Briefing Paper

The Importance of Reforming the EU Benchmarks Regulation

August 2022

Table 1. High level comparison of the reforms proposed within this paper against the existing provisions of the European Benchmark Regulation.

Characteristics	**Existing BMR**	**Reformed BMR**
Use of benchmarks	Prohibited unless specifically qualified	Permitted unless specifically prohibited
Scope	All benchmarks regardless of size or systemic importance with very limited exemptions	Only 'Systemic' EU and third country benchmarks would be subject to mandatory compliance. All other EU and third country benchmarks would be removed from scope for mandatory compliance but able to comply via a voluntary regime.
Means of qualification	**EU** • Authorization • Registration **Third country** • Equivalence • Endorsement • Recognition	**EU and Third Country** • Authorization • Registration • Equivalence • reformed Endorsement • reformed Recognition
Powers to prohibit use of non-qualifying benchmarks and powers to allow continued use for legacy	**EU Benchmarks** • Powers to allow continued use of EU Benchmarks in legacy contracts provided that poorly defined contingencies are met (frustration, force majeure, breach) • Powers for EU benchmarks do not encompass all circumstances in which a benchmark may become prohibited • Inability to use non-qualifying benchmarks in <u>new</u> transactions to manage legacy risk creates cliff-edge risks for EU investors **Third Country Benchmarks** • Legacy contracts permitted to continue to use non-qualifying benchmarks until maturity.	**EU and Third Country** In line with 'tough legacy' approaches for LIBOR, use of non-compliant EU and Third Country Systemic Benchmarks prohibited except: • use permitted in legacy contracts (including where a legacy contract subsequently falls back to such benchmark as the result of existing fallback provisions becoming applicable). • new transactions automatically permitted for the following purposes: ○ reducing/hedging/novating the legacy exposure of any client. ○ determining a close out amount. ○ market-making in support of client activity related to legacy transactions ○ reducing/hedging/novating/managing a Supervised Entity's exposure whensoever that exposure was incurred. ○ participation in a central counterparty procedure.

	• Inability to use non-qualifying benchmarks in new transactions to manage legacy risk creates cliff-edge risks for EU investors	These provisions should cover all relevant circumstances including: • Withdrawal or suspension of Registration, Authorization, Equivalence, Recognition or Endorsement • Failure to comply at expiry of any transition period • Prohibition on use of a benchmark for any other reason.
End user visibility of application process for qualifying benchmarks	Very limited data on ESMA's register, insufficient to allow end users to understand whether the benchmark they want to use qualifies or has become prohibited	Enhanced visibility for end users with more comprehensive data on ESMA's register
Penalties for breach	Up to 10% of global annual turnover for even relatively administrative breaches.	The highest penalty reserved for only the most serious breaches.

Introduction

European retail and institutional investors use European Union (EU) and third-country benchmarks for a variety of critical commercial purposes, from hedging their exposures and making investments to converting overseas revenue and repatriating funds. The EU Benchmarks Regulation[1] (**BMR**) was intended to protect European investors from the risks and disruption posed by poorly governanced or failing benchmarks. Instead, fundamental flaws in its conception have made the Regulation itself a threat to the financial well-being of benchmark-users in the EU and put them at a significant competitive disadvantage.

The current BMR Review[2] process represents a vital opportunity to reform the BMR so that it:

- provides protection to investors on a proportionate basis, in alignment with global standards;
- imposes the highest compliance burdens in respect of the most important benchmarks;
- encourages administrators with benchmarks that are used on a more minor scale in the EU to adopt similarly high standards without creating unwarranted barriers to entry;
- ensures EU investors have visibility over the application process to allow them to reduce their exposures to non-qualifying benchmarks ahead of and/or over time.

[1] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance)

[2] European Commission's Consultation document - Targeted consultation on the regime applicable to the use of benchmarks administered in a third country

- implements vital lessons learnt from the winding down of LIBOR.

In order to provide sufficient time for the reforms to be implemented, it is vital that the European Commission exercises its power to extend the transition period for the Third Country regime until end of 2025.

Proposal for Reformed BMR

We propose that BMR is reformed so as to:

(1) Allow benchmarks to be used in the EU unless specifically prohibited (i.e., a reversal of the current general prohibition of benchmarks unless specifically authorized).

