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EU Benchmark Regulation: Final Compromise Text Approved

The final compromise text of the European Benchmark Regulation was approved by the European Council on 9 December 2015. The regulation on indices used as benchmarks in financial instruments and financial contracts ("**Benchmark Regulation**") has been a political hot potato with much lobbying at European level due to the breadth of its scope and the impact it will have on the financial industry. The Benchmark Regulation will bring activities and firms into scope who, on a domestic level, would not otherwise consider themselves to be administering, contributing to or using a benchmark.

The Benchmark Regulation is a European legislative response to the LIBOR and EURIBOR scandals which have recently blighted the financial industry. It is intended (i) to improve governance and controls over the benchmark process, particularly in relation to conflicts of interest, (ii) to improve the quality of input data and methodologies and ensure that data contributions are free of conflicts and (iii) to protect consumers and investors through greater transparency, rights of redress and a suitability assessment in certain cases.

The scope of the Benchmark Regulation and the definition of "benchmark" itself are intentionally wide in order to capture a wide array of activities; however, the regulation seeks to take a proportionate approach, and whether or not specific obligations under the regulation apply depends on the benchmark's underlying asset(s), its significance in relation to financial markets and the source of the input data.

The proposed text of the Benchmark Regulation was originally released by the European Commission in October 2013 (see our briefing here and our summary of the Financial Conduct Authority's conclusions following its thematic review of benchmarks' administration in July 2015 here). While the framework of the Benchmark Regulation remains as originally proposed, there have been some important changes to the text from the original proposal, which we highlight below.

Summary

What is a benchmark?

A "benchmark" is an index used to determine the amount payable under or the value of certain financial instruments or contracts or to measure the performance of investment funds (see full definition overleaf).

What is required?

Administrators of benchmarks must (i) apply for and obtain authorisation and/or registration from their competent authority and (ii) adhere to various requirements including in relation to internal governance and benchmark methodology.

Contributors to benchmarks must comply with the applicable code of conduct and contribute data for critical benchmarks where required, amongst other things.

Users of benchmarks may only use benchmarks provided by registered administrators.

What about non-EU administrators and benchmarks?

Benchmarks of non-EU administrators may only be used in the EU where: (i) the administrator is authorised or registered under an **equivalent** third-country regime; (ii) the administrator is **recognised** by Member State authorities pending an equivalence decision; or (iii) the benchmark is **endorsed** by an EU administrator.

Are all benchmarks treated equally?

The requirements of the Benchmark Regulation vary according to: (i) the nature of the benchmark's underlying asset(s) (i.e. "interest rate" and "commodity" benchmarks); (ii) the significance of the benchmark in relation to financial markets (i.e. "critical", "significant" and "non-significant" benchmarks); and (iii) the source of benchmark data inputs (i.e. "regulated-data" benchmarks).

What is the expected timing?

- Expected implementation date: Q1 2018
- Expected deadline for authorisation/registration: Q1 2020

Meaning of "Benchmark"

- A "**benchmark**" is "any **index** by reference to which the amount payable under **a financial instrument** or a **financial contract**, or the value of a financial instrument is determined or an index that is used to measure the performance of an **investment fund** with the purposes to track the return of such index or to define the asset allocation of a portfolio or to compute the performance fees".
- An "**index**" is "any figure: (i) that is **published or made available to the public**; (ii) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (iii) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes or other values or surveys".
  - A key element of each index is discretion: "[a]n index is calculated using a formula or some other methodology on the basis of underlying values. Discretion exists in constructing this formula, performing the calculation or determining the input data. This discretion creates a risk of manipulation and therefore all benchmarks sharing this characteristic should be covered by this Regulation." (Recital 15)
  - A single price or reference value is not a benchmark since there is no calculation, input data or discretion (Recital 15a and Article 2(2)(ac)).

Other definitions used above:

- "**financial instrument**" means any of the instruments (being transferable securities and OTC derivatives contracts) listed in Section C of Annex I to 2014/65/EU (i.e. MiFID II) for which a request for admission to trading on a trading venue has been made or which are traded on a trading venue or "systematic internaliser".

