

Benchmarks Legislative Tracker

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The Simmons & Simmons Benchmarks Regulation Legislative Tracker

This Legislative Tracker provides you with an update on the Benchmarks Regulation, setting out:

- a high level background to, and summary of the main aims of, the Benchmarks Regulation
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents) and
- a table setting out what is currently known about the consultation process for Level 2/Level 3 measures.

Background

The European Commission's (Commission) proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts (the "Regulation") followed a public *consultation* in the wake of concerns about the integrity and accuracy of benchmarks.

The Regulation addresses concerns raised by the manipulation of interest rate benchmarks such as the London Interbank Offered Rate (LIBOR), the Euro Interbank Offered Rate (EURIBOR) and the Tokyo Interbank Offered Rate (TIBOR). The regulatory investigations, enforcement actions and settlements reached by several regulatory authorities concerning LIBOR and EURIBOR in 2012 have served to highlight the importance of benchmarks and their vulnerabilities.

The Regulation is intended to prohibit the use by a "supervised entity" (as defined at Article 3(1)(17) of the Regulation) in the European Union (EU) of unauthorised benchmarks, including benchmarks prepared by unregistered non-EU administrators from non-equivalent jurisdictions and to enhance the single market by creating a common framework across Member States. By limiting the ability of national administrators to set benchmarks rates using their own discretion, it is hoped that conflicts of interests will be reduced and confidence will be restored in the accuracy and integrity of benchmarks.

The Commission issued its proposal for this Regulation in association with:

- the revision of MiFID which aims to strengthen the provision of benchmarks by increasing both market transparency and the availability of more robust data
- amendments which bring benchmarks within the scope of the Market Abuse Regulation, and the recast Market Abuse Directive introducing sanctions for the manipulation of benchmarks

- the *Principles for benchmark-setting processes in the EU* published by the European Securities and markets Authority (ESMA) and the European Banking Authority (EBA) in June 2013, and
- IOSCO's *Principles for Oil Price Reporting Agencies* (October 2012) and *Principles for Financial Market Benchmarks* (July 2013).

Summary

The Regulation seeks to:

- improve governance and controls over the benchmark process, in particular to ensure that administrators avoid conflicts of interest, or at least manage them adequately
- improve the quality of input data and methodologies used by benchmark administrators
- ensure that contributors to benchmarks and the data they provide are subject to adequate controls, in particular to avoid conflicts of interest
- protect consumers and investors through greater transparency and adequate rights of redress.

The Regulation aims to address potential issues at each stage of the benchmark process and will apply in respect of:

- the provision of benchmarks
- the contribution of input data to a benchmark, and
- the use of a benchmark by a “supervised entity” within the EU.

Key aspects of the Regulation

(i) Definition of “benchmark”

The Regulation defines a “benchmark” as “any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of financial instrument is determined or an index that is used to measure the performance of an investment fund.”

(ii) Administrator requirements

An administrator is defined in the Regulation as a natural or legal person that has control over the provision of a benchmark, and in particular administers the arrangements for determining the benchmark, collects and analyses the input data, determines the benchmark, and either directly publishes or outsources the publication or the calculation of the benchmark to a third party.

In order to ensure the integrity of benchmarks, administrators are subject to a number of requirements, including:

- implementation of adequate governance arrangements
- establishment of a permanent and effective oversight function
- outsourcing limitations
- adoption of a code of conduct specifying obligations of contributors in respect of input data, and in particular its reliability and consistency with the benchmark administrator’s controls and methodology
- publication of benchmark statements providing key information to users in relation to the benchmarks measures and their vulnerabilities
- systems and controls to ensure integrity of data
- complaints handling mechanisms
- adequate record keeping requirements

Administrators providing benchmarks must be authorised. Alternatively, when benchmarks are non-significant or provided by a supervised entity other than an administrator, they can apply for registration with a competent authority.

ESMA will establish and maintain a public register of authorised and registered administrators.

(iii) Input data

To ensure that only sufficient and accurate data is used in determination of benchmarks, the Regulation sets out five requirements for benchmark administrators. They must:

- ensure that the input data accurately and reliably represents the market or economic reality that the benchmark measures
- obtain the input data from a reliable and representative panel or sample of contributors
- ensure that the input data is verifiable
- publish clear guidelines regarding the types of input data, the priority of their use and the exercise of expert judgement
- not use input data from contributors who do not adhere to the code of conduct

(iv) Benchmark categories

The Regulation sets three main categories of benchmarks:

