European Securities and Markets Authority

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ESMA's response to the Commission's consultation on the BMR review

1 Introduction

ESMA welcomes the opportunity to respond to the Commission's Consultation on the BMR review (hereafter "the Consultation")[1].

The Benchmarks Regulation (BMR)[2] entered into application on 1 January 2018. The Third Country (TC) benchmarks are still under a grace period until 31 December 2023 (with a possible extension until 31 December 2025) where the use in the Union of TC benchmarks not yet compliant with the BMR is permitted. Currently the BMR envisages two options for TC administrators willing to apply in the EU; (i) recognition (whereby ESMA is the competent authority responsible for the recognition and supervision of TC administrators) or (ii) endorsement (whereby national competent authorities (NCAs) are responsible for the endorsement and supervision of TC benchmarks). Pursuant to Article 54(6) of the BMR, the Commission should review the BMR and submit a report to the European Parliament and to the Council by 15 June 2023. The Consultation covers the topics of the continued use by supervised entities of TC benchmarks and the potential shortcomings of the current framework. The majority of the questions raised in the Consultation targets specific market participants (i.e. EU and non-EU administrators or users of benchmarks) and aims at collecting quantitative and qualitative information on the state of the market and the use of TC benchmarks in the EU.

The Consultation also includes a separate section addressed to all types of respondents. This section is relevant to ESMA as well as to NCAs since it aims at collecting views on the functioning of the current TC regime and introduces the proposals of an alternative regulatory and supervisory framework based on the concept of "strategic" benchmarks. In this response, ESMA wishes to share with the Commission some views on this section.

2 Questions to all respondents

Question 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?

[1] https://ec.europa.eu/info/consultations/finance-2022-benchmarks-third-country_en
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011

Those rules are not fit-for-purpose, and should be reviewed

Currently the BMR regime applies to all EU-based administrators. For TC administrators there are still transitional provisions until 31 December 2023 (with a possible extension until 31 December 2025).

Based on Article 29 of the BMR, supervised entities can only use TC benchmarks included on ESMA's dedicated register. On 1 January 2018, ESMA set up the registers of all administrators and TC benchmarks subject to the BMR. As of June 2022, the registers include 11 TC administrators and more than 16.000 TC benchmarks.

During this transitional period, EU supervised entities can continue to use the benchmarks provided by TC administrators even if they are not yet included on ESMA's register.

At global level, so far very few jurisdictions have followed a similar regulatory approach as the EU with regard to the provision and use of benchmarks. Therefore, the scope of the regulatory regimes for financial benchmarks differs significantly between the EU and other jurisdictions, notwithstanding the international principles for Financial Benchmarks introduced by IOSCO in 2013[3]. Even considering those few TC jurisdictions where a regulatory framework for benchmarks is in place, there is a key difference with the EU approach since those third countries, with the exception of the UK (which has not changed its national regulatory framework since the UK left the EU), have opted for a narrower scope of the regulation and supervision, limited to the most critical or systemic financial benchmarks administered in their respective jurisdictions, whereas the BMR covers all types of benchmarks used in the EU.

The consequences of the current legal framework as regards the TC regime impact both the benchmark administrators as well as the availability of benchmarks to EU investors. With regard to benchmark administrators, during the current transitional period, there is an unlevel playing field for EU administrators, which are obliged to comply with the BMR requirements, whereas their non-EU competitors are not.

With regard to the availability of benchmarks to EU investors, pending the outcome of the Consultation which will provide additional data on the use of TC benchmarks in the EU, ESMA has retrieved some data from a commercial database on the number of TC administrators providing benchmarks, and therefore potentially available for use in the EU. The total number of TC administrators providing benchmarks available to investors or users in the EU is around 330, out of which only 11 (i.e. 3%) are already authorised to be used in the Union under one of the TC regimes. 20% are exempted pursuant to Article 2 on the scope of the BMR. Finally, the remaining 77% of those TC administrators provide benchmarks that are not yet subject to the BMR. Should those TC administrators not apply for recognition or endorsement before the expiration of the transitional period, hundreds of thousands of benchmarks will not be accessible anymore to EU supervised entities and thus for use in the EU, which could be detrimental to the functioning of the EU financial markets.