(2) Provide designatory powers to the European Commission (EC) to mandate compliance for those EU and third-country benchmarks that are most systemically important to investors in the EU ('Systemic Benchmarks').

(3) Provide a voluntary labelling regime to allow administrators to comply with the BMR and market their benchmarks as BMR-compliant.

(4) Allow third-country administrators to obtain authorization from ESMA), or to qualify via Equivalence, or via reformed Endorsement or Recognition processes, each within a fixed period of time.

(5) Exempt public policy benchmarks (e.g., FX rates used in non-deliverable forwards (NDFs) and certain interest rate swaps), regulated data benchmarks and rates calculated and made available to the public solely for the purposes of providing a fallback.

(6) In alignment with global approaches adopted for transition off LIBOR, provide regulators with the power to prohibit the acquisition of new exposure to benchmarks that fail to comply with the BMR, but permit the use of such benchmarks for managing or reducing legacy positions (including undertaking new transactions for such purposes).

(7) Provide end users with greatly enhanced visibility on whether benchmarks have qualified (or been disqualified) for use under the regime via a more usable ESMA register.

(8) Create a more proportionate enforcement regime, reserving the heaviest financial sanctions for only the most serious breaches.

These proposals represent a practical, proportionate regime that respects the overarching aims of the EU BMR, as further detailed in the rest of this paper.

Problems with the EU BMR

The BMR was introduced to complement the civil and criminal sanctioning regime provided by the Market Abuse Directive, the Market Abuse Regulation and member state legislation that together outlaw and punish attempts to manipulate benchmarks. Nothing in this proposal is designed to weaken or narrow the laws relating to manipulation of benchmarks. They provide vital protection for investors and users of financial products and the broad application of these laws should remain as currently in force.

The BMR set out to protect European investors and users of the estimated 3 million benchmarks in existence worldwide[3] by enhancing the governance and oversight of benchmark production, as well as

[3] http://www.indexindustry.org/2019/10/15/index-industry-associations-third-annual-survey-finds-2-96-million-indexes-globally/

promoting transparency on the construction and evolution of benchmark methodologies. To this extent, it represents a codification of the widely implemented International Organization of Securities Commissions' (IOSCO) *Principles for Financial Benchmarks* (**IOSCO Principles**).

However, the BMR also regulates use of benchmarks by supervised entities in the EU by:

- Requiring them to have contingency plans (reflected in their client contracts) against material change to a benchmark or its cessation (referred to in this paper as the **Contingency Plan Requirement**); and
- Prohibiting the use of benchmarks that have failed to qualify under the BMR (referred to in this paper as the **General Prohibition on Use**).

IOSCO subsequently published a recommendation replicating the Contingency Plan Requirement in its *Statement on Matters to be Considered for Use of Benchmarks*[4].

However, as illustrated in Table 2, the General Prohibition on Use is unique to the BMR. It does not feature in any recommendation by IOSCO and no other jurisdiction globally has introduced it.

Table 2

Major Features of Benchmark Reform	**BMR**	**IOSCO Principles**
Governance procedures for Administrators (including conflict of interest management)	✓	✓
Benchmark methodology design, evolution and transparency	✓	✓
Quality of data sources	✓	✓
Submitter code of conduct	✓	✓
Contingency Plan Requirement	✓	✓
General Prohibition on Use of benchmarks unless they qualify	✓	✗

Scope of the BMR

Of the 3 million benchmarks in use globally, the vast majority pose no systemic or material risk to the EU or EU institutions. When viewed in that context, the extremely broad scope of the BMR, combined with its considerable extraterritorial reach, has resulted in a disproportionate compliance burden being placed upon benchmark users and administrators.

The regulation justifies this broad scope by asserting that it needs to guard against the growth of benchmarks which are not currently well used[5]. However, as described further below, the benefits of

[4] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD589.pdf

[5] Recital 8, BMR

regulating against a benchmark's potential future development do not justify the potentially damaging effects, cost and complexity for those the regulation is intended to protect.

Adverse impact of the General Prohibition on EU investors

Cessation of a benchmark has been flagged by global regulators as a potential source of disruption and uncertainty that could pose a threat to financial stability if it were to happen to a widely used benchmark. There is no reason why, however, prohibition on use of a benchmark would be less disruptive or dangerous than its cessation.