- *Critical benchmarks*
 - These are benchmarks used for financial instruments, contracts and performance of investment funds having a total value of at least EURO 500bn, and meeting qualitative criteria such as location of contributors and importance of the benchmark in the country where a majority of contributors is located
 - Administrators of critical benchmarks have to comply with all requirements set out in the Regulation
- *Significant benchmarks*
 - These are benchmarks used for financial instruments, contracts and performance of investment funds having a total value of at least EUR 50bn over a period of six months, and meeting qualitative criteria such as the benchmark has no reliable substitute, and its absence would lead to market disorder
 - Administrators of significant benchmarks do not have the mandatory obligation to comply with all the rules related to governance, control of administrators and input data, but have to comply with the other provisions in the Regulation
- *Non-significant benchmarks*
 - These are benchmarks that do not fulfill the conditions set for critical or significant benchmarks
 - Administrators of non-significant benchmarks are subject to a lighter regulatory regime based on a compliance statement – administrators are exempt from governance, control of administrators and input data, but have to comply with the code of conduct rules.

(v) Contributor requirements

The Regulation imposes obligations on supervised contributors making them subject to adequate governance and controls requirements, specifically to avoid conflicts of interest.

Contributors are also required to adhere to a legally binding code of conduct adopted by administrators, and can be required by competent authorities to contribute to critical benchmarks to preserve their credibility.

(vi) Use of a benchmark

The definition of “use of a benchmark” extends the scope of the Regulation to the following activities:

- issuance of a financial instrument which references an index or a combination of indices
- determination of the amount payable under a financial instrument or financial contract by referencing an index or combination of indices
- being party to a financial contract which references an index or combination of indices
- providing 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 for a financial contract, and
- determination of the performance of an investment fund through an index or combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees.

The Regulation imposes a ban on supervised entities using benchmarks that are not included in the ESMA’s register or provided by administrators who are not included in the register.

The definition at Article 3(1)(17) of the Regulation contains a list of the types of entity which is a “supervised entity” – this includes credit institutions, investment firms, UCITS and AIFMs.

(vii) Third country regime

To ensure investor protection, the Regulation provides for the following mechanisms under which third country benchmarks can be used by supervised entities in the EU:

- *Equivalence* – the Commission takes a positive decision on equivalence of a third country regime or specific rules/ requirements of a third country with respect to individual and specific benchmarks/ administrators. Co-operation arrangements with the relevant third country competent authorities must follow the equivalence decision.
- *Recognition* – national competent authorities assess the application of IOSCO Principles by a third country administrator, and determine whether such application is equivalent to compliance with the requirements established in the Regulation. A third country administrator must also have a legal representative in the EU. Recognition is intended as a temporary measure until such time as an equivalence decision is adopted by the Commission.
- *Endorsement* – administrators or supervised entities located in the EU can apply to their competent authority to endorse third country benchmarks.

Next steps

The Regulation applies, with some exceptions, from 01 January 2018.

Review of the Benchmarks Regulation following the Commission's Proposal to reform the European System of Financial Supervision

On 20 September 2017, the Commission adopted a *Proposal for a Regulation* (the ESA Proposal) to amend (among other measures) the Regulations which established the European Supervisory Authorities (i.e., the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority).

As part of the ESA Proposal, the Commission put forward changes to the Benchmarks Regulation, under which ESMA would be established as the competent authority for administrators of critical benchmarks and of all benchmarks used in the EU but administered in a third country. ESMA would also be established as the competent authority for the recognition and approval of endorsements of third country administrators and benchmarks respectively.

Under the ESA Proposal, the Benchmarks Regulation would also be amended to grant ESMA the power to conduct investigations and on-site inspections.

The ESA Proposal will now be subject to scrutiny by the EP and the Council.

Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
<i>Commission Proposal</i>	18 September 2013
<i>Council General Approach</i>	13 February 2015
<i>ECON Final Report</i>	31 March 2015
<i>Political Agreement</i>	25 November 2015
<i>European Parliament adoption</i>	28 April 2016
<i>Council of the EU adoption</i>	17 May 2016
<i>Publication in OJ</i>	29 June 2016
Entry into force	30 June 2016
Application Date	01 January 2018
<u>ESA Proposal</u>	
Commission <i>ESA Proposal</i>	20 September 2017

Table 2: Development of Level 2 / Level 3 measures

Paper	Covers	Published	Closed	Outcome
DP	<i>Future proposals on draft Regulatory Technical Standards (RTS) and Technical Advice (TA) to the European Commission</i>	Feb. 2016	31 Mar.2016	CP (27 May 2016)
CP	<i>Draft technical advice</i>	27 May 2016	30 Jun. 2016	10 November 2016 <i>Technical Advice</i>
CP	<i>Draft technical standards under the Benchmarks Regulation</i>	29 Sept. 2016	02 Dec. 2016	30 March 2017 <i>Final Report</i> 01 June 2017 <i>Final Report</i>
CP	<i>Draft guidelines on non-significant benchmarks</i>	29 Sept. 2017	30 Nov. 2017	