[3] Principles for Financial Benchmarks (iosco.org)

If there is no further extension of the transitional period, it can be anticipated that the larger administrators based in third countries would be willing to apply in the EU, if they have not done it already. That would include more likely the UK-based administrators, which were already subject to BMR before the UK left the EU. However, it is uncertain whether small and medium TC administrators will apply for recognition or endorsement before the expiration of the transitional period (as mentioned in question 4.e, while ESMA is already engaging with potential applicants for recognition, those TC administrators account for a minimal portion in comparison to the 300plus figure outlined above). In such circumstance, while the extent of use of these benchmarks is not entirely clear, the fact that EU supervised entities will not have access anymore to the widest range of TC benchmarks is evident.

Therefore, when the transitional period expires, the wide scope of the BMR, combined with the limited progress made on the alignment of the TC regulatory regimes with the EU one, would lead to the undesirable outcome of limited availability of TC benchmarks to EU investors as opposed to their non-EU peers, which could impair the competitiveness of EU investors and, more generally, the EU financial market.

To ensure the smooth functioning of the internal market and the availability of TC benchmarks for EU investors after the end of the transitional period, ESMA is of the view that the restrictions of the use of TC benchmarks should be removed for some benchmarks not widely used in the EU, following a risk-based approach. To that end it is essential to change the scope of the BMR as regards the TC regime, while continuing to ensure a level playing field between EU and TC administrators and avoid circumvention of the BMR.

Since the scope of the Consultation focuses on the continued use of TC benchmarks in the Union after the end of the TC transitional provision, ESMA has focused its response accordingly. Nevertheless, it is worth mentioning that ESMA has identified some critical issues with the current framework and stands ready to highlight them to the Commission together with related possible enhancements. Those improvements could be implemented together with the Commission's proposed changes to the scope of the BMR. Several issues were already raised in ESMA's response to the first BMR review of 2020[4] (BMR review 2020), whereas others are additional and have been identified following that review.

Question 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.

Somewhat in favour

The response to this question would be "Totally in favour" if the level playing field between EU and TC administrators were ensured.

[4] ESMA responds to European Commission consultation on the Benchmark Regulation review (europa.eu)

To ensure the smooth functioning of the internal market and the availability of TC benchmarks for use in the EU after the end of the transitional period, the Commission is suggesting creating a new category of 'strategic' benchmarks which would be the only ones subject to mandatory restrictions of use, similar to the current rules. Under this approach, the use by EU supervised entities of all other TC benchmarks that are not designated as 'strategic' would be in principle free, without any additional requirement attached to the status of the administrator.

Considering the aforementioned discrepancies between the EU and the TC regulatory frameworks (see question 1) and pending additional data to be collected through the Consultation that will allow a more accurate analysis on the use of TC benchmarks in the EU, ESMA sees merit in exploring a change of the current rules by imposing regulatory restrictions only to certain TC benchmarks deemed 'strategic'. These restrictions are compatible with the risk-based and proportionality principles. Stricter regulatory obligations and supervision should apply to those categories of benchmarks that are strategically important in the EU and which pose the highest risks to investor protection and financial stability.

ESMA suggests to the Commission to perform further analysis to ensure that no unintended consequences occur if the legislation will be amended accordingly. For example, to avoid excessive complexity of the regulatory framework, ESMA suggests reconsidering the several other categories of benchmarks currently identified by the BMR (e.g. significant and non-significant) with the aim to simplify the regulatory framework. For instance, in ESMA's view the introduction of 'strategic' benchmarks would make the two categories of significant and non-significant unnecessary (see also response to question 3). Regarding the critical benchmarks category, since it is linked to additional BMR requirements (e.g. the college and related powers), ESMA believes that this category should be maintained.