The effect of the General Prohibition on Use has been to turn the BMR from an important regulatory protection for European investors into a source of uncertainty, disruption, competitive disadvantage and potential systemic risk.

(a) Disruptive Effect on Day-to-Day Business/Investment Activities of Prohibiting a Benchmark

The adverse effects of prohibiting use of a benchmark on normal business operations have already been recognized by the EU when, in response to concerns raised by industry participants, it introduced a new exemption process for certain FX rates. Recital 1 to the 2021 amending regulation[6] explains:

> "The unavailability of spot foreign exchange benchmarks for calculating the payouts due under currency derivatives would have a negative effect on companies in the Union that export to emerging markets or hold assets or liabilities in those markets, with consequent exposure to fluctuations of emerging market currencies."

The issues identified with respect to FX rates are likely to arise with respect to other types of benchmarks and other types of use. Given the all-encompassing scope of the BMR, many other large and small benchmarks across interest rates, equities, commodities, credit and other asset classes are at risk of the General Prohibition on Use because flaws in the third-country benchmarks regime mean that their administrators are unlikely to be willing or able to qualify them in time.

For FX rates, the Amending Regulation provides the EC with the power to exempt a benchmark which:

'(a) ….references the spot exchange rate of a third-country currency that is not freely convertible and

(b) ….is used on a frequent, systematic and regular basis to hedge against adverse foreign exchange movements'.[7]

GFMA is monitoring nine spot FX benchmarks that would likely become prohibited unless exempted or benefitting from an equivalence decision (because their administrators are unlikely to use any other available route to qualify and there are no alternatives)[8]. There remains concern among industry participants about whether the power as drafted is sufficiently broad to ensure all of those rates will benefit from an exemption.

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[6] Regulation (EU) 2021/168 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) 2016/1011 as regards the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation, and amending Regulation (EU) No 648/2012

[7] Ibid

[8] Certain FX rates for the currencies of the Philippines, Argentina, Nigeria and Kazakhstan, South Korea, Taiwan, India, Russia and China.

(b) Disruptive Effect of Prohibition With Respect to Legacy Positions

The impact of prohibition on legacy positions was intended to be mitigated by powers allowing the benchmark to continue to be used while the legacy positions rolled off. However, those powers are inconsistent as between EU and Third Country Benchmarks, subject, in the case of EU benchmarks, to poorly drafted contingencies and not available in all circumstances in which a benchmark may become prohibited.

Furthermore, as demonstrated during the LIBOR transition process, it is not enough to allow legacy transactions to continue to use a prohibited benchmark. It is also critical that market participants are able to enter into new and life-cycle trades in order to be able to appropriately manage and reduce their exposures.

It was for this reason that authorities in the U.S. and U.K., citing concerns about potential consumer protection, market integrity, litigation and reputational impacts, specifically permitted new use of the prohibited LIBOR rates in the following circumstances:

1. Market making in support of client activity related to…[transactions] executed before [the date of prohibition]
2. Transactions that reduce or hedge the supervised entity's or any client of the supervised entity's … LIBOR exposure on contracts entered into before [the date of prohibition]
3. Novations of … LIBOR transactions executed before [the date of prohibition]
4. Transactions executed for purposes of participation in a central counterparty auction procedure in the case of a member default, including transactions to hedge the resulting … LIBOR exposure
5. Interpolation or other use provided for in contractual fallback arrangements in connection with …LIBOR….[9], [10]

In explaining their rationale, the UK FCA said (among other things):

> "A particular feature of derivatives is that new transactions referencing the ceasing benchmark can be used in some cases to reduce legacy exposure. For example, derivative positions can be "unwound" by entering an equal and opposite trade and typically "compressing" those trades down to zero. This would require new use of … LIBOR.[11]"

By prohibiting this kind of new use, the EU BMR exposes end users of benchmarks to the risks it was intended to provide protection from.

Why Will Third-country Administrators Not Comply with the BMR?

Under the BMR's third-country benchmark regime, benchmarks can qualify for use in the EU under one of three routes: Equivalence, Endorsement or Recognition. This regime was constructed on the basis of underlying assumptions that, as acknowledged by the EC in its Inception Impact Assessment[12] in relation to the Review of the BMR, have turned out to be incorrect.

