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HU24EU
HUNGARIAN PRESIDENCY
OF THE COUNCIL OF THE EU 2024

Attaché meeting on BMR review

Brussels

29 November 2024

PRESIDENCY NOTE ON THE ESG BENCHMARKS, FOREIGN EXCHANGE BENCHMARKS AND NON-CONTRIBUTOR BASED COMMODITY BENCHMARKS

Introductory remarks

On 23 September, the Presidency held a preparatory meeting for the kick-off political trilogue on the proposal to amend Regulation (EU) 2016/1011 (BMR) as regards the scope of the rules on benchmarks, the use in the Union of benchmarks provided by a third country administrator and certain reporting requirements.

On ESG benchmarks, some Member States signalled that they are not satisfied with the current provisions of the General Approach on ESG disclosure requirements. On this basis, the Presidency intends to explore with Member States a possible way forward to improve the current provisions on ESG disclosure requirements.

On foreign exchange benchmarks, there was broad agreement among Member States that the removal of the targeted exemption (Recital 3 - line 13; and Article 18a - line 58), as reflected in the Commission's original proposal, the Council's general approach and the European Parliament's (EP) position, would have unintended consequences. The Presidency would like to work on the issue of exchange rate benchmarks and explore a possible way forward to address the problems associated with this issue.

As for non-contribution based commodity benchmarks, some problems connecting to these types of benchmarks has been brought to the table by some Member States. The Presidency wants to discover Member States views and explore a potential way forward.

1. ESG benchmarks

The Council and the EP agree to propose to limit the use by supervised entities of EU and third-country benchmarks, that claim (in their legal or marketing communication) to take ESG factors into account in their methodology. This should only be allowed if the administrator discloses certain information regarding key elements of the methodology (Article 13(1)) and key terms in the benchmark statement (Article 27(2a), lines 122a-122c)). The EP goes slightly further and proposes that such disclosure has to be in line with Article 10 SFDR (line 122a).

Since this proposal was made by the Parliament and the Council, concerns have been voiced over a potential transfer of responsibility to users who would not only be responsible for checking the availability of such information, but also for the content of such information. There are doubts that the solution proposed will give users enough commercial leverage on benchmark administrators to obtain the information free of charge. It would be an actual transfer of burden (including financial burden) on users, in a situation where such benchmarks are often administered by third-country entities (thereby meaning a burden transfer from non-EU to EU entities).

In addition, several Member States have also expressed concerns about the current solution for disclosure requirements in relation to ESG benchmarks, and the Presidency therefore proposes the following to improve the framework.

An ESG disclosure obligation that benefits EU benchmark users would need to be directly imposed on administrators, and would need to cover their ESG benchmarks, at least as regards ESG disclosure obligations.

A balanced solution could therefore provide for the extension of the ESG disclosure obligations to all ESG benchmarks, regardless of their size, which are administered by entities already otherwise in scope of the BMR (e.g. because they administer a Paris-Aligned Benchmark or a Climate Transition Benchmark, a significant, or a critical benchmark). This situation would have three major upsides:

- it would allow to maintain ESG transparency for a large bulk of ESG indices available on the market, while keeping smaller administrators out of the scope of the BMR and being largely consistent with the burden reduction objective at entity-level;

- such maintained transparency is subject to supervisory oversight by NCAs/ESMA (depending on the status of the administrator), and clarifies that the liability including as regards the content of the disclosure lies with the administrator (who are in fact the information holders), containing any potentially negative impact on the cost of financial products for end users (investors);

- when it comes to third-country ESG benchmarks, it reduces moral hazard linked to the loss of access to those benchmarks, as administrators of those benchmarks would in any case be required to seek recognition or endorsement.

It is also worth noting, as explained above, that this solution would transfer burden from EU users back towards large, often third-country-based, (ESG) benchmark administrators.

In order to avoid any circumvention of the rules via an artificial split of activities between legal entities (e.g., the creation of a dedicated entity devoted to ESG benchmarks that would not be captured under the BMR), this requirement should capture any entity that is part of a group that includes an entity that falls within the scope of the BMR.

Q1: What are your views on the proposed way forward on the framework of ESG benchmark disclosures?

2. Foreign exchange benchmarks (Recital 3 - line 13; and Article 18a - line 58)

The Commission proposal removed from the BMR the exemption power created in 2020 on the spot foreign exchange benchmarks. According to Recital 3 (line 13), due to the narrower scope the Commission does not considered necessary such a specific exemption regime for spot foreign exchange benchmarks. This was accepted by the Co-legislators in their positions.

Foreign exchange benchmarks are used by EU businesses and investment funds to hedge against adverse foreign currency movements. In the specific case of emerging market currencies that are not freely convertible, hedging is accomplished using non-deliverable forward contracts. As the administrators of those benchmarks on which these derivative contracts are based are unlikely to comply with the BMR (because they are based in a non-EU country and are unlikely to seek access to the EU market under the equivalence, recognition or endorsement route), putting them in scope of the BMR would have the effect of depriving EU benchmark users (EU banks offering hedging products) of the possibility to use these foreign exchange benchmarks. In turn, the EU end-users (businesses, investment funds and others seeking to hedge foreign currency exposure) would be forced to turn to non-EU counterparts for this purpose and would likely face increased hedging costs. This situation was assessed in the Commission's 2020 impact assessment and led to the creation of a specific exemption power for these types of foreign exchange benchmarks for the Commission. As the application of the rules for the use of third country benchmarks was deferred, there was no need to use this exemption, until now.

Based on all this certain foreign exchange benchmarks would most likely meet the quantitative threshold, in which case the BMR would present a risk of depriving EU users of access to these benchmarks. We can infer that at least for the following currencies, the use of non-deliverable forward contracts for hedging may be substantial and may exceed the EUR 50 billionn threshold:

(a) Argentine Peso (ARS)

(b) Indian Rupee (INR)

(c) Kazakhstan Tenge (KZT)

(d) Korean Won (KRW)

(e) Nigerian Naira (NGN)

(f) Philippine Peso (PHP)

(g) Taiwanese Dollar (TWD)

Based on this, to adress the concerns of Member States, the Presidency proposes a potential solution which would be the reinstatement of the previous Article 18a, that would allow the Commission, under certain conditions, to exempt specific foreign exchange benchmarks from the application of the BMR.

Q2: What are your views on the reinstatement of the previous Article 18a?

3. Non-contribution based commodity benchmarks

Non-contributor based commodity benchmarks are based on readily available data (agricultural commodity prices) published either by national authorities or by agricultural associations. As these prices are not provided for the purpose of calculating a benchmark, they do not formally constitute contributions to a benchmark and the bodies publishing the prices are not considered to be contributors to a benchmark. This means that these benchmarks fall under Annex II of the BMR, but cannot benefit from the de minimis exemption in Article 2(2)(g). On this basis, the attention of some Member States has been drawn to the fact that the current framework is too strict with regard to these benchmarks. The Presidency believes that this problem can be solved by removing non-contributor-based commodity benchmarks from the scope of Annex II commodity benchmarks and keeping these benchmarks only in Title II. This could be achieved in two ways, in particular either by amending Art. 19 (so that non-contributed commodity benchmarks always remain in Title II and benefit from the EUR 50 billion threshold), or by amending the definition of regulated data to include agricultural prices published for regulatory purposes (which would also keep these benchmarks in Title II).

Q3 What are your views on non-contributor based commodity benchmarks? Could you support the way forward suggested by Presidency?