Table 3: UK implementation

Paper	Covers	Published	Closed	Outcome
FCA CP17/17	<i>Handbook changes to reflect the application of the EU Benchmarks Regulation</i>	22 June 2017	22 August 2017	20 Dec. 2017 <i>Policy Statement</i>
PRA CP18/17, FCA CP17/34	<i>Form, PRA Rulebook, and FCA Handbook changes</i>	03 Oct. 2017	03 Nov. 2017	
FCA	<i>EU Benchmarks Regulation</i>	05 Feb. 2018	05 Mar. 2018	

Table 4: Adopted Level 2 measures

Level 2 measure	European Commission	Official Journal
Delegated Acts		
<i>Commission Delegated Regulation (EU) 2018/64</i> specifying how the criteria referred to in Article 20(1)(c)(iii) of the Benchmarks Regulation are to be applied to assess the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States	29 Sept. 2017	17 Jan. 2018
<i>Commission Delegated Regulation (EU) 2018/65</i> specifying the meaning of two technical elements of the definitions set out in the Benchmarks Regulation: public availability and administering the arrangements for determining a benchmark	29 Sept. 2017	17 Jan. 2018
<i>Commission Delegated Regulation (EU) 2018/66</i> specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed	29 Sept. 2017	17 Jan. 2018
<i>Commission Delegated Regulation (EU) 2018/67</i> on the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks	03 Oct. 2017	17 Jan. 2018
Implementing Technical Standards		
<i>Commission Implementing Regulation (EU) 2016/1368</i> establishing a list of critical benchmarks used in financial markets pursuant to the Benchmarks Regulation	11 Aug. 2016	12 Aug. 2016

Table 5: Other documents

Document	Published
ESMA <i>Q&As</i> on the Benchmarks Regulation	Feb. 2018

Table 6: UK implementing legislation

Document	Published
<i>The Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018</i>	20 Feb. 2018



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Annex

Benchmarks Regulation Level 2 & 3 Measures

Level 1 Reference	Level 1 text setting out scope of Level 2/ Level 3 measure	ESMA Technical Advice/ Final Report	European Commission Adoption
Title I: Subject matter, scope and definitions			
Article 3 Definitions			
3(2)	Delegated acts to specify further technical elements of the definitions laid down in Article 3(1), in particular specifying what constitutes making available to the public for the purposes of the definition of an index.	<i>Technical Advice</i>	<i>29 Sept. 2017</i>
3(3)	Implementing acts in order to establish and review a list of public authorities in the Union falling within the “public authority” definition.		
Title II: Benchmark integrity and reliability			
Chapter 1: Governance of and control by administrators			
Article 5 Oversight function requirements			
5(5)	Regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition as well as its positioning within the organisational structure of the administrator, so as to ensure the integrity of the function and the absence of conflicts of interest, and, in particular, a non-exhaustive list of appropriate governance arrangements.	<i>Final Report</i>	
5(6)	Guidelines addressed to administrators of non-significant benchmarks to specify the elements referred to in the regulatory technical standards issued under Article 5(5).		
Chapter 2: Input data, methodology and reporting of infringements			
Article 11 Input Data			
11(5)	Regulatory technical standards to specify further how to ensure that input data is appropriate and verifiable as well as the	<i>Final Report</i>	

Level 1 Reference	Level 1 text setting out scope of Level 2/ Level 3 measure	ESMA Technical Advice/ Final Report	European Commission Adoption
	<p>internal oversight and verification procedures of a contributor that the administrator has to ensure are in place in order to ensure the integrity and accuracy of input data. The regulatory technical standards should not cover or apply to administrators of non-significant benchmarks.</p> <p>11(6) Guidelines addressed to administrators of non-significant benchmarks.</p>		
Article 13 Transparency of methodology			
<p>13(3)</p> <p>13(4)</p>	<p>Regulatory technical standards to specify further the information to be provided by an administrator, distinguishing for different types of benchmarks and sectors.</p> <p>The regulatory technical standards should not cover or apply to administrators of non-significant benchmarks.</p> <p>Guidelines addressed to administrators of non-significant benchmarks.</p>	<p><i>Final Report</i></p>	
Chapter 3: Code of conduct and requirements for contributors			
Article 15 Code of conduct			
<p>15(6)</p>	<p>Regulatory technical standards to specify further the elements of the code of conduct for different types of benchmarks, and in order to take account of developments in benchmarks and financial markets.</p>	<p><i>Final Report</i></p>	
Article 16 Governance and control requirements for supervised contributors			
<p>16(5)</p> <p>16(6)</p>	<p>Regulatory technical standards to specify further the requirements concerning governance, systems and controls, and policies. Regulatory technical standards should not cover or apply to supervised contributors of non-significant benchmarks.</p> <p>Guidelines addressed to supervised contributors to non-significant benchmarks</p>	<p><i>Final Report</i></p>	