[9] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf

[10] https://www.fca.org.uk/publication/libor-notices/article-21a-benchmarks-regulation-prohibition-notice.pdf

[11] 4.25, Ibid.

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.049.01.0006.01.ENG&toc=OJ%3AL%3A2021%3A049%3ATOC

First, it was assumed that the EU was leading the way with an all-encompassing benchmark regulation and that other jurisdictions would follow suit.

Second, it was assumed that benchmark administrators would want to comply with the BMR in order to have their benchmarks used in Europe.

Third, it was assumed that Equivalence would provide a scalable regime that could be used to qualify the majority of third-country benchmarks for the purposes of BMR.

In reality, many jurisdictions (such as the US) have not introduced any such framework, and those jurisdictions that have developed benchmark regulations have tended to limit them to cover only their own critical benchmarks. For example, Japan has introduced regulations that only cover major interest rate benchmarks. The draft equivalence decision for Japan[13] that has was released on April 4, 2020 would not benefit their equity benchmarks, such as the Topix indices, at all.

While some third-country administrators derive significant financial gain from having their benchmarks used in the EU, others do not. The EC's 2019 consultation on the BMR Review[14] says "in absence of licensing income from EU users, many third-country benchmark administrators might not have the incentive to seek…[to qualify]…their benchmarks for use in the Union. This would mean that many third-country benchmarks could no longer be used in the Union after the expiry of the extended transition period…"[15].

These administrators are therefore unlikely to qualify by means of Equivalence and are not incentivized to go through the significant cost and administrative burdens associated with Endorsement or Recognition. Even those that do have incentives face significant impediments to using them.

Endorsement requires a third-country administrator to have its benchmarks endorsed by an EU supervised entity as being compliant with the BMR on an ongoing basis. In the absence of a supervised affiliate to perform this role, Endorsement effectively requires third-country administrators to divulge information to third party EU firms who may be competitors, or even effectively cede control of their benchmark governance process.

Recognition requires the appointment of a legal representative that is required to perform the oversight function of an administrator but precise responsibilities and potential liabilities are unclear.

Breaches of the regulation are accompanied by fines of up to 10% of global annual turnover, making those endorsing or providing legal representative services at risk of high potential liabilities for breaches of an administrative nature, something which may adversely impact their willingness to provide the service or the price at which they are willing to do so. While we understand there may be commercial providers ready to provide Endorsement and Recognition services, we cannot be sure that third-country benchmark administrators will be willing to pay the price of using them.

Four and a half years after the main provisions of the BMR became effective, only two Equivalence determinations (for Singapore and Australia) have been made, which together cover seven benchmarks. One draft Equivalence determination was published in respect of Japan on April 4, 2020, (but has yet to be adopted) which will cover a further two benchmarks. Seven administrators have qualified their benchmarks via recognition, while two have qualified their benchmarks via Endorsement. The fact that the seven administrators that have used Recognition account for 11,885

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[13] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12330-Equivalence-decision-for-a-third-country-Japan-under-the-Benchmarks-regulation-BMR-

[14] https://ec.europa.eu/info/publications/finance-consultations-2019-benchmark-review_en

[15] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-benchmark-review-consultation-document_en.pdf

benchmarks and the two administrators that have used Endorsement account for 4,561 benchmarks suggest that only large global administrators have so far managed to navigate the complexities and cost of the regimes, and that they represent a significant barrier to entry for less well-resourced administrators.

Although these may seem like issues for third-country administrators, it is actually EU investors such as EU manufacturers, retail investors, pension funds, and other financial and non-financial institutions that will be the major casualties because of the General Prohibition on Use. It was for this reason that the transition period applicable to third-country benchmarks was extended by two years in 2019[16]and further extended by two years in 2021 to the end of 2023 (with a further possibility for the European Commission to extend it to 2025)[17]. Without reform, the same risks are likely to require an additional extension at the end of 2025.

EU End Users unable to see which Benchmarks will qualify

Given the likely disruption, it might be expected that investors would use the extended transition period to reduce their exposure to benchmarks under threat of prohibition. However, there is no visibility over which administrators will be likely apply under the BMR. In many cases, alternative benchmarks may not exist or may not comply with the BMR, or alternatives may not be comparable in terms of liquidity, providing little option for investors looking to transfer positions. European investors may therefore be in a position where they are unable to adequately mitigate their risks ahead of the relevant benchmarks becoming prohibited.

