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CHANGES TO THE EU BENCHMARKS REGULATION:
NEW RULES FOR BENCHMARK PROVIDERS AND USERS

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The European Commission has published a legislative proposal for a new Regulation removing most 'non-significant benchmarks' from the scope of the EU Benchmarks Regulation. However, the new Regulation would also impose new obligations on non-EU administrators of benchmarks which are widely used in the EU and would prohibit non-EU administrators providing certain EU-labelled low-carbon benchmarks. If adopted, the new Regulation would apply from 1 January 2026, immediately after the end of the current transitional period for non-EU benchmarks.

What is the background to the proposal?

The 2016 Benchmarks Regulation (BMR) regulates the use in the EU of a broadly defined category of 'benchmarks' (in summary, indices used to determine the amount payable under a financial instrument or financial contract or to measure the performance of an investment fund). EU benchmark administrators must be authorised or registered under the BMR, and more stringent obligations apply to administrators of 'critical benchmarks' and 'significant benchmarks' while less stringent obligations apply to administrators of other 'non-significant benchmarks'.

The BMR does not require third-country (non-EU) administrators of benchmarks to be authorised or registered in the EU but does prohibit EU supervised entities from 'using' benchmarks provided by non-EU administrators in the EU unless the benchmarks are included in the register of benchmark administrators and benchmarks maintained by the European Securities Markets Authority (ESMA). The BMR creates three routes by which non-EU administrators can get their benchmarks included in the register and thus qualified for use in the EU by supervised entities:

- an equivalence decision by the Commission;
- recognition by ESMA; and
- endorsement by an EU administrator or other EU supervised entity.

To give non-EU administrators more time to qualify their benchmarks for use in the EU, the BMR also allowed the continued use in the EU of non-EU benchmarks during a transitional period which has been extended three times and now expires at end-2025. However, only a few non-EU administrators have so far been willing or able to qualify their benchmarks for use in the EU under the BMR.

The legislative proposal, published in October 2023, aims to reduce the overall regulatory burden by taking most 'non-significant benchmarks' outside the scope of regulation under the BMR. This change would also mean that EU supervised entities would not be prohibited from using the many non-significant benchmarks provided by non-EU administrators on the expiry of the current transitional period. In addition, the

Key issues

- Scope of the BMR to be limited to critical benchmarks, significant benchmarks, and EU-labelled climate transition and Paris-aligned benchmarks
- Benchmarks to be significant if EU usage exceeds a €50 billion threshold or if the benchmarks are designated as significant by EU supervisors
- EU and non-EU benchmark administrators must notify EU supervisors when EU usage of their benchmarks exceeds the €50 billion threshold
- EU administrators of significant benchmarks must seek authorisation or registration under the BMR
- Non-EU administrators of significant benchmarks must seek recognition or endorsement under BMR (unless an equivalence decision applies)
- EU supervised entities must cease to use a significant benchmark in the EU if the administrator does not make the required application, its application is rejected or its status under the BMR ends or is suspended
- Non-EU administrators must not provide EU-labelled climate transition or Paris-aligned benchmarks
- If adopted, the new regime would apply from 1 January 2026, immediately after the end of the current transitional period for non-EU benchmarks

legislative proposal aims to prohibit non-EU administrators providing the EU-labelled low-carbon benchmarks covered by the BMR: namely EU Climate Transition Benchmarks (CTBs) and EU Paris-aligned Benchmarks (PABs).

This briefing assumes that the new Regulation is adopted in the form of the Commission's legislative proposal.

What are the main changes to the BMR?