  "**trading venue**" is not directly defined but instead cross refers to MiFID II and therefore includes any EU regulated market, EU multilateral trading facility (MTF) or EU organised trading facility (OTF).
- "**financial contract**" means (i) a consumer credit agreement under Article 3(c) of Directive 2008/48/EC (directive on consumer credit agreements), or (ii) a residential mortgage agreement under Article 4(3) of Directive 2014/17/EU (directive on credit agreements relating to residential property).
- "**investment fund**" is any alternative investment fund or UCITS.

A Proportionate Approach

The approach of the Benchmark Regulation is to provide for a broad scope in order to regulate a diverse array of benchmark activity, but to do so in a proportionate way by reference to the risks posed by the particular benchmark. According to the Recitals:

> *The scope of this Regulation should be as broad as necessary to create a preventive regulatory framework. The degree of risk [of benchmarks] varies, and the approach adopted should therefore be tailored to the particular circumstances. (Recital (8))*
>
> *This Regulation should also provide for a proportionate response to the risks that different benchmarks pose. (Recital (9))*

Benchmark Classification

In order to achieve proportionality and ensure that the requirements are appropriately tailored to the diverse array of indices within its scope, the requirements of the Benchmark Regulation vary according to whether the benchmark has certain features relating to three aspects:

(i) **the underlying asset(s)** – the regulation envisages alternative requirements where the underlying asset is an "**interest rate**" or a "**commodity**", which differ from the standard requirements that apply for other underlying assets and which have their own bespoke annexes within the Benchmark Regulation.

(ii) **the significance of the benchmark** – the stringency of the requirements varies according to the significance of the benchmark. Additional requirements apply for benchmarks classed as "**critical**", while those classed only as "**significant**" or "**non-significant**" are exempt from certain requirements.

These exemptions do not apply to interest rate or commodity benchmarks, which distinguish only between critical benchmarks and benchmarks that are not classed as critical.

(iii) **the source of data** – "**regulated-data**" benchmarks, which use only input data from specified sources, are exempt from certain requirements.

We summarise each of these below.

Underlying Asset(s)

Interest rate benchmarks – Interest rate benchmarks are benchmarks in respect of which the underlying asset is the rate at which banks may lend to, or borrow from, other banks, or agents other than banks, in the money market.

Interest rate benchmarks must comply with certain alternative requirements set out in Annex I to the Benchmark Regulation in relation to data, oversight function and auditing.

As noted above, interest rate benchmarks are unable to benefit from the exemptions for significant and non-significant benchmarks.

Commodity benchmarks – Commodity benchmarks are indices in respect of which the underlying asset is a commodity (other than emission allowances).

Most commodity benchmarks must comply with the provisions of Annex II of the Benchmark Regulation, which effectively mirror the IOSCO principles for Oil Price Reporting Agencies of October 2012 and are more stringent than the basic Benchmark Regulation requirements. However, the following benchmarks remain subject to the standard requirements: (i) regulated-data commodity benchmarks; (ii) commodity benchmarks based on submissions by contributors which are in majority supervised entities; and (iii) commodity benchmarks that are also critical benchmarks where the underlying asset is gold, silver or platinum. In any case, the exemptions for significant and non-significant benchmarks do not apply to commodity benchmarks.

On the other hand, the Benchmark Regulation fully exempts commodity benchmarks that (i) are based on submissions by contributors which are in majority non-supervised entities, (ii) are referenced in financial instruments trading on only one EU trading venue and (iii) the total notional value of financial instruments referencing the benchmark does not exceed €100mn.

Significance

Critical benchmarks – A critical benchmark is a benchmark which satisfies at least one of the following conditions:

- it is used as a reference for financial instruments or financial contracts or for the determination of the performance of investment funds having a total value of at least €500bn;
- it is based on submissions by contributors the majority of whom are located in one EU member state and is recognised as critical in that member state by the relevant competent authority; or
- (i) it is used as a reference for financial instruments or financial contracts or for the determination of the performance of investment funds having a total value of at least €400bn, (ii) there are no or few market-led substitutes and (iii) cessation of the benchmark would have significant and adverse consequences for, amongst others, consumers or the financing of households and corporations in one or more EU member state. The relevant competent authorities may agree to recognise the benchmark as critical even if the monetary threshold is not met.

