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CMCE response to the European Commission's consultation on the regime applicable to the use of benchmarks administered in a third country

About CMCE

Commodity Markets Council Europe (CMCE) is the only association in Europe representing the range of commodity market participants – agriculture, energy, metals and other commodity market participants, benchmark providers, price reporting agencies, and trading venues operating in the European region (EU, EEA, UK, Switzerland and neighbouring countries). The majority of CMCE members use commodity derivative markets to hedge the risks related to their physical activities and assets. CMCE's key purpose is to engage with policymakers and regulators to promote liquid and well-functioning commodity derivative markets in Europe.

General comment

CMCE welcomes the opportunity to provide the European Commission with feedback regarding the EU Benchmark Regulation (the 'BMR') and particularly on possible potential improvements in its functioning related to the rules applicable to third-country benchmarks and the impact on market participants of the entry into application of the third country regime as of 1 January 2024.

Questions to all types of respondents

Question 2.1 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?

- Those rules are appropriate
- Those rules are overall appropriate, but minor adjustments are needed
- Those rules are not fit-for-purpose, and should be reviewed
- Answer. Don't know / no opinion / not applicable

Response (2000 character(s) maximum):

The CMCE agrees that the BMR third country regime would be problematic for benchmark users in the EU if fully applied in 2024. The current scope of the BMR is very broad compared to other jurisdictions, which are unlikely to follow suit in the future. Therefore, the current BMR regime for third countries is

unlikely to be fit-for-purpose anytime in the future, leading to uncertainty and higher costs for EU users of benchmarks. In principle, the CMCE would cautiously welcome the approach outlined in the consultation paper by the European Commission of essentially reducing the scope of the application of BMR only to third country benchmarks classified as 'strategic' benchmarks. This support would be subject to a clear and robust regulatory definition of which benchmarks would be defined as a 'strategic' and a clear process that would need to be followed when bringing any benchmark into the classification of 'strategic'. CMCE also supports the extension of the current third country extension until the end of 2025 in order to avoid any potential market disruption.

Question 2.2 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.

- Totally opposed
- Somewhat opposed
- Neither opposed nor in favour
- Somewhat in favour
- Totally in favour
- Don't know / no opinion / not applicable

Response (2000 character(s) maximum):

As stated above, the CMCE would be cautiously in favour of the introduction of the framework described in the European Commission's consultation of introducing the concept of 'strategic' benchmarks. However, the CMCE believes that a clear and robust definition of what would be defined as a 'strategic' benchmark. A clear process with specific criteria for the designation or classification of a benchmark 'strategic' must be set out in any new legislation at Level I. Without such provisions, EU users of benchmarks would lack clarity over which benchmarks would fall into the scope of BMR and remain uncertain as to which benchmarks would be usable in the long term.

Question 2.4 (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.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Somewhat agree
- Fully agree
- Don't know / no opinion / not applicable

Response (2000 character(s) maximum):

Applying the proposed regime only to third countries is likely to lead to EU benchmarks administrators

being at a competitive disadvantage compared to third country administrators. It may also lead to confusion among EU benchmark users as to the regulatory status of any benchmarks they wish to use. The CMCE would, therefore, be in favour of applying the same treatment to EU benchmarks to avoid an unlevel playing field.

Question 2.4 (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.

- Do not agree at all
- Do not agree
- Neither agree nor disagree
- Somewhat agree
- Fully agree
- Don't know / no opinion / not applicable

Response (2000 character(s) maximum):

The CMCE is ambivalent on the opt-in regime proposal described by the European Commission's consultation. While it perceives that such regime would allow benchmark administrators to demonstrate their adherence to BMR standards and in turn provide a quality label to their users, it is at the same time concerned that the regime could create an unlevel playing field between a benchmark administrator that opts-in and one that does not, and it may also lead to market confusion for benchmark users as to the actual scope of the BMR.