The new Regulation would:

- limit the scope of the key obligations under the BMR to critical benchmarks, significant benchmarks, CTBs and PABs and remove other 'non-significant benchmarks' from the scope of the BMR;
- remove the exemption under the BMR for spot foreign exchange benchmarks provided by non-EU administrators where the benchmark is designated by the Commission (none have so far been designated);
- amend the definition of a 'significant benchmark' in the BMR:
  - to make clear that only use 'within the Union' counts towards the €50 billion threshold triggering classification of a benchmark as a significant benchmark; and
  - to provide that benchmarks whose EU usage does not exceed the €50 billion threshold are only classified as significant benchmarks when they are designated as such by a Member State supervisor or (for benchmarks provided by non-EU administrators) by ESMA at the request of a Member State supervisor;
- require EU benchmark administrators immediately to notify their Member State supervisor when the EU usage of any of their benchmarks exceeds the €50 billion threshold and to apply for authorisation or registration under the BMR within 60 working days of that notification or (unless they are already authorised or registered) of the designation of any of their benchmarks as a significant benchmark;

What is a significant benchmark?

The new Regulation would define a 'significant benchmark' as a benchmark (other than a critical benchmark) where:

- the benchmark is used directly or indirectly within a combination of benchmarks within the EU as a reference for financial instruments or financial contracts or for measuring the performance of investments funds that have a total average value of at least €50 billion (based on all the range of maturities or tenors of the benchmark, where applicable) over a period of six months; or
- the benchmark has been designated as a significant benchmark by a Member State supervisor or, for benchmarks provided by non-EU administrators, by ESMA at the request of a Member State supervisor because:
  - the benchmark has no, or very few, appropriate market-led substitutes; and
  - if the benchmark ceases to be provided or is provided based on input data that are no longer fully representative of the underlying market or economic reality or that are unreliable, there would be significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

- require non-EU benchmark administrators immediately to notify ESMA when the EU usage of any of their benchmarks exceeds the €50bn threshold and (unless the benchmark is covered by a relevant equivalence decision) to apply for recognition or endorsement of that benchmark under the BMR within 60 working days of that notification or of the designation of any of their benchmarks as a significant benchmark;
- allow Member State supervisors or (for benchmarks provided by non-EU administrators) ESMA to issue notices triggering the obligations of a benchmark administrator to apply for authorisation, registration, recognition or endorsement where the supervisor or ESMA has clear and demonstrable grounds to consider that EU usage of a benchmark exceeds the €50 billion threshold;
- require Member State supervisors and ESMA to publish notices (to be made available on the ESMA website and via its register) warning that a significant benchmark does not comply with the requirements of the BMR where the benchmark administrator fails to comply with the requirement to apply for authorisation, registration, recognition or endorsement, the application is rejected, the authorisation, registration or recognition is withdrawn or suspended, or the benchmark's endorsement has ceased;
- replace the prohibition on EU supervised entities using unregistered benchmarks in the EU with a prohibition on EU supervised entities adding new references to significant benchmarks in financial instruments, financial contracts and funds where the benchmark is the subject of a warning notice, although the Member State supervisor or ESMA would be able to allow an adaptation period of six months (extendable once for a further six months) to avoid significant market disruption;
- where a significant benchmark is the subject of a warning notice, require EU supervised entities using the benchmark in existing financial instruments or financial contracts to replace that reference with a reference to an appropriate alternative within six months following the notice or to publish a statement on their website that there is no appropriate alternative.

The new requirements would apply from 1 January 2026.

What are the penalties for non-compliance?

Member States would be required to ensure that their supervisors can apply administrative sanctions and other administrative measures, including administrative fines of at least 10% of annual turnover, in relation to breaches of the new requirements (without prejudice to their powers to apply criminal sanctions). ESMA would have the power to apply administrative sanctions and other supervisory measures, including administrative fines of up to 10% of annual turnover, in relation to breaches of the new requirements by non-EU administrators recognised or intending to seek recognition of significant benchmarks under the BMR.

What is the impact on EU benchmark administrators?

The new Regulation would have no impact on the regulation under the BMR of critical benchmarks (currently, EURIBOR, WIBOR, STIBOR and NIBOR).