The deferral of application of the Third Country regime for the past four years has provided a period of calm during which, among other things, EU critical benchmark administrators were able to ensure the benchmarks qualified for use under the BMR. However, flaws in the third-country benchmark regime mean that time alone will not resolve the problems faced by European investors.

<u>The Problem with Data</u>

Industry associations have been consistently asked by European regulatory authorities for data that illustrates the adverse impacts of an unreformed BMR.

However, reliable publicly available data on how benchmarks are used in the EU is not available. For example, there is no data on how many benchmarks are used by which EU institutions and for what purposes. There is also no data on the number of benchmarks that are on track to qualify under the BMR by the end of the transition period, and very little information on how the prohibition on using benchmarks that will fail to qualify will impact EU investors and end users.

For example, the Bank for International Settlements (**BIS**) publishes a survey on benchmark use for the FX and interest rate markets, but the complexity of compiling this information means it is only completed every three years. The survey requires the involvement of central banks globally and 1,300 dealers. Some of the published data is useful in setting out the issues caused by the BMR, but most is not.

These issues are exacerbated by fundamental uncertainties over what is in and out of scope of BMR, and whether that status can change during the lifetime of a financial instrument. For example, an index is deemed to have been 'made available to the public' (and, therefore, potentially a 'benchmark') if it can be reverse engineered from the coupon payable on a financial instrument.

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[16] By means of the Regulation on Low Carbon Benchmarks that entered into application on December 10, 2019 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2089&from=EN)

[17] Regulation (EU) 2021/168 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) 2016/1011 as regards the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation, and amending Regulation (EU) No 648/2012

Every user of such a rate must make its own determination as to whether this is possible. In the face of such uncertainty, it is difficult to conduct a data collection exercise.

This data would also have been absent at the time of the original impact assessment for the BMR. Lack of data, therefore, should not be used to fight reform – it should be a strong reason not to allow expiry of the BMR's transition period to change the status quo.

Proposal to Reform BMR

The BMR urgently needs to be reformed. In particular, the General Prohibition on Use should be reversed in order to protect EU investors, and the scope of the BMR needs to be narrowed so that the compliance burdens fall where there is most risk.

The following proposal represents a practical, proportionate regime that respects the overarching aims of the EU BMR, while allowing EU investors to continue to use benchmarks to hedge their naturally occurring risks or make investments in the same way as their non-EU peers:

- **General Permission for Use.** EU and third country benchmarks should be permitted to be used in the EU unless specifically prohibited. This reverses the current regulation's General Prohibition.
- **Mandatory compliance by designation**. The EC should be given the power to designate EU and third-country benchmarks as being in-scope as 'Systemic Benchmarks' following an evidence-based determination after public consultation and discussion with the relevant administrator that the benchmark satisfies all of the following criteria:

    a. Cessation/non-representativeness of the benchmark would result in significant/adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States[18]; and

    b. Designating the benchmark as a 'Systemic Benchmark' is proportionate and in the public interest.

  The EC should consider the following non-exclusive and non-determinative factors in determining whether these criteria have been satisfied:

    (i) Notional amount/values of assets referencing the benchmark exceeds €500 billion.

    (ii) Whether designation is proportionate and in the public interest where:

      a. the administrator/benchmark is already subject to regulatory supervision in its domestic jurisdiction and/or complies with the IOSCO principles.

      b. designation of the benchmark might directly result in use of the benchmark by Supervised Entities becoming prohibited, particularly in circumstances in which there are no or very few appropriate market-led substitutes.

  Adopting this approach would result in mandatory compliance being reserved for those benchmarks whose cessation would pose the greatest threat to financial stability, retail investors and the integrity of the markets (in alignment with the approach adopted by other jurisdictions). The highest compliance burden would be imposed on those administrators most able to cope with them and Equivalence decisions would likely cover most in-scope benchmarks for jurisdictions in which benchmarks are regulated.

[18] This wording mirrors Article 20(1)(c) of BMR for determining a Critical Benchmark.