A reduction of the scope of the BMR would imply that only a portion of administrators providing TC benchmarks in the EU will be subject to mandatory compliance with the BMR. On one hand, the proposed approach has the benefit to be risk-based as it intends to capture under the regulatory scope those administrators (and related benchmarks) which are more relevant for, and pose the higher risks to, EU investors and financial markets. On the other hand, the resulting narrowed regulatory scope implies that a number of administrators and benchmarks would remain available to EU investors while not being subject to EU supervision and in principle being allowed to elude the standards set by the BMR. From an investor protection perspective, this approach would inherently pose more risks when compared to the current BMR regime which does not allow for any exception to mandatory compliance and supervision. However, it is to be noted that the 'no-exception' approach underpinning the current BMR framework has relevant drawbacks which should not be disregarded. In particular, once the transitional regime expires, the EU supervised entities would be subject to regulatory restrictions applicable to all the benchmarks they use, restrictions which are not replicated at global level and do not equally apply to market participants outside the EU. That would hinder the competitive position of EU supervised entities vis-à-vis their non-EU peers since they would be prevented from accessing the same investment and business opportunities as their non-EU peers. In light of the above considerations and mindful of the discrepancies between the different benchmark regulatory frameworks across the globe, imposing regulatory restrictions only to selected 'strategic' benchmarks seems more appropriate. Such a risk-based approach seeks to achieve the right balance between regulation and competitiveness and aims at

avoiding the undesirable result that a stricter regulation, instead of introducing necessary safeguards, would rather be detrimental to the functioning of EU financial markets and EU market participants.

Furthermore, to mitigate the possible risk of lower investor protection resulting from a reduced scope of the BMR, ESMA believes that it could be helpful to leverage on the IOSCO Principles for financial benchmarks. Those Principles include requirements on, amongst others, the governance, quality and integrity of the benchmarks and the methodologies as well as the related transparency. In particular, as a risk-mitigation measure, ESMA suggests requiring EU supervised entities to verify that the administrator has been certified as compliant with the IOSCO Principles before using benchmarks that are outside of the BMR scope.

While such requirement would limit, to a certain extent, the accessibility of EU supervised entities to the benchmarks they are allowed to use, nonetheless it would be a more appropriate trade-off between promoting investor protection and supporting market competitiveness. Specifically, it would be significantly less invasive when compared to the restrictions imposed by the current regime once the transitional period expires while, at the same time, contributing to a safer market and higher conduct standards in the EU.

Moreover, ESMA believes that the criteria applied to identify those strategic benchmarks can also contribute to minimise the aforementioned risks (see response to question 3).

Question 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?

ESMA sees merit in defining different types of criteria, both quantitative and qualitative, since such approach would allow to capture the different elements which can make a benchmark systematically important in the EU - hence 'strategic'.

On the quantitative criteria, ESMA believes that they should refer to the notional amount of derivatives, the nominal amounts of financial instruments other than derivatives and the values of investment funds referencing benchmarks, as these amounts or values will provide an indication on the systemic importance of the benchmark in the EU.

ESMA believes that the type of benchmark and the different labels should also be considered as criteria to identify these strategic benchmarks. This is because different types of benchmarks have different characteristics, vulnerabilities and risks. For example, interest rate benchmarks play an important role in the transmission of monetary policy whereas commodity benchmarks have unique characteristics and a wide impact across the economy and society. Also, although equity benchmarks are generally based on regulated data, they might also embed a financial stability risk when they are extensively referenced in financial instruments, most notably in UCITS and ETF. The current BMR framework considers that a regulated data benchmark cannot be classified as a critical benchmark. ESMA believes that an extensive use of a benchmark (be it regulated data or not) may pose financial stability risks and should be therefore considered in the criteria for strategic benchmarks (as also highlighted below). Also,

the labelled climate benchmarks have a strategic dimension to ensure the reorientation of capital flows towards sustainable investment to achieve sustainable and inclusive growth.

Moreover, the absence of substitutability of the benchmark and the (lack of) existence of a market-led substitute should also be considered. In case of few market-led substitutes the cessation of such benchmark might have a significant and adverse impact on market integrity, financial stability, consumers, the real economy or the financing of households or businesses in one or more Member States.

The regulatory status of the administrator in its home jurisdiction may provide an indication of the soundness of the benchmark provided and its compliance with the national regulation.

Therefore, and to identify all benchmarks posing potentially significant risks of manipulation, ESMA suggests addressing the concern on lower investor protection resulting from a reduced scope of the BMR by refining the criteria to ensure they capture the benchmarks that are more prone to manipulation by considering the type of input data used for the calculation of the benchmark. For instance, a benchmark based on contributions as defined in Article 3(1)(8) of the BMR would be more prone to manipulation.

