

Benchmarks Regulation

QUICK GUIDE

January 2018

WHAT IS IT? THE REGULATION ON INDICES USED AS BENCHMARKS IN FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS (KNOWN AS THE BENCHMARKS REGULATION).	
When does it apply from?	1 January 2018.
Background	The Benchmarks Regulation is a European response to the Libor and Euribor scandals and will bring firms into scope who, on a domestic level, would not otherwise consider themselves to be administering, contributing to or using a benchmark. The stated aim of the Benchmarks Regulation is to restore confidence in the accuracy and integrity of benchmarks. The European Commission intends to achieve this by ensuring that benchmarks are not subject to conflicts of interest, are used appropriately and reflect the actual market or economic reality they are intended to measure.
Status	In force.
Key definitions	<p>"Benchmark" is defined broadly in the Benchmarks Regulation and comprises either:</p> <ul style="list-style-type: none"> (a) any index by reference to which the amount payable under a financial instrument that is traded on trading venues or via systematic internalisers in the EU or mortgage or consumer credit contracts, or the value of such a financial instrument, is determined; or (b) an index that is used to measure the performance of an investment fund. <p>An index is also widely defined under the Benchmarks Regulation and means a figure that is published or made available (ESMA has clarified that this means that the figure has been made accessible either directly or indirectly, to a potentially indeterminate number of persons other than the index provider or a determined number of recipients connected to the index provider) and that is regularly determined by the application of a formula or calculation or assessment or on the basis of the value of underlying assets or prices.</p> <p>Some benchmarks may fall within specific regimes under the Benchmarks Regulation, such as a regulated data benchmark (for example the FTSE 100 index), a commodity benchmark or an interest rate benchmark.</p> <p>A single price or reference value is not a benchmark since there is no</p>

calculation, input data or discretion. Benchmarks provided by a central bank or a public authority that provides a benchmark for public policy purposes (e.g. as a measure of inflation) are exempt from the Benchmarks Regulation.

An entity may be a benchmark administrator if it has control over the provision of a benchmark that are used in financial instruments traded on trading venues or via systematic internalisers in the EU, mortgage or consumer credit contracts, or to measure the performance of investment funds.

An entity may be a supervised contributor under the Benchmarks Regulation if it is an authorised person and it contributes input data that is not readily available to the administrator, and provides that input data for the purpose of a benchmark determination.

Under the Benchmarks Regulation, a benchmark user is not defined, but "use of a benchmark" is (article 3(1)(7)). A benchmark user may therefore be an authorised person which:

- (i) issues a financial instrument that references an index;
- (ii) determines the amount payable under a financial instrument or a mortgage or consumer credit contract by referencing an index;
- (iii) is a party to a mortgage or consumer credit contract that references an index (e.g. as a lender);
- (iv) provides a borrowing rate calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a consumer credit contract to which the creditor is a party; or
- (v) measures the performance of an investment fund through an index either to track the return of the fund or to define its asset allocation.

Requirements

Administrators of benchmarks must:

- (i) apply for and obtain authorisation and/or registration from their national competent authority; and
- (ii) adhere to various requirements including in relation to internal governance and benchmark methodology as well as input data verification.

The specific requirements depend on whether the benchmark is classified as "critical", "significant" or "non-significant" under the Benchmarks Regulation and on whether the benchmark falls within one of the specific regimes, such as a regulated data benchmark, a commodity benchmark or an interest rate benchmark.

Contributors to benchmarks must comply with the applicable code of conduct. Input data must be appropriate and verifiable. In its consultation, ESMA proposed additional measures in relation to input data such as to ensure that administrators are able to carry out certain checks on input data, including formal checks on whether the input is contributed by an authorised submitter, and whether it is provided on time. Oversight and verification procedures for input data contributed by a front office function (broadly, a department performing any pricing, trading, sales or similar activities) of a contributor,

