Proposal for amendment of the Regulation regarding benchmarks

March 2024

On 17 October 2023 the European Commission (EC) published the proposal for amendment of Regulation (EU) 2016/1011 regarding benchmarks (the Regulation), which proposes changes as regards the scope of the rules, the use in the Union of benchmarks provided by an administrator located in a third country, and certain reporting requirements, which would be applicable from 1 January 2026.

The objective of this amendment is to remedy (1) the insufficient proportionality in the current framework; and (2) the dissuasive effects on the willingness of third-country administrators to offer benchmarks in the European Union (EU).

In order to ensure a more proportionate approach, a **reduction in the scope of the Regulation** is proposed with the requirements focussing on the benchmarks of greater systemic relevance and/or a significant role for one or several European markets, that is to say, critical benchmarks, significant benchmarks and European climate benchmarks (i.e., climate transition benchmarks and Paris-aligned benchmarks). In this way, it is considered that the strategic objectives of the Regulation continue to be complied with, whether the administrators of such benchmarks are from the EU or from third countries.

Moreover, it entails **improvements of procedural rules and clarifies certain aspects** that generated legal uncertainty, in particular on the part of the benchmark users.

The amendment also entails the objective of rationalising reporting requirements and the overall regulatory burden, particularly for small and medium-sized enterprises (SMEs), **reviewing the authorisation and registration regime for administrators**.

Pregunta

What deficiencies are addressed?

Respuesta

Benchmark administrators

Current situation, some figures

The explanatory memorandum of the proposal argues that there are currently 73 European Union (EU) benchmark administrators registered in the European Securities and Markets Authority (ESMA) register. Of the benchmarks in use in the EU, only one is critical under ESMA supervision (Euribor) and three under national supervision (in Sweden, Norway and Poland). Each one is administered by a different EU administrator, so we are referring to four administrators. Data collected informally by ESMA in September 2022 indicates that only three EU benchmark administrators and another three non-EU administrators recognised or endorsed in the EU offered one or several significant benchmarks. Taking both figures into account, the conclusion is reached that 90% of benchmark administrators registered at present in the EU only provide non-significant benchmarks.

Third-country benchmark administrators

The Regulation started being applied on 1 January 2018 but included transitional regime for EU supervised users to be able to use non-EU benchmarks. The deadline has been postponed several times, the latest in July 2023, with an extension until 31 December 2025.

Non-EU benchmark administrators are often not under supervision in their home jurisdiction. They could be dissuaded by the compliance burden in seeking access to the EU market, which would reduce the number and

variety of benchmarks available to EU benchmark users. Limiting the requirements for certain benchmarks would allow the access to and offer of non-significant benchmarks from third countries to be maintained.

In figures, ESMA estimates there are currently around 273 third-country benchmark administrators offering benchmarks in the EU and only 5% have used one of the three access routes to the EU market: equivalence (currently two), recognition (currently ten) or endorsement (currently two). On the other hand, it is estimated that at least six non-EU administrators provide at least one significant benchmark in the EU and that, of these, only three have obtained recognition or endorsement.

Rationalisation of burdens for benchmark administrators

The proposal is to remove the requirement of authorisation or registration (regarding EU administrators) or endorsement or recognition (regarding third-country administrators) for administrators of only non-significant benchmarks. Taking the previous figures into account, this would involve a potential 90% reduction in administrators registered, which would also reduce the supervisory burden.

Benchmark users

The Regulation also seeks to introduce improvements for benchmark users, in particular for the smaller ones. For this, it proposes (1) the removal of third-country benchmark usage restrictions by EU supervised entities that currently can only use benchmarks registered via equivalence, recognition or endorsement; and (2) the rationalisation of compliance burdens for EU benchmarks users, such as the need to individually verify the regulatory status of indices they wish to use as benchmarks by consulting websites and public registers. This is because the transparency of the circumstances of benchmarks is improved, as mentioned further on.

Pregunta

What are the details of the proposal?

Respuesta

Regarding the scope, it should be indicated that, although generally the regime for third-country administrators is rationalised, it stands out that in order to safeguard the integrity and reputation of the ’EU labels’ associated to European climate benchmarks, these could only be provided by administrators authorised or registered in the Union.

Apart from the reduction in the scope, the core of this proposal focuses on the requirements regarding significant benchmarks, which currently must be designated as such by the national competent authority (NCA) supervising their administrator, when they comply with the requirements of the Regulation.