Further, ESMA believes that the impact or risk on the market would be better captured by adding a new criterion on benchmarks with a larger influence on financial stability, market integrity and the real economy in the EU. Many of the benchmarks that have large impact on the EU economy are provided from outside the Union, including the most common foreign exchange indices. These benchmarks include the most used currency pair: the EUR/USD. According to ESMA estimates, based on EMIR data as of Q1 2022, the notional value of derivatives whose underlying is the EUR/USD exchange rate is in the trillions of EUR. This exchange rate affects not only economic growth in the EU, but also inflation via the price of imported goods. Additionally, this type of benchmarks does not have easily identifiable market-led substitutes. For these reasons, the foreign exchange indices could be deemed as systemically important in the EU vis-à-vis the suggested additional criterion.

Another type of benchmark that has wide influence on EU economy is commodity benchmarks, which are usually provided from outside the EU. According to ESMA's estimates, based on EMIR data as of Q1 2022, the notional value of derivatives referencing, directly or indirectly these types of benchmarks may amount to EUR 50 billion. However, the importance of these indices belonging to the category of energy or food commodities, goes beyond the value of derivatives referencing to it. Rising commodity prices intensify EU inflationary pressures while, at the same time, the high volatility of commodities poses significant risks to the EU economy. These dynamics have clear and lasting impact on the balance sheet of European households. Within the commodity universe, also precious metal indices are widely used, especially in UCITS and ETF. For the main commodity benchmarks, there are no clear market-led substitutes, and the Commission should consider them when defining the criteria to identify strategic benchmarks.

Regarding the remaining criteria suggested in the Consultation, ESMA believes that the type of use or the core activity of the administrator are not key criteria to discriminate between 'strategic' and non-strategic benchmarks. This is because, there is no higher impact on the

market or higher risk that relate to such criteria. With regard to the type of user, ESMA believes that the focus should be on the two categories of retail versus non-retail.

When comparing the current BMR regime with the one based on 'strategic' benchmarks, ESMA anticipates that, as a minimum, the benchmarks currently classified as significant would likely be designated as 'strategic' based on the quantitative or the substitutability criteria. Other suggested criteria would also result in designating as 'strategic' some benchmarks that are currently classified as non-significant, for instance benchmarks that are: (1) labelled as EU CTB / EU PAB; (2) more prone to manipulation, for example when the input data comply with the definition of contribution of input data under Article 3(1)(8) of the BMR.

To sum up:

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			
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 (retail vs non-retail)				X		
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	
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: Type of input data					X	
Other: Benchmarks with a larger influence over financial stability, market integrity and the real economy in the EU					X	

Question 4.a): 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.

Agree somewhat

ESMA believes that 'strategic' benchmarks should be designated in a transparent and objective manner. ESMA also highlights the need for a smooth process, which allows a prompt designation of strategic benchmarks. The objective should be to ensure that administrators of 'strategic' benchmarks fall under the remit of BMR without delay, not to impair the supervision of such systematically important benchmarks in the Union and protect financial stability and good functioning of financial markets.

Moreover, for the list of strategic benchmarks to be promptly updated, ESMA suggests that the designation should be made public on ESMA's website. This will allow a smooth and transparent communication to the market on the strategic benchmarks designated.

Question 4.b): ESMA should be given the task to supervise those third country 'strategic' benchmarks.

Agree completely

As of January 2022, ESMA is the supervisor of administrators providing the EU critical benchmarks and the TC recognised administrators. ESMA therefore supports being the supervisor of those TC 'strategic' benchmarks in light of their systematic importance in the EU. Financial products using systematically important benchmarks are available in all Member States. Those benchmarks are of crucial importance for the functioning of financial markets and financial stability in the Union. The supervision of such benchmarks should therefore take a holistic view of potential impacts, not only in the Member State where the administrator is located and the Member States where its contributors are located, but across the entire Union.

Question 4.c): ESMA should also be tasked with the supervision of EU-based benchmarks that qualify as 'strategic'.

Agree somewhat

As previously mentioned, ESMA believes that a level playing field should be ensured for EU and TC administrators of benchmarks under the BMR to avoid regulatory arbitrage and to preserve stable and orderly EU financial markets.

Given the systematic importance of these 'strategic' benchmarks across the EU, ESMA believes that a supervision at European level is appropriate - like it is now for critical benchmarks. This is because, financial products using systematically important benchmarks are available in all Member States. Those benchmarks are therefore of crucial importance for the functioning of financial markets and the financial stability in the Union.