The Benchmark Regulation allows authorities to impose mandatory contribution requirements in respect of a critical benchmark and also contains notification requirements which apply where a contributor to a critical benchmark intends to cease contributing input data.

Significant benchmarks – A significant benchmark is a benchmark which does not satisfy all of the criteria necessary for it to be a critical benchmark, but:

(i) is used as a reference for financial instruments or financial contracts or for the determination of the performance of investment funds having a total average value of at least €50bn over a period of six months; or

(ii) has no or very few market-led substitutes and its absence would have significant and adverse consequences for, amongst others, consumers or the financing of households and corporations in one or more EU member state.

Administrators of significant benchmarks are subject to less stringent requirements than administrators of critical benchmarks, subject to certain conditions.

Non-significant benchmarks – A non-significant benchmark is a benchmark which does not fulfil the necessary criteria for it to be a critical benchmark or a significant benchmark.

An administrator of non-significant benchmarks is partially exempted from governance and control requirements and partially exempted from input data requirements under the Benchmark Regulation, but must still comply with the requirement to develop codes of conduct for contributors (albeit on a less prescriptive basis). See "*Non-significant benchmarks and proprietary indices*" box below.

Non-significant benchmarks and proprietary indices

The creation of a lighter-touch regime for non-significant benchmarks in the final text of the Benchmark Regulation is an important result for sponsors of proprietary indices.

Since most proprietary indices will not satisfy the criteria required for them to be classified as critical or significant (see "*Significance*" above), most proprietary indices (other than those referencing commodities or interest rates) are likely to be classified as non-significant benchmarks and thus subject to less onerous requirements. However, proprietary indices referencing commodities or interest rates are generally subject to the more stringent regimes applicable for such assets (see "*Underlying Asset(s)*" above).

Administrators of non-significant benchmarks must:

- take limited steps to prevent conflicts of interest and ensure that discretion is independently and honestly exercised (unlike for critical benchmarks, there is no requirement for operational separation);
- have a clear organisational structure with transparent and consistent roles for those involved in the provision of a benchmark and ensure that those involved have the necessary skills, knowledge and experience and are subject to effective supervision;
- establish a limited permanent oversight function (unlike for critical benchmarks, there is no requirement for a separate committee and the specific procedures and responsibilities that apply for critical benchmarks are not applicable);
- use sufficient input data, robust and reliable methodologies and provide appropriate transparency;
- publish a "benchmark statement" for each family of benchmarks containing certain prescribed information, including details relating to the exercise of any discretion;
- develop a limited code of conduct for each family of benchmarks specifying the contributors' obligations (unlike for critical benchmarks, the code's contents are not prescribed);
- publish a procedure covering actions to be taken in the event of changes to a benchmark or its cessation;
- report any manipulation of the benchmark under the EU Market Abuse Regulation; and
- apply for authorisation and/or registration as for other types of benchmark (if all indices provided by the administrator are non-significant then registration only is required).

In other words, administrators of non-significant benchmarks are only obliged to comply with a limited set of the more fulsome "Title II" requirements that other types of benchmarks must satisfy. However, to the extent that an administrator chooses not to comply with the more fulsome requirements, it must publish a compliance statement explaining the appropriateness of such choice and file the statement with its competent authority.

Source of Data

Regulated-data benchmarks – A regulated-data benchmark is a benchmark determined by the application of a formula derived from:

(i) input data received from, amongst others, an EU trading venue, certain EU energy exchanges, EU emission allowance auction platforms or an outsourced service provider receiving input data in such a way; or

(ii) the net asset values of investment funds (AIFs or UCITS).