All other EU and third country benchmarks should be out of scope for mandatory compliance since these pose the least risk of systemic disruption. Administrators that only produce such benchmarks (rather than more sophisticated administrators that also produce critical benchmarks) are least equipped to qualify their benchmarks by means of the costly and burdensome Recognition or Endorsement routes and cannot benefit from Equivalence decisions. This would help ensure parity with benchmark regimes in other jurisdictions.

Regulated data benchmarks have already been removed from the scope of BMR and should remain out of scope of mandatory designation. Where the input data is regulated at its source, then it is appropriate to reduce the regulatory burdens applicable to these benchmarks under the BMR. The regulated data benchmark exemption should extend to include indices that rely on inputs from major global exchanges.

Public utility benchmarks – for example, FX rates used in NDFs and interest rates (including restricted or pegged rates) used in dollar-settled swaps (e.g., NIRDS) – should not be in scope of mandatory designation because they are pseudo-governmental and their prohibition would be disproportionately disadvantageous to end users.

- **Voluntary compliance by election.** Administrators of benchmarks that would otherwise be out-of-scope should be able to elect for their benchmarks to comply and be labelled as such.
    - This would promote higher standards of governance and compliance by incentivizing administrators that will then be able to use the labelling in their marketing.
    - It would provide investors with confidence that benchmarks they use that carry this label meet those high standards.
    - It would provide an opportunity for EU and third-country administrators to gain recognition of the efforts and investment that they have already made to comply with the BMR.

The Australian[19] and New Zealand[20] benchmark regulations both contain an elective regime of this nature.

- **Reforming the Third-country Benchmark Qualification Routes**
    - Third-country benchmark administrators should be able to apply for authorization or registration for their benchmarks from ESMA, following a similar process to that applicable for EU administered benchmarks. Consideration should also be given to allowing EU administrators to have their benchmarks qualify by means of Endorsement.
    - In relation to Recognition and Endorsement, the role and responsibilities of the legal representative should be clarified, along with their potential liability (which should be proportionate to their role and responsibilities).

[19] https://www.legislation.gov.au/Details/C2018A00027. In Australia, administrators of significant benchmarks must be licensed under the Corporations Act 2001 as opposed to administrators of non-significant benchmarks, which may voluntarily “opt-in” to that licensing scheme.

[20] http://www.legislation.govt.nz/act/public/2013/0069/latest/whole.html. In New Zealand, under legislation that received Royal assent on 30 August 2019, licensing is not required for any benchmark administrators. However, administrators may “opt-in” to obtain licensing under the benchmark administrator licensing scheme.

- **No New Flow.**
  - If the administrator of a Systemic Benchmark fails to gain qualification within a fixed period of time, or to maintain qualification thereafter, it would become a 'non-qualifying benchmark' and therefore prohibited save as set out below.
  - A Systemic Benchmark which becomes non-compliant should continue to be permitted (without contingency) to be used in legacy transactions, including as a fallback rate.
  - Use in new transactions should be automatically permitted for the following purposes:
    a. reducing/hedging/novating the legacy exposure of any client.
    b. determining a close out amount.
    c. market-making in support of client activity related to legacy transactions
    d. reducing/hedging/novating/managing a Supervised Entity's exposure whensoever that exposure was incurred.
    e. participation in a central counterparty procedure.
  - These provisions should cover all scenarios in which a Systemic Benchmark could become prohibited:
    - Withdrawal/suspension of registration/authorization/equivalence/recognition/endorsement;
    - Failure to comply at expiry of the transition period;
    - Prohibition on use of a benchmark for any other reason.
  - These provisions should not be subject to any contingencies (such as the need to demonstrate frustration, force majeure or breach) or require any regulatory authority to exercise any power in order for users of the non-qualifying benchmark to benefit from them.
  - This approach provides users of benchmarks that fail to become compliant or become non-compliant with the ability to manage or reduce their exposures in a safe and efficient way, avoiding the current risk of a cliff edge. This will align BMR with the global regulatory approach taken to prohibition on use of LIBOR[21], [22], [23].
- **Improving End-user Visibility**
  - In order to allow end users of benchmarks visibility over whether benchmarks have or are likely to qualify for use at the end of the transition period or have become non-qualifying third country benchmarks, it is also critical that the ESMA register provide users with a golden source of compliant benchmarks including the following:
    - Full name/unique benchmark level identifier (including ISIN) of every EU and 3rd country compliant benchmark.
    - Name/jurisdiction of the administrating entity (not group)