Existing EU benchmark administrators on 1 January 2026 may have to notify their Member State supervisor and apply for re-authorisation or re-registration under the amended regime if the EU usage of any of their benchmarks exceeds the €50 billion

What is a critical benchmark?

Under the BMR, the Commission may designate a benchmark (other than a regulated-data benchmark) as a 'critical benchmark' where:

- the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least €500 billion (based on all the range of maturities or tenors of the benchmark, where applicable);
- the benchmark is based on submissions by contributors the majority of which are located in one Member State and is recognised as being critical in that Member State; or
- the benchmark meets the following conditions:
  - the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds having a total value of at least €400 billion (based on all the range of maturities or tenors of the benchmark, where applicable);*
  - the benchmark has no, or very few, appropriate market-led substitutes; and
  - if the benchmark ceases to be provided or is provided based on input data that are no longer fully representative of the underlying market or economic reality or that are unreliable, there would be significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

*Member State competent authorities may agree that a benchmark should be recognised as critical even if it does not meet this condition so long as the other conditions are met.

threshold on or after that date. The new Regulation would require Member State supervisors to ensure that administrators already authorised or registered under the BMR on 1 January 2026 can benefit from a simplified procedure if they apply for re-authorisation or re-registration by 1 January 2028.

The Commission notes that an informal 2022 ESMA survey indicated that there were only three EU administrators supervised under the BMR which administer significant benchmarks. However, other existing EU administrators could be in scope of the new requirements if Member State supervisors exercise their powers to designate additional benchmarks as significant benchmarks.

Existing EU benchmark administrators that do not provide significant benchmarks would fall outside the scope of the BMR with effect from 1 January 2026 (unless they provide CTBs and PABs). Those EU administrators would need to ensure that they have policies and procedures to monitor the EU usage of their benchmarks so that they can comply with the notification obligation if the EU usage of a benchmark exceeds the €50 billion threshold in the future. A similar obligation already exists under the BMR but, under the amended BMR, reaching or exceeding the threshold would now trigger the obligation to seek authorisation or registration. This obligation may present some EU administrators with similar challenges to those faced by many non-EU administrators in relation to the new obligations that would fall on them under the amended BMR.

What is the impact on non-EU benchmark administrators?

The current BMR does not require non-EU benchmark administrators to notify ESMA or Member State supervisors of the usage of their benchmarks in the EU or to take any steps to qualify their benchmarks for use in the EU. In contrast, the new Regulation would impose a new obligation on non-EU administrators to notify ESMA if the EU usage of any of their benchmarks reaches or exceeds the €50 billion threshold on or after 1 January 2026. Following that notification, or if any of their benchmarks is designated as a significant benchmark by ESMA, non-EU administrators would also be subject to a new obligation to seek recognition or endorsement of their benchmark under the BMR (unless they are covered by an equivalence decision).

Non-EU administrators would need to put in place policies and procedures to monitor the EU usage of their benchmarks so that they can comply with the notification obligation. This could be challenging where administrators do not have direct contractual relationships with users or those contracts do not require users to report the volume of usage in the EU in a way that aligns with the definitions in the BMR, especially as use in the EU arising from references to the benchmark in financial instruments, financial contracts or funds added before 1 January 2026 under the existing transitional arrangements may count towards the €50 billion threshold.

In some cases, non-EU administrators may conclude that they should, even before the new Regulation is adopted, take steps to prohibit or restrict usage in the EU of their benchmarks to reduce the risk of triggering the new obligations to notify ESMA and to seek recognition or endorsement of their benchmarks under the amended BMR from 1 January 2026. The new Regulation does not remove any of the obstacles that have made it difficult or unattractive for non-EU administrators to seek to qualify their benchmarks for use in the EU under the existing equivalence, recognition or endorsement regimes.