Administrators of regulated-data benchmarks are partially exempted from certain requirements (including input data requirements), and the code of conduct requirements for contributors are not applicable.

We provide a table in the annex to this briefing which sets out the applicable exemptions for different classes of benchmarks.

To Whom Does The Benchmark Regulation Apply?

The Benchmark Regulation applies to entities involved in the following three activities carried out in the EU in relation to a benchmark:

(i) **The provision of a benchmark** - the party carrying out this activity is an **administrator**.

(ii) **The contribution of input data to a benchmark** - the party carrying out this activity is a **contributor**.

(iii) **The use of a benchmark** - the party carrying out this activity is **a user**.

EU central banks, public authorities, central clearing counterparties, the press and lenders are broadly exempt from the Benchmark Regulation.

Administrators

Who is an administrator?

An administrator is a party having control over the provision of a benchmark. This includes (i) administering the arrangements for determining a benchmark, (ii) collecting, analysing or processing input data for the purposes of determining a benchmark, and (iii) determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data.

What obligations apply?

Authorisation or registration

A benchmark administrator within the EU must obtain either an authorisation or a registration depending on the category of benchmark it will be providing.

There are different requirements for non-EU administrators, which are discussed below. These were heavily negotiated (and particularly contentious) provisions of the Benchmark Regulation which led to much of the delay in finalising the text.

Governance and control

A benchmark administrator must, amongst other things:

- ensure that a benchmark is not affected by any existing or potential conflict of interest and that, where discretion is required, it is independently and honestly exercised;
- have a clear organisational structure with transparent and consistent roles for those involved in the provision of a benchmark and ensure that those involved have the necessary skills, knowledge and experience and are subject to effective supervision;
- establish a permanent oversight function (consisting of a separate committee) to annually review the benchmark's definition and oversee the control framework and any third party involvement;
- use sufficient and verifiable input data, robust and reliable methodologies and provide appropriate transparency;
- publish a "benchmark statement" for each family of benchmarks containing certain prescribed information, including details relating to the exercise of any discretion;
- develop a code of conduct for each family of benchmarks specifying the contributors' obligations;
- publish a procedure covering actions to be taken in the event of changes to a benchmark or its cessation; and
- report any manipulation of the benchmark under the EU Market Abuse Regulation.

Methodology and transparency

The Benchmark Regulation requires an administrator to develop, operate and administer the benchmark data and methodology transparently. It also requires the publication or provision of the key elements of the methodology and details of the internal review and approval thereof. However, the Benchmark Regulation contains an explicit statement to the effect that this requirement for transparency should not be construed as a requirement that the applicable formula(e) must be published; rather, the disclosure of the various elements must be sufficient to allow stakeholders to understand how the benchmark is derived in order to assess its representativeness, relevance and appropriateness for use.

Contributors

Who is a contributor?

A contributor is a person who contributes input data to an administrator for the purpose of determining a benchmark.

The Benchmark Regulation only applies (for the most part) to contributors who are regulated EU entities such as credit institutions and investment firms. Other contributors are required to adhere to codes of conduct developed by administrators in respect of particular benchmarks, guidelines for which are set out in the Benchmark Regulation.

What obligations apply?

As mentioned above, each benchmark contributor must comply with the requirements and obligations specified in the applicable code of conduct. Each benchmark contributor which is a supervised entity must also, amongst other things:

- ensure that the provision of input data is not affected by any existing or potential conflict of interest and that, where discretion is required, it is independently and honestly exercised;
- cooperate in the auditing and supervision of benchmarks and maintain and make records available; and
- contribute data for critical benchmarks if required to do so by a competent authority.

Users

Who is a user?

A user is a person who: (i) issues a financial instrument which references the benchmark; (ii) determines the amount payable under a financial instrument or financial contract which references the benchmark; (iii) is party to a financial contract which references the benchmark; (iv) provides a borrowing rate calculated as a mark-up over a benchmark; or (v) determines the performance of an investment fund through an index.

While the Benchmark Regulation will affect all users of benchmarks, the obligations and restrictions in it apply only to benchmark users which are supervised entities.