At the same time, ESMA sees merit in potentially exploring the identification of strategic benchmarks that are systematically important in individual countries (national strategic benchmarks) but not at EU level. For these benchmarks, NCAs' higher knowledge of the local market and proximity to the users should support a better risk assessment, prioritisation and overall supervision, that therefore should remain with the NCAs similar to the current system of national critical benchmarks. Nevertheless, the introduction of such national strategic benchmarks would also require the corresponding legal framework to address specific

challenges: for instance, the criteria based on which a national strategic benchmark would become an EU strategic benchmark (and vice versa).

Question 4.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.

Agree completely

Yes, as stated above, ESMA believes that a level playing field should be ensured for EU and TC administrators of benchmarks under the BMR to avoid regulatory arbitrage and to preserve stable and orderly EU financial markets.

Further, as indicated in the response to the previous question, ESMA sees merit in exploring the identification of strategic benchmarks that are systematically important in individual countries (national strategic benchmarks) but not at EU level.

Question 4.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.

Agree completely

ESMA supports the proposal for an opt-in regime by putting forward a quality label for administrators of non-strategic benchmarks for conducting business in the EU. This approach has similarity with other EU regimes, for example the UCITS funds. The relevance of such approach is confirmed by the recent ESMA and NCAs' experience on applications for recognition and endorsement where several relatively small administrators, while not currently obliged to do so, are applying in the EU and willing to demonstrate compliance with the BMR also to support their business presence in the EU.

Question 4.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.

Disagree somewhat

Climate benchmarks (EU CTB and EU PAB) are provided currently both from EU and non-EU administrators. The data available to ESMA shows that more than 90% of these climate benchmarks are currently provided by administrators located outside the EU. Considering both the challenges of a practical implementation of a restriction of accessibility of labels to TC

administrators and the current high proportion of these benchmarks provided by TC administrators, ESMA believes that climate benchmarks should still be accessible to TC administrators on the condition that an appropriate supervision is in place (see next question).

Considering that a quality label is intended to ensure the benchmarks meet minimum regulatory standards, ESMA is of the opinion that the location of the administrator (EU versus non-EU) is not the key issue. It is rather the fact that the administrators providing the labelled benchmarks are subject to the regulation, and consequently being supervised to ensure their continuous compliance with the regulatory requirements, that is key. For that reason, it is important to include the labels in the criteria for the selection of strategic benchmarks (see question 3).

ESMA suggests that the Commission performs further analysis to ensure that the regulatory requirements and supervisory powers are not impaired when the administrator is not located in the EU, in order to minimise the risk of greenwashing and regulatory arbitrage.

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:

Question 4.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).

Agree somewhat

As specified previously in question 3, ESMA believes that the labelled benchmarks should be a criterion for the designation of a 'strategic' benchmark and therefore should be supervised accordingly.

However, should the labels not be selected as a criterion for the identification of strategic benchmarks then supervision of these labels provided by TC administrators is appropriate, similar to the current TC regime framework (which allows for both endorsement and recognition).

Question 4.h): They should be directly supervised by ESMA (under a mechanism similar to the current recognition framework).

Agree somewhat

As specified previously in question 3, ESMA believes that the labelled benchmarks should be a criterion for the designation of a 'strategic' benchmark and therefore should be supervised accordingly.

However, should the labels not be selected as a criterion for the identification of strategic benchmarks then supervision of these labels provided by TC administrators is appropriate, similar to the current TC regime framework (which allows for both endorsement and recognition).

Question 4.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

ESMA does not believe that users should be required to be tasked with the responsibility of verifying that benchmarks are compliant with the BMR. Firstly, when users of benchmarks are not subject to a regulatory and supervisory regime, it does not seem feasible to impose those obligations on them nor to oversee the users' conduct. Secondly, even when users are supervised entities, it may prove difficult for them to gather the necessary information and perform a compliance assessment to verify that the benchmark's methodology is consistent (on a continuous basis) with the EU standards. Moreover, as a matter of principle, such approach does not seem sensible since this task should be the responsibility of the competent authorities that supervise the administrator. As described in previous responses, ESMA believes that labelled benchmarks should be subject to supervision. In such circumstance, ESMA should provide transparency to users of benchmarks by providing a list of those benchmarks that comply with the EU standards in a dedicated ESMA register. Based on the above, considerations users should be required to use the labelled benchmarks only if included in such dedicated register, in line with the existing requirement (Article 29 of the BMR) whereby supervised entities can only use TC benchmarks if they are included on ESMA's dedicated register.

