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The EU Benchmarks Regulation: A Brief Overview

1.0 Introduction

[Regulation \(EU\) 2016/1011](#) of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the 'BMR'/'the Benchmarks Regulation'), entered into force on 30 June 2016 and most of its provisions came into effect on 1 January 2018.

The BMR introduces a common framework and consistent approach to the regulation of benchmarks across the EU. The main scope of the Benchmarks Regulation is to ensure that benchmarks are robust and reliable, and to minimise conflicts of interest in the benchmark-setting processes, whilst safeguarding the integrity and accuracy of benchmark provision with the aim of reducing the risk of manipulation of benchmarks.

2.0 Benchmarks and Indices

Under the BMR, an index is defined as a publicly available and regularly determined figure by means of applying a formula or assessing a representative set of underlying data. The objective is to cover indices used in securities or derivatives traded either on a regulated trading venue or outside a venue through an investment firm under MiFID II/MiFIR.

An index becomes a benchmark falling within the scope of the Benchmarks Regulation where:

- i. it is used to determine the amount payable under a financial instrument or financial contract, or the value of a financial instrument; or
- ii. it is used to measure the performance of an investment fund for the purpose of:
 - tracking the return; or
 - defining the asset allocation or a portfolio; or
 - computing the performance fees.

3.0 Benchmarks Regulation

The Benchmarks Regulation applies to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the EU¹.

The BMR is primarily focused on achieving the following objectives:

¹ Article 2(2) of the BMR includes a list of exemptions where the BMR does not apply

- Promoting better governance and controls throughout the benchmark process, mainly ensuring that conflict of interest is avoided, or at least adequately managed by administrators.
- Improving the input data quality and methodologies employed by administrators in the provision of benchmarks.
- Making sure that contributors and the data being provided to benchmarks are subject to adequate controls, above all to avoid conflicts of interest.
- Ensuring greater transparency and appropriate rights of redress to protect consumers and investors.

3.1 Types and Categories of Benchmarks

The BMR distinguishes between different types of benchmarks and specifies the requirements which are applicable to each type of benchmark or the provisions which a particular benchmark could be exempted from. The following are the different types of benchmarks regulated by the BMR:

- Critical benchmarks are benchmarks which value of financial contracts underlying them is at least €500 billion, or where a benchmark is recognised in a European Member State as critical.
- Significant benchmarks are benchmarks which value of financial contracts underlying them is at least €50 billion, or in cases where there are no or very few market-led substitutes, so much so that if the benchmark is ceased to be provided, there would be an impact on financial stability.
- Commodity benchmarks are benchmarks where their underlying asset is a commodity as defined by MIFID II. Unless they are regulated data benchmarks or are based on submissions the majority of which are supervised entities, Commodity benchmarks are subject to the requirements set out in Annex II of the BMR. The articles in relation to significant and non-significant benchmarks do not apply to commodity benchmarks.
- Regulated data benchmarks are benchmarks with the input data being provided directly from regulated trading venues. Regulated data benchmarks cannot be classified as critical and certain provision of the BMR do not apply.
- Interest rate benchmarks are benchmarks which are determined on the rate at which banks lend to, or borrow from, other banks or agents in the money markets. Such benchmarks are subject to the requirements outlined in Annex I of the BMR. The articles relating to significant and non-significant benchmarks do not apply to interest rate benchmarks.
- Non-significant benchmarks are benchmarks which value of financial contracts underlying the benchmark is less than €50 billion, and the benchmark is neither a commodity nor interest rate benchmark.

3.2 Requirements under the Benchmarks Regulation

3.2.1 Contributors

Under the BMR, a contributor can be defined as a natural or legal person contributing input data, whereas a supervised contributor refers to a supervised entity that contributes input data to an administrator located in the Union. Contributors are subject to the requirements contained in Chapter 3 of the Benchmarks Regulation.

3.2.2 Administrators

The BMR defines an administrator as a natural or legal person that has control over the provision of a benchmark. Amongst others, administrators are required to have strict control standards and oversight requirements on benchmark computation.

For a benchmark to be provided by an administrator, the latter has to apply for authorisation or registration depending on the type of benchmark being provided by such administrator. Specifically, if the benchmark provided is a critical benchmark the administrator is required to apply for authorisation, whereas if the benchmark is a non-critical benchmark, the administrator is required to apply for or registration. Administrators are also subject to supervision by the competent authority in the country in which the administrator is located. Administrators of benchmarks shall comply with the requirements contained in Chapter 1 of the Benchmarks Regulation.

As of 1st January 2018, ESMA started publishing the list of Administrators and third country benchmarks in accordance with Article 36 of the Benchmarks Regulation. The list of administrators and third country benchmarks can be accessed through the following [link](#).

3.2.3 Users

In terms of Article 3(7) of the BMR 'use of a benchmark' means:

- Issuance of financial instrument which references an index or a combination of indices;
- Determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;
- Being a party to a financial contract which references an index or a combination of indices;
- Providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices that is solely used as a reference in a financial contract to which the creditor is a party;
- Measuring the performance of an investment fund through an index or a 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 Benchmarks Regulation prohibits the use of a benchmark unless the administrator is authorised or registered in the EU. In the case of third country administrators, benchmarks can be used only if the administrator is recognised or the benchmark is endorsed. This regulation also ensures that users have fair access to benchmarks.

In terms of Article 28(2) of the BMR, supervised entities² that use a benchmark shall produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided. Inter alia, where feasible and appropriate, such plans shall nominate one or several alternative benchmarks that could be referenced to substitute the benchmarks no longer provided, indicating why such benchmarks would be suitable alternatives. The supervised entities shall, upon request, provide the relevant competent authority with those plans and any updates and shall reflect them in the contractual relationship with clients.

Contacts

Should you have any queries relating to the above please contact the Authority on benchmarks@mfsa.mt.

² The list of what amounts to a supervised entity is contained in Article 3(17) of the BMR