The Commission notes that only 14 out of an estimated 273 non-EU benchmark administrators have qualified benchmarks for use in the EU under the BMR (two are covered by equivalence decisions, ten are recognised and two are endorsed) and that only an estimated six non-EU administrators provide benchmarks whose EU usage exceeds the €50 billion threshold (of which only three are recognised or endorsed under the BMR). However, the Commission acknowledges that there could be an unknown number of other benchmarks whose EU usage exceeds the €50 billion threshold under the existing transitional provisions or that might be designated as significant benchmarks under the new regime.

The new Regulation would require ESMA and Member State supervisors to ensure that non-EU benchmark administrators whose benchmarks are already recognised or endorsed under the BMR on 1 January 2026 can benefit from a simplified procedure if they apply for re-recognition or re-endorsement of a significant benchmark by 1 January 2028.

Existing non-EU benchmark administrators on 1 January 2026 whose benchmarks are already recognised and endorsed under the BMR (or covered by an equivalence decision) but are not significant benchmarks would fall outside the scope of the BMR.

What happens to existing authorisations, etc.?

The legislative proposal does not state whether existing EU and non-EU administrators of benchmarks that are authorised, registered, recognised or endorsed (or covered by an equivalence decision) under the BMR automatically cease to be treated as authorised, registered, recognised or endorsed (or covered by the equivalence regime) on 1 January 2026 pending the outcome of any application for re-authorisation, re-registration, re-recognition or re-endorsement (or steps to re-activate the equivalence regime) triggered by a subsequent notification or designation of their benchmarks as significant benchmarks (and whether and, if so, when this will be reflected in the ESMA register). EU and non-EU administrators may need to update published benchmark statements and other documentation to reflect the changes in their status or the status of their benchmarks under the BMR and any descriptions of the requirements of the BMR.

The legislative proposal does not envisage that administrators of benchmarks that are not critical benchmarks, significant benchmarks, CTBs or PABs can opt to be authorised, registered, recognised or endorsed under the BMR.

What are the changes for CTBs and PABs?

CTBs and PABs would remain within the scope of the BMR even if they are not significant benchmarks and EU administrators of CTBs and PABs would still need to be authorised or registered under the BMR.

What is a CTB or PAB?

Under the BMR, a CTB is a benchmark which is labelled as an EU Climate Transition Benchmark and fulfils the following requirements:

- its underlying assets are selected, weighted or excluded in such a manner that the resulting benchmark portfolio is on a science-based and time-bound trajectory towards alignment with the objectives of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change by reducing Scope 1, 2 and 3 carbon emissions; and
- it is constructed in accordance with the minimum standards laid down in delegated acts adopted by the Commission under the BMR.

Under the BMR, a PAB is a benchmark which is labelled as an EU Paris-aligned Benchmark and fulfils the following requirements:

- its underlying assets are selected, weighted or excluded in such a manner that the resulting benchmark portfolio's carbon emissions are aligned with the objectives of the Paris Agreement;
- it is constructed in accordance with the minimum standards laid down in the delegated acts adopted by the Commission under the BMR; and
- the activities relating to its underlying assets do not significantly harm other environmental, social and governance objectives.

However, the new Regulation would prohibit EU administrators not authorised or registered under the BMR and all non-EU administrators:

- providing CTBs or PABs;
- indicating or suggesting, in the name of the benchmarks they make available for use in the EU or in the legal or marketing documentation for those benchmarks, that the benchmarks they make available comply with the requirements applicable to the provision of CTBs or PABs.

EU supervised entities would also be required not to add new references to a CTB or PAB or combination of such benchmarks in the EU where the administrator is not authorised or registered under the BMR.

The new Regulation would delete the obligation imposed by the existing BMR on EU administrators of significant benchmarks to endeavour to provide at least one CTB by 1 January 2022.

What is the impact on users and contributors?

Supervised entities would be required to monitor the ESMA register (or the future European Single Access Point) to verify the regulatory status of the administrators of significant benchmarks, CTBs or PABs they intend to use. Issuers of securities publishing a prospectus under the Prospectus Regulation would still be required to include a statement in the prospectus as to whether the benchmark administrator of any benchmark referenced by the securities is included on the ESMA register.