[21] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf

[22] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf

[23] https://www.fca.org.uk/publication/libor-notices/article-21a-benchmarks-regulation-prohibition-notice.pdf

    - Whether designated ‘Systemic’
    - Status of applications (pending/approved/rejected) for authorisation/registration/ recognition/endorsement with relevant dates or whether a benchmark qualifies under an equivalence determination;
    - Suspension/withdrawal/reinstatement of authorisation/registration/equivalence/recognition/endorsement and the date such notice was issued.
    - Other status flags to the extent that additional powers are exercised in relation to administrators or their benchmarks.
    - Additional fields to help users keep track of changes to each administrator (e.g authorisation date/last update).
    - Links to the website pages of the administrator that deal with EU BMR-specific information, including links to the benchmarks statements pursuant to Article 27.
- The register should allow for filtering of benchmarks by category (e.g Systemic/voluntary benchmarks).
- The register should be machine searchable
- There should be a notification e-mail service which alerts subscribers to updates and new information added to the register.
- It is important that the register remained capable of being updated in real time in order to avoid any delay between a benchmark becoming compliant and its being able to be used by investors. This could be achieved by making administrators of non-Strategic benchmarks responsible for uploading and maintaining the information relating to voluntarily compliant benchmarks on a continuous basis while ESMA retains responsibility for uploading and maintaining the information relating to designated Systemic Benchmarks on a continuous basis.

Conclusion

There are many other technical improvements that can be made to the BMR to enable users, administrators, contributors and regulators to understand what is in and out of scope, and whether that status can change over the lifetime of a financial instrument. The proposals set out in this paper represent the most fundamental and critical reforms. Their implementation would result in a benchmark regulation that protects investors without stifling their bona fide use of more minor benchmarks.

About ISDA and the basis for this paper in relation to ISDA members' views
Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 990 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube. ISDA's membership is diverse and includes firms that use benchmarks but do not administer or contribute to them; firms that administer benchmarks but do not contribute to or use them; and firms that administer, use and contribute to benchmarks. The proposals set out in this paper were overwhelmingly supported by the ISDA members who provided feedback as part of its response to the EC's 2022 targeted consultation on the Benchmark Regulation Review. Where a divergent minority view was put forward it has been reflected in the feedback that ISDA submitted as its response to the EC's consultation but has not been reflected in this paper.

About ASIFMA
ASIFMA is an independent, regional trade association comprising a diverse range of over 160 leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the US and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

About FIA
FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C.
FIA's mission is to:
- Support open, transparent and competitive markets,
- Protect and enhance the integrity of the financial system, and
- Promote high standards of professional conduct.

As the leading global trade association for the futures, options and centrally cleared derivatives markets, FIA represents all sectors of the industry, including clearing firms, exchanges, clearing houses, trading firms and commodities specialists from about 50 countries, as well as technology vendors, law firms, and other industry service providers.

About GFMA
Global Foreign Exchange Division (GFXD) was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24 global foreign exchange (FX) market participants[24], collectively representing the majority

[24] Bank of America, Bank of New York Mellon, Barclays, BNP Paribas, Citi, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, ING, JP Morgan, Lloyds, Mizuho, Morgan Stanley, MUFG Bank, NatWest Markets, Nomura, Northern Trust, RBC, Standard Chartered Bank, State Street, UBS and Wells Fargo.

of the FX inter-dealer market[25]. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

About EACT

Founded in 2002, The EACT (The European Association of Corporate Treasurers) brings together 14 000 treasury professionals active in 23 countries in non-financial companies and working for over 6500 individual companies. The EACT is the voice of this community in Europe and beyond and strives to represent the real economy and end-users of financial services.

About EMTA

Founded in 1990, and currently with over 170 members worldwide, EMTA (formerly, the Emerging Markets Traders Association) is a not-for-profit corporation dedicated to promoting the orderly development of fair, efficient and transparent trading markets for Emerging Markets instruments, and the integration of the Emerging Markets into the global financial marketplace. EMTA's website is located at www.emta.org.

[25] According to Euromoney league tables.