What obligations apply?

A benchmark user which is a supervised entity:

- may only use benchmarks provided by administrators which are authorised or registered for such purpose; and
- must produce robust written plans setting out the actions that they would take in respect of their relevant financial instruments or financial contracts in the event that a benchmark materially changes or ceases to be produced.

We provide a table in the annex to this briefing which sets out the requirements of the Benchmark Regulation and the applicable exemptions for different classes of benchmarks.

Use Of Third Country Benchmarks

One of the key issues that has prolonged negotiations is the use of third country benchmarks. Under the final compromise text of the Benchmark Regulation, the use of third country benchmarks is possible via three avenues:

(i) **Equivalence**: This regime applies for non-EU countries in respect of which the European Commission has reached an equivalence decision and a cooperation agreement is in place. Benchmark administrators that are authorised or registered and subject to supervision in such a country can notify ESMA to be included in the ESMA register, following which the benchmark in question may be used.

(ii) **Recognition**: A third country administrator may be recognised by member state national authorities until such time as an equivalence decision is made by the European Commission. This requires the administrator to be able to demonstrate compliance with the Benchmark Regulation (save for certain provisions) or with the IOSCO principles for Financial Benchmarks of July 2013 (see the IOSCO final report and page 5 of our Ashurst briefing) or the IOSCO principles for Oil Price Reporting Agencies of October 2012 (provided that compliance with the relevant IOSCO principles is equivalent to compliance with the applicable terms of the Benchmark Regulation), and for this to be verified by (i) an independent external auditor in the case of a non-supervised administrator, or (ii) its national competent authority in the case of a supervised administrator. The third country administrator must have a legal representative in the applicable member state.

(iii) **Endorsement**: EU administrators are able to endorse third country benchmarks (or a family of benchmarks) where the EU administrator has a clear and well-defined role in the accountability framework of the third country administrator, can monitor the provision of the benchmark or family of benchmarks and there is an objective reason to provide the benchmark or family of benchmarks in a third country and endorse it

for use in the EU. The EU endorsing administrator must remain fully responsible for the third country benchmark or family of benchmarks and its compliance with the Benchmark Regulation. The European Commission will produce delegated legislation setting out further detail on this process.

Non-EU benchmarks – difficult questions remain

While the final compromise text of the Benchmark Regulation has moved some way towards addressing concerns as to the use of benchmarks of non-EU administrators by adding new recognition and endorsement powers, there remain difficult questions as to whether and how these terms will work in practice. For example, the equivalency regime is likely to include very few jurisdictions (e.g. it would not include the United States), and so is likely to have very limited application. The recognition regime only applies pending an equivalency decision and requires a number of difficult and unclear conditions to be satisfied. Finally, the new endorsement regime requires direct oversight of the non-EU benchmark and makes the endorsing EU administrator responsible for it, thereby effectively limiting the endorsement regime only to EU affiliates of non-EU administrators.

Considerable work is to follow from the European Commission and ESMA in this area which may help to shed light on the viability of these third country provisions.

Administrative Measures And Sanctions

Under Article 30 of the Benchmark Regulation, national authorities must be accorded supervisory and investigatory powers together with the ability to impose sanctions for any breach of its provisions, including monetary fines up to specified limits (being at least the higher of €1,000,000 or 10% of total annual turnover for firms and €500,000 for individuals).

Timing And Next Steps

The final text will be voted on by the European Parliament (the vote in the ECON committee is scheduled for 25 January 2016 with the plenary vote yet to be scheduled), formally adopted by the European Council and published in the Official Journal ("**OJ**"). No domestic implementation is necessary since, as a European regulation, the Benchmark Regulation is directly applicable in all EU member states.

Publication of the Benchmark Regulation is not likely to take place until sometime towards the middle of this year, meaning that it is unlikely to apply before the first quarter of 2018, being 18 months after its entry into force (i.e. the day after publication in the OJ), though it is possible that this period will be amended to 24 months in the final text.