However, the exclusion of most non-significant benchmarks from the scope of the BMR should reduce the number of entries on the register that need to be checked. In addition, the restrictions on supervised entities using significant benchmarks would only apply where the benchmarks have been the subject of a warning notice (and these notices should also appear on the register).

Nevertheless, supervised entities and issuers might find their ability to use benchmarks is limited if non-EU benchmark administrators respond to the new Regulation by seeking to prohibit or restrict the use of their benchmarks in the EU to reduce the risk of triggering their new obligations under the new Regulation when it begins to apply.

Currently, the BMR requires supervised entities that contribute input data to EU benchmark administrators to comply with certain governance and control requirements. From 1 January 2026, these requirements would no longer apply unless the benchmark is a critical benchmark, significant benchmark, CTB or PAB.

What happens next?

The Commission's legislative proposal will now be considered by the European Parliament and the Council of the EU which may amend the proposed Regulation. Adoption of the Regulation may be delayed by the hiatus in legislative activity resulting from the elections to the European Parliament and the appointment of the next Commission in 2024. However, there should be adequate time for the co-legislators to agree the text and for the new Regulation to be published in the Official Journal before the expiry of the current transitional period at end-2025.

After the new Regulation enters into application on 1 January 2026, the Commission would be empowered to adopt delegated acts further specifying the calculation method for the €50 bn usage threshold.

What are the implications for the UK?

UK benchmark administrators will face similar issues under the new Regulation as other non-EU administrators. However, for the time being, it seems unlikely that the Commission will determine that the UK regime is equivalent to the EU regime for the regulation of benchmarks even though the BMR became part of UK law after the UK left the EU with limited amendments. Therefore, UK administrators whose benchmarks are widely used in the EU may be required to seek recognition or endorsement of those benchmarks in the EU after 1 January 2026.

Following the passage of the Financial Services and Markets Act 2023, HM Treasury is extending the transitional period under the UK BMR allowing the continued use in the UK of benchmarks provided by EU and other non-UK administrators until the end of 2030. This means that UK supervised entities will continue to be able to use (until end-2030) benchmarks provided by EU administrators even if those administrators are no longer supervised under the EU BMR because their benchmarks are not significant benchmarks under the new Regulation and those administrators take no steps to qualify their benchmarks for use in the UK under the UK BMR. Currently, EU administrators can qualify their benchmarks for use in the UK using the equivalence regime under the UK BMR, pursuant to an equivalence direction made by HM Treasury in 2020. However, this may change, at least for benchmarks administered by EU benchmark administrators that cease to be supervised under the BMR as a result of the new Regulation.

The extension of the UK transitional period also provides HM Treasury with additional time to decide on the timing of the repeal of the UK BMR under the 2023 Act and whether and, if so, how to restate or replace the requirements of the UK BMR in UK legislation. For example, HM Treasury might consider modifying the UK regime in a way that is aligned with the amended EU BMR. This might assist UK administrators whose benchmarks are significant benchmarks under the EU BMR if the Commission were to decide that the UK regime could be considered equivalent to the EU regime - but would raise similar issues for EU and other non-UK administrators as are raised for non-EU administrators by the proposed Regulation. Alternatively, HM Treasury might consider reintroducing the regime that applied in the UK before the adoption of the BMR under which the UK only required authorisation for the administrators of a limited class of critical benchmarks designated by HM Treasury (which would be more in line with the approach adopted in some other non-EU countries). HM Treasury may give more information on at least the timing of its approach when it provides information on Tranche 3 of its plans to deliver the new UK 'smarter regulatory framework' under the 2023 Act.

*For more information, visit the Regulation of Benchmarks topic guide on the **Clifford Chance Financial Markets Toolkit**.*

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