The regime proposed differentiates between significant benchmarks by law (those fulfilling the volume requirement based on the €50 billion threshold regarding contracts and instruments referenced in the EU) and the significant benchmarks by designation (those not reaching the threshold but playing a significant role in one or several national retail markets, as detailed in Article 24 of the proposal). Principio del formulario

Benchmarks reaching the threshold will automatically be considered significant (no designation required). The administrator will notify its NCA, if from the EU, or ESMA, if from a third country, when one or more of its benchmarks exceed the threshold. In turn, the NCA or ESMA, where applicable, will publish a statement making this known. If there is no notification, the NCA or ESMA, according to the benchmark administrator’s registered address, may issue a statement indicating that the benchmark exceeded the threshold which would involve the same obligations for the administrator as if the latter has itself informed about this.

The designation of significant benchmarks will remain limited and motivated. The NCA will be in charge in the case of EU benchmark administrators. This will previously consult ESMA, which will issue an opinion on such designation to ensure consistency with the national designations. In the case of non-EU benchmarks, ESMA will be that which makes the designation, at the request of one or more NCAs.

The deadline (60 working days following the notification or designation as significant benchmark) is also established for the administrators to fulfil the authorisation or registration requirements (Article 34 of the Regulation) in the case of EU administrators and the recognition (Article 32) or endorsement (Article 33) requirements for third-country administrators (provided the benchmark is not covered by an equivalence decision adopted pursuant to Article 30).

The transparency regarding the benchmarks and, as a result, the burdens for benchmark users improve as the public register of benchmarks of ESMA (Article 36 of the Regulation) is completed by information that allows for, apart from the current identifying information (authorised or registered EU administrators and the NCAs

supervising them, non-EU administrators with equivalence decision, recognised or with endorsed benchmarks together with the benchmarks provided in the EU and the identity of the authorities of the third country competent for their supervision where applicable), access to other relevant information to benchmark users. Therefore, the same register could reveal: (1) benchmarks subject to public notice of a NCA or ESMA prohibiting their use in the EU[1] and accessing such notices; (2) EU climate benchmarks available for their use in the EU; (3) the list of critical benchmarks that was not previously provided. Moreover, the register would include all the pertinent decisions of the NCAs and ESMA, that is to say, the benchmarks the NCAs or ESMA notify are significant and the link to the statements and the benchmarks designated by the NCAs and notified to ESMA or designated by ESMA, together with the link to the designation.

[1] Article 24a(5) includes the conditions for ESMA or a NCA to conclude that a benchmark administrator has not complied with its obligations, giving rise to the aforementioned public notice, warning EU benchmark users s that a particular benchmark is not fit for use in the Union and further use of that benchmark will be prohibited.

Pregunta

What is the approach of the Council and the European Parliament to this proposal?

Respuesta

The Council adopted its approach to this proposal on 20 December 2023. This mainly highlights the following three differences:

Treatment of commodity benchmarks. The Council asks for the commodities benchmarks of Annex II of the Regulation[2] to remain within the scope independently from their size.

Environmental, social and governance (ESG) benchmarks. The Council proposes that supervised benchmark users making ESG statements in their marketing documents, should only use them when they provide the information required in the Regulation regarding ESG factors.

Transition of supervised administrators to the new rule. The Council proposes maintaining existing authorisations or registrations (EU administrators) and endorsements or recognitions (non-EU administrators) for six months. After this period, the NCAs or ESMA, where applicable, will ensure that the administrators that comply with the requirements of the new Regulation can keep their status without the need for a new request.

Meanwhile, the European Parliament continues working on its proposals. Requests that stand out in the documents published could include: (1) the review of the threshold to determine that a benchmark is significant, increasing this or even allowing for aggregate calculation of the benchmarks managed by an administrator; (2) the elimination of the qualitative criteria determining a benchmark is significant for one or several markets and, therefore, of the designation regime envisaged in the EC proposal, only maintaining quantitative criteria; (3) the inclusion of general exchange rate benchmarks; or (4) an increase in the powers of ESMA to also be in charge of significant benchmark administrators by designation, those endorsing benchmarks, climate benchmark administrators and all those that may choose it as the competent authority. Furthermore, the support of several MEPs to the proposals of the Council can be seen regarding (1) the treatment of commodities benchmarks; and (2) the transition of supervised administrators to the new rule, although some request the period is extended to 12 months while others that the administrators left outside the new Regulation are allowed to voluntarily request and remain in the register and under supervision.

[2] Commodities benchmarks, except for those (1) with a majority of supervised entities contributing input data; (2) which are also regulated data benchmarks; and (3) that are critical with gold, silver or platinum as the underlying. In these three cases, the new general regime applicable to significant or critical benchmarks would be applied.

Links of interest:
Proposal for amendment of the Regulation (EU) 2016/1011 regarding benchmarks

Approach by the Council on 20 December 2023

Work by the European Parliament on the review