Within 12 months of the Benchmark Regulation's entry into force (i.e. around the middle of 2017), ESMA will produce regulatory technical standards on governance, input data, transparency of methodology, and content of benchmark statements.

Transitional Provisions

Authorisation of administrator: an administrator has up to two years from the date of application of the Benchmark Regulation to apply for authorisation or registration (i.e. by the first quarter of 2020, subject to change in the final text), and may continue to provide benchmarks unless and until such application is refused.

Non-compliant benchmark: where an existing benchmark does not meet the requirements of the Benchmark Regulation but ceasing or changing that benchmark would result in a force majeure event, or frustrate or otherwise breach the terms of any financial contract or financial instrument referencing that benchmark, the use of that benchmark shall be permitted. However, no financial instrument or financial contract shall start to reference the non-compliant benchmark after the date of application of the Benchmark Regulation (i.e. around the first quarter of 2018, subject to change in the final text).

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ANNEX

Exemptions for Specific Classes of Benchmarks

The following table illustrates which Articles of the Benchmark Regulation are exempt (either partially or entirely) for the different classes of benchmarks. Cells that are left blank indicate that no exemption applies.

Provision	Heading	Exemptions for specific classes of benchmarks				
		Interest Rate (Annex I applies)	Commodity[1] (Annex II applies)	Significant[2]	Non-Significant[3]	Regulated-Data
Title II: Benchmark Integrity and Reliability						
Chapter 1: Governance and Control of Administrators						
Article 5	**Governance and Conflict of Interest Requirements**		Entire Article	Articles 5(2) and 5(3c)(c)(d)(e)	Articles 5(2), 5(3c)(c)(d)(e) and 5(3d)	
Article 5a	**Oversight Function Requirements**	Articles 5a(4) and 5a(5)	Entire Article		Articles 5a(2), 5a(3) and 5a(4)	
Article 5b	**Control Framework Requirements**		Entire Article		Articles 5b(1) and 5b(2a)[4]	
Article 5c	**Accountability Framework Requirements**		Entire Article		Article 5c(2)	
Article 5d	**Record Keeping Requirements**		Entire Article			Article 5d(1)(a)[5]
Article 5e	**Complaints Handling Mechanism**		Entire Article			
Article 6	**Outsourcing**					

[1] Excluding where such commodity benchmark is either a regulated-data benchmark; based on submissions by contributors which are in majority supervised entities; or a commodity benchmark that is also a critical benchmark where the underlying asset is gold, silver or platinum.

[2] For significant benchmarks, exemptions apply only where the administrator considers that the requirement would be disproportionate, which decision may be overturned by the competent authority.

[3] For non-significant benchmarks, if the administrator uses an exemption it must publish a compliance statement explaining why this is appropriate and file such statement with its competent authority.

[4] The final compromise text of the Benchmark Regulation also erroneously states that Article 5b(4) does not apply, which section does not exist in any case.

[5] Exempt only with reference to input data that are contributed entirely and directly as specified in Article 3(1)(20a).

Chapter 2: Input Data, Methodology and Reporting of Infringements						
Article 7	**Input Data**		Entire Article	Article 7(3a)(b)	Articles 7(1)(aa), 7(2a)(b)(c), 7(3a) and 7(5)	Articles 7(1)(b)(c), 7(2a) and 7(3a)
Article 7a	**Methodology**		Entire Article			
Article 7b	**Transparency of Methodology**		Entire Article		Article 7b(2)	
Article 8	**Reporting of Infringements**		Entire Article		Article 8(2)	Articles 8(1) and 8(2)
Chapter 3: Code of Conduct and Requirements for Contributors						
Article 9	**Code of Conduct**		Entire Article	Article 9(2)	Article 9(2)	Entire Article
Article 11	**Governance and Controls Requirements for Supervised Contributors**	Article 11(4)	Entire Article		Articles 11(2), 11(2b) and 11(4)	Entire Article
Title IV: Transparency and Consumer Protection						
Article 15	**Benchmark Statement**					
Article 17	**Cessation of a Benchmark**					

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