dry Bulk 10 Time Charter Average Freight Index	Baltic Exchange Information Services Ltd.	EEX Baltic Supramax 10TC Freight Future

<b>Handysize Dry Bulk 7 Time Charter Average Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Handysize 7TC Freight Future
<b>Panamax P1A_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P1A_82 Freight Future
<b>Panamax P1E_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P1E_82 Freight Future
<b>Panamax P2A_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P2A_82 Freight Future
<b>Panamax P2E_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P2E_82 Freight Future
<b>Panamax P3A_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P3A_82 Freight Future
<b>Panamax P3E_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax P3E_82 Freight Future
<b>Panamax P6_82 Freight Index</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Panamax Pacific P6_82 Freight Futures
<b>C3 Capesize Dry Bulk Voyage Route Freight (Tubarao - Qingdao)</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Capesize C3 Freight Future
<b>C5 Capesize Dry Bulk Voyage Route Freight (Western Australia - Qingdao)</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Capesize C5 Freight Future
<b>C7 Capesize Dry Bulk Voyage Route Freight (Bolivar - Rotterdam)</b>	Baltic Exchange Information Services Ltd.	EEX Baltic Capesize C7 Freight Future

**4. Do you anticipate that all third country benchmarks that you might wish to use in offering financial services and products in the future (i.e., post 31 December 2023) will be either deemed equivalent, recognised or endorsed for use in the Union under the current BMR third country framework?**

**If so, please explain.**

**If not, please indicate the benchmarks that you might wish to reference but that will not be recognised or endorsed for use by supervised entities in the Union. + explain**

We doubt that the third country benchmarks that we wish to use in offering financial services and products in the future (i.e., post 31 December 2023) will be either deemed equivalent, recognised or endorsed for use in the Union under the current BMR third country framework. All third country benchmarks listed in our answer to Question 3 are affected. The reason why we are doubtful is because there is no evidence that these providers will seek access to the EU. We

understand this is because the costs of becoming compliant outweigh the benefits of continuing to offer the benchmark to EEX, who is in most cases the sole user of these benchmarks within the EU. As for EEX there are no alternative benchmarks in the EU. EEX wood pellet, LNG and fry bulk freight business are fully dependent on the provider seeking access or not.

**5. Do you believe that the current grandfathering provisions in the BMR, Article 51 paragraph 5, suffice to ensure that you have access to all indices that you need for managing your portfolio of financial products and services?**

- Yes, they will suffice.
- **No, our activities will be affected by the entry into application of the BMR third country regime despite the grandfathering provisions.**

Please refer to our answer to Question 4.

Generally, our view is that the regime would benefit from a more proportionate approach towards benchmark providers. However, this approach should apply to EU benchmark administrators as well as to third country benchmark administrators to ensure a level playing field. In this spirit, we would propose not to introduce a specific framework for third-country benchmarks under which only “strategic” benchmarks fall under the BMR. Rather, we would propose to de-scope the BMR, making it applicable only to critical benchmarks. The BMR needs to ensure appropriate consumers/investors protection while maintaining a level playing field for benchmark administrators. A de-scoping would reduce unnecessary administrative burden while allowing the administrators and the regulator to focus on relevant risk.

Alternatively, a total exemption of commodity benchmarks from the BMR could be considered. Another option would be to revisit the exemption for small commodity benchmarks under Art. 2 (2) (g) BMR, which currently requires commodity benchmarks to be contributor based. We consider that this exemption should apply to all types of benchmarks regardless of the underlying input data. In addition, the threshold for the notional value of currently 100m EUR should be significantly increased.

**6. To what degree have the benchmark administrators whose third country benchmarks you use already communicated on the conditions for the availability of these benchmarks beyond 31 December 2023, that is to say after the third country provisions start applying? Among benchmark administrators that have communicated on such availability, how many indicated that their benchmarks will not be available, or are likely to be unavailable, beyond 31 December 2023?**

**None** / some / most / all

+ explain your answer

Whereas Platts has communicated on the conditions for the availability of certain benchmarks beyond 31 December 2023, there has been no communication on the benchmark which is of interest to us, which is Platts JKM LNG front month.

Argus and the Baltic Exchange did not communicate on any benchmark so far.

**7. In light of the answers above, please provide your estimation of the impact of the entry into application of the rules on third country benchmarks in the BMR on your activities (e.g. on revenues or costs)? Please complement, if possible, with a quantitative estimation of the expected impact.**

No/negligible impact – slight impact – medium impact – severe impact – **some / all of our activities would not be sustainable.**

+ explain your answer

As suggested above, **certain products and market areas** would not be sustainable if the rules on third country benchmarks entered into force. This would reflect 30 billion notional value as well as the loss of all dry bulk freight trading in Europe. Please note that since the agreement with Nasdaq NFX for EEX to take over all of the interest in Nasdaq's dry bulk freight futures, EEX has made Europe the most liquid exchange for dry bulk freight futures trading. The closest as well as only competitor is SGX and would not have any problems with the third country regime as it is located outside of the EU.

**8. Do you anticipate 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 at the latest?**

**Yes/No**

+ please explain your answer

The dry bulk freight market is shared by EEX and SGX, with EEX holding slightly more than the majority of the market share. The market is atypical compared to other commodity markets as almost all trades are broker facilitated and exchange cleared, with no OTC market.

Should EEX no longer be able to use the third country benchmarks on which these dry bulk freight futures are based, there would only be one exchange left offering trading of dry bulk freight contracts, with SGX being outside of the EU and hence having no issue with the third country regime.

**9. Do you / does your organisation use benchmarks advertising ESG features that are administered in a third country? If yes, what is your estimation of the share of those ESG benchmarks you use that are administered in a third country?**

**Yes/No**

+please explain your answer