	<p>including ensuring that appropriate training is in place, are required.</p> <p>Subject to certain transitional provisions, users of benchmarks may only use benchmarks provided by authorised or registered administrators. Users will be subject to article 28(2) requirements on contingency planning which, for financial instruments issued / entered into from 1 January 2018, include:</p> <ul style="list-style-type: none"> (i) producing and maintaining robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided; and (ii) where feasible and appropriate, nominating in such plans one or several alternative benchmarks that could be referenced to substitute the benchmarks no longer provided, indicating why such benchmarks would be suitable alternatives; and (iii) upon request, providing its relevant national competent authority with those plans and any updates and reflecting them in its contractual relationship with clients. In relation to contracts entered into prior to 1 January 2018 and still existing at that date, ESMA expects supervised entities to amend them where practicable and on a best-effort basis.
Territoriality and transitional provisions	<p>Whether or not an authorised firm can use a benchmark from 1 January 2018 depends on where the index provider is located. Generally, firms are permitted to use a benchmark, or a combination of benchmarks, if the benchmark is provided by an authorised benchmark administrator that is referenced in a new EU register of benchmarks, or if the benchmark is itself included in that register (article 29(1)).</p> <p>However, there are some transitional provisions:</p> <ul style="list-style-type: none"> (i) EU index providers that provided a benchmark as of 30 June 2016 <p>Article 51(1) allows an EU index provider (that would be an "administrator"), <u>already providing a benchmark on 30 June 2016</u>, to apply for authorisation or registration until 1 January 2020. This means that such an administrator may not feature in any register until nearer the 2020 deadline. This transitional provision applies at the entity level. This means that authorised firms can continue to use a benchmark from any such entity provided that by 1 January 2020, such entity has applied for authorisation or registration or unless and until the authorisation or registration of the EU index provider is refused. This applies equally to any benchmark <u>already provided before 1 January 2018</u>, updates and modifications of benchmarks already provided before 1 January 2018, <u>as well as the provision of new benchmarks for the first time after 1 January 2018</u>.</p> (ii) EU index providers that were not providing a benchmark as of 30 June 2016 <p>Similarly, where an EU index provider was <u>not providing a benchmark on 30 June 2016</u> and <u>starts to provide benchmarks between 1 July 2016 and 31 December 2017</u>, the EU index provider can continue to provide an existing benchmark until 1 January 2020 or unless and until authorisation or registration is refused. However, if such EU index provider only starts to provide benchmarks after 30</p>

June 2016 and provides a new benchmark after 1 January 2018, authorised firms cannot use such newly provided benchmarks, unless the EU index provider obtains authorisation or registration.

For benchmarks provided by any **non-EU index provider**, ESMA has clarified that Article 51(5) allows benchmarks administered by non-EU entities that were already being used in the EU on or before 1 January 2020 to be used in financial instruments and financial contracts that reference the benchmark on or before 1 January 2020. This means that authorised firms can continue to use benchmarks provided by non-EU entities even if the non-EU administrator does not benefit from an equivalence decision nor is recognised nor is endorsed (under article 33).

For new benchmarks provided for the first time by a non-EU administrator after 1 January 2020, one of the three regimes will need to be followed:

- (i) the administrator is authorised or registered under an equivalent third-country regime (under article 30(1) Benchmarks Regulation);
- (ii) the administrator is recognised by Member State authorities pending an equivalence decision (in accordance with article 32); or
- (iii) the benchmark is endorsed by an EU administrator (under article 33).

For more information, see Ashurst briefings:

<https://www.ashurst.com/en/news-and-insights/legal-updates/eu-benchmark-regulation-final-compromise-text-approved-january-2016/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/1-july-2016---eu-benchmark-regulation-now-in-force-transitional-dates-determined/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/eu-benchmarks-regulation-may-2016/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/benchmark-regulation-esma-launches-consultation-on-technical-standards/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/14-november-2016-benchmark-regulation-esma-settles-transitional-provisions-and-other-key-terms/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/benchmark-regulation-esma-delivers-regulatory-technical-standards-to-european-commission/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/the-fca---benchmarks/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/benchmark-regulation-european-commission-publishes-draft-delegated-acts/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/benchmark-regulation-esma-publishes-level-3-qa-guidance-on-transitional-provisions/>

<https://www.ashurst.com/en/news-and-insights/legal-updates/benchmark-regulation-esma-updates-level-3-qa-guidance-commission-adopts-delegated-acts/>

Contacts



Jake Green
Partner

T +44 (0)20 7859 1034
M +44 (0)7876 030 472
jake.green@ashurst.com



James Perry
Partner

T +44 (0)20 7859 1214
M +44 (0)7789 982 184
james.perry@ashurst.com



Michael Logie
Partner, Head Securities and Derivatives

T +44 (0)20 7859 2489
M +44 (0)7768 231 903
michael.logie@ashurst.com



Jasmine Tiw
Partner

T +44 (0)20 7859 1984
M +44 (0)7920 810 386
jasmine.tiw@ashurst.com



Timothy Cant
Counsel

T +44 (0)20 7859 3394
M +44 (0)7920 292 653
timothy.cant@ashurst.com



Lorraine Johnston
Counsel

T +44 (0)20 7859 2579
M +44 (0)7766 835 841
lorraine.johnston@ashurst.com



Tim Edmonds
Counsel

T +44 (0)20 7859 1146
M +44 (0)7717 527 829
tim.edmonds@ashurst.com



Bradley Rice
Senior Associate

T +44 (0)20 7859 2245
M +44 (0)7823 340 846
bradley.rice@ashurst.com



www.ashurst.com



This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at Broadwalk House, 5 Appold Street, London EC2A 2AG T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com.

Ashurst LLP is a limited liability partnership registered in England and Wales under number OC330252 and is part of the Ashurst Group. It is a law firm authorised and regulated by the Solicitors Regulation Authority of England and Wales under number 468653. The term "partner" is used to refer to a member of Ashurst LLP or to an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Ashurst LLP's affiliates. Further details about Ashurst can be found at www.ashurst.com.

© Ashurst LLP 2018. Ref:61413499 05 January 2018