Level 1 Reference	Level 1 text setting out scope of Level 2/ Level 3 measure	ESMA Technical Advice/ Final Report	European Commission Adoption
Title III: Requirements for different types of benchmarks			
Chapter 4: Critical benchmarks			
Article 20 Critical benchmarks			
20(1)	Implementing acts in accordance with the examination procedure referred to in Article 50(2) to establish and review at least every two years a list of benchmarks provided by administrators located within the Union which are critical benchmarks	<i>Technical Advice</i>	<i>11 August 2016</i>
20(6)	Delegated acts in order to:	<i>Technical Advice</i>	<i>29 Sept. 2017</i>
	(a) specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed, including in the event of an indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the critical benchmarks thresholds;		
	(b) review the calculation method used to determine the critical benchmarks thresholds in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts, or investment funds referencing them that is close to the thresholds; such review shall take place at least every two years as from 1 January 2018;		
	(c) specify how the criteria of discontinuity and unreliability of a benchmark are to be applied, taking into consideration any data which helps assess on objective grounds the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.		<i>29 Sept. 2017</i>
Chapter 5: Significant benchmarks			
Article 24 Significant benchmarks			
24(2)	Delegated acts in order to review the calculation method used to determine the EUR 50 billion threshold in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts or investment funds referencing them that is close to that threshold. Such review shall take place at least every two years as from 1 January 2018.		

Level 1 Reference	Level 1 text setting out scope of Level 2/ Level 3 measure	ESMA Technical Advice/ Final Report	European Commission Adoption
Article 25 Exemptions from specific requirements for significant benchmarks			
25(8)	Implementing technical standards to develop a template for a compliance statement to be maintained and published by an administrator of a significant benchmark who chooses not to comply with the Benchmarks Regulation.	<i>Final Report</i>	
25(9)	Regulatory technical standards to specify further the criteria that competent authority needs to take into account while deciding that an administrator of a significant benchmark is to apply the requirements from which they can be exempted under the Benchmarks Regulation.	<i>Final Report</i>	
Chapter 5: Non-significant benchmarks			
Article 26 Non-significant benchmarks			
26(5)	Implementing technical standards to develop a template for the compliance statement to be maintained and published by an administrator of a non-significant benchmark who chooses not to comply with the Benchmarks Regulation.		
Title IV: Transparency and consumer protection			
Article 27 Benchmark statement			
27(3)	Regulatory technical standards to specify further the contents of a benchmark statement and the cases in which an update of such statement is required.	<i>Final Report</i>	
Title V: Use of benchmarks in the Union			
Article 30 Equivalence			
30(5)	Regulatory technical standards to determine the minimum content of the cooperation arrangements with competent authorities of equivalent third countries so as to ensure that the competent authorities and ESMA are able to exercise all their supervisory powers under the Benchmarks Regulation.	<i>Final Report</i>	
Article 32 Recognition of an administrator located in a third country			
32(9)	Regulatory technical standards to determine the form and content of the application for recognition in a Member State and, in particular, the presentation of the information provided by the administrator in the application for recognition.	<i>Final Report</i>	

Level 1 Reference	Level 1 text setting out scope of Level 2/ Level 3 measure	ESMA Technical Advice/ Final Report	European Commission Adoption
Article 33 Endorsement of benchmarks provided in a third country			
33(7)	Delegated acts concerning measures to determine the conditions under which the relevant competent authorities may assess whether there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union.	<i>Technical Advice</i>	
Title VI: Authorisation, registration and supervision of administrators			
Chapter 1: Authorisation and registration			
Article 34 Authorisation and registration of an administrator			
34(8)	Regulatory technical standards to specify further the information to be provided in the application for authorisation and in the application for registration, taking into account that authorisation and registration are distinct processes where authorisation requires a more extensive assessment of the administrator's application, the principle of proportionality, the nature of the supervised entities applying for registration and the costs to the applicants and competent authorities.	<i>Final Report</i>	
Chapter 3: Role of competent authorities			
Article 47 Cooperation with ESMA			
47(3)	Implementing technical standards to determine the procedures and forms for exchange of information with competent authorities.	<i>Final Report</i>	
Title VIII: Transitional and final provisions			
Article 51 Transitional provisions			
51(6)	Delegated acts concerning measures to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the Benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark.	<i>Technical Advice</i>	<i>03 Oct. 2017</i>
Article 54 Review			
54(3)	Delegated acts in order to extend the 42-month period for transitional registration by 24 months, if the report provides evidence that the transitional registration regime is not detrimental to a common European supervisory culture and consistent supervisory practices and approaches among competent authorities.		

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