Question 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?

Agree completely

The strong growth of the ESG benchmark segment and the co-existence of divergent approaches to benchmark methodologies result in the fragmentation of the internal market because it is not clear to users of benchmarks what level of ambition is underpinning different categories of ESG benchmarks. For example, the absence of clear labelling raises questions on the inclusion of firms with a negative environmental or social impact in these benchmarks.

Currently the only regulatory requirements applicable to ESG benchmarks are disclosure requirements as set in the relevant delegated regulations[5]. ESMA believes that these

[5] Commission Delegated Regulation (EU) 2020/1816 of 17 July 2020 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council as regards the explanation in the benchmark statement of how environmental, social and

disclosure requirements are not sufficient to ensure an adequate level of harmonisation between the different ESG benchmarks provided. Specifying the minimum standards for harmonisation of the methodology of these benchmarks is key to ensuring a quality label, and a high level of consumer and investor protection.

Further, ESMA believes that the introduction of an EU ESG benchmark label would be an extra supporting tool against greenwashing. Enhanced transparency requirements on the methodology would help to reduce information asymmetries between benchmark administrators and users of benchmarks and help investors to make an informed assessment of the sustainability-related claims of the benchmark. In addition, the creation of such an EU ESG label should consider sufficiently ambitious minimum standards for the methodology which would offer reassurances as to the sustainability-related impact of such benchmarks.

ESMA appreciates the interconnections between different regulatory acts related to sustainable finance and that the timing of the creation of an EU ESG benchmark label should be carefully assessed in combination with the implementation of the other sustainable finance related legislation in order to ensure alignment. As an anectodical example, the delegated acts on the disclosure of ESG factors in both the benchmark statement and the methodology document were set in 2020 when the other EU legislation on sustainable finance was not yet published. The Taxonomy Regulation[6] has subsequently entered into force and it is now important for consistency purposes to ensure that the BMR is aligned with it. The European Commission is tasked to provide a report to the European Parliament and the Council on the alignment of the minimum standards of the climate benchmarks with the Taxonomy. ESMA would like to highlight to the Commission that having clarity on the other pieces of legislation (SFDR, Taxonomy) is paramount to avoid the situation where the requirements established through the creation of an ESG benchmark label might conflict with other regulatory requirements.

As outlined above, should the EU ESG benchmark labels be created then ESMA believes that such labels should be included in the criteria to select the 'strategic' benchmarks and therefore should be supervised accordingly. Furthermore, ESMA believes that the BMR should require administrators to include a prefix in the name of the ESG labelled benchmarks for users to clearly identify those labelled benchmarks. In that context, the current framework of the BMR includes two labelled benchmarks[7] that are not easily identifiable, as administrators may use different naming standards. This facilitates greenwashing as some administrators use similar naming conventions (e.g. 'Paris aware' benchmarks) to refer to benchmarks that do not meet the minimum standards applicable to climate benchmarks. Therefore, ESMA suggests requiring administrators to include a predefined prefix in the naming of the labelled benchmarks (e.g. EUBMR-CTP, EUBMR-PAB).

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governance factors are reflected in each benchmark provided and published and Commission Delegated Regulation (EU) 2020/1817 of 17 July 2020 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology

[6] REGULATION (EU) 2020/852 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

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

Agree Somewhat

Yes, similarly to the climate benchmarks and as outlined in question 4.f), ESMA believes that the EU ESG benchmark label should be accessible to TC administrators on the condition that they are subject to BMR and supervision. To that end and considering that a quality label intends to bring to investors an assurance about the minimum standards met by the benchmarks, ESMA is of the opinion that labelled benchmarks should be subject to supervision to oversee the compliance of the relevant administrators with the regulatory requirements. In this regard, ESMA reiterates the need to include the labelled benchmarks as a criterion for the designation of 'strategic' benchmarks (see question 3).

ESMA suggests that the Commission should perform further analysis to ensure that the regulatory requirements and supervisory powers are not impaired when the administrator is not located in the EU in order to minimise the risk of greenwashing and regulatory arbitrage.