

FINANCIAL REGULATORY QUICK START GUIDE

UK BENCHMARKS REGULATION

OVERVIEW

The UK “onshored” the EU Benchmarks Regulation (BMR) at the end of the Brexit transitional period on 31 December 2020. The EU BMR implemented and built upon the IOSCO Principles for Financial Benchmarks. Subject to transitional arrangements, from 1 January 2018 providers of in scope benchmarks have needed to be authorised or registered, and supervised users of benchmarks have been restricted as to the benchmarks they may use.

INTERACTION WITH THE EU BMR

The BMR was onshored in the UK with a UK-only scope. Consequently, the UK BMR only applies to the administration of, contribution of input

data to, and use of benchmarks in the UK. EU benchmark administrators providing benchmarks in the UK are now subject to the third country regime under the UK BMR. Similarly, UK benchmark administrators are now treated as third country administrators under the EU BMR.

The UK has made certain changes to the UK BMR, and so the regimes have already begun to diverge.

WHICH BENCHMARKS?

The definition of “benchmark” for the purposes of the BMR is extremely broad. It includes any index by reference to which the amount payable under a financial instrument, a consumer credit agreement, or residential mortgage agreement is

determined, or by reference to which the value of a financial instrument is determined. The definition of benchmark also includes an index that is used to measure the performance of certain funds.

An index is any figure that is regularly determined on the basis of a calculation or assessment on the basis of the value of one or more underlying assets or prices, and that is published or made available to the public.

WHO IS AFFECTED?

The BMR has implications for those who provide, contribute input data to, and reference (use), benchmarks within scope, as summarised in the table below.

	Administrator	Contributor	User
Description	<p>Person who has control over the administration of the benchmark. Includes:</p> <ul style="list-style-type: none"> Administering arrangements for determining a benchmark Collecting, analysing or processing input data for the purposes of determining a benchmark Determining a benchmark through the application of a formula or other method of calculation, or by an assessment of input data 	<p>Person contributing input data:</p> <ul style="list-style-type: none"> That is not readily available to the administrator That is required in connection with the determination of a benchmark and is provided for that purpose 	<p>Person who:</p> <ul style="list-style-type: none"> Issues financial instruments which reference a benchmark Determines the amount payable under a financial instrument or financial contract by referencing the benchmark Is party to a contract which references a benchmark Measures the performance of an investment fund through the use of an index
Requirements	<ul style="list-style-type: none"> Authorisation or registration Proportionate controls in light of classification of benchmark Governance and control Outsourcing / licensing arrangements Methodology and transparency 	<ul style="list-style-type: none"> Follow administrator's code of conduct Prevent conflicts of interest Co-operate in auditing and supervision of benchmarks Maintain records and make these available 	<p>Supervised users (broadly, regulated firms) must:</p> <ul style="list-style-type: none"> Only use authorised benchmarks Produce robust action plans if a benchmark materially changes or ceases to be produced (to be reflected in contractual documents)

BENCHMARK CLASSIFICATION

The regime distinguishes between different types of benchmarks, classifying them as critical, significant or non-significant. Administrators of critical benchmarks are subject to the most stringent requirements, while those providing significant and non-significant benchmarks can benefit from more proportionate requirements in relation to areas such as governance and oversight of input data.

Further, the regime is also tailored to benchmarks with different characteristics. Specific categories of benchmarks include:

- Regulated-data benchmarks
- Interest rate benchmarks
- Commodity benchmarks
- UK climate transition benchmarks
- UK Paris-aligned benchmarks

The latter two are later additions to the BMR and were added to the EU BMR pre-Brexit as part of the EU Sustainable Finance initiative. The BMR sets out the various criteria and minimum standards that benchmarks need to meet in order to use these labels. There are additional disclosure requirements for benchmarks that reflect ESG factors, and where a benchmark does not pursue ESG objectives.

PRACTICAL ISSUES

The very wide definition of “benchmark” means that the regime can capture, for example, proprietary indices, private custom indices, and indicators.

One particular issue is identifying which indices are (i) administered by; (ii) contributed to; and/or (iii) used by any particular institution. It is quite possible for an institution to be performing all three roles in relation to different benchmarks. Also, the overlap between contribution and administration needs to be considered carefully as different governance and control frameworks are required for each role.

THIRD COUNTRY REGIME

Third country benchmarks (that is, benchmarks provided by administrators located outside of the UK) can only be used by supervised users in the UK if they qualify for use in the UK under the third country regime set out in the UK BMR.

There are three ways in which a third country benchmark may qualify for use in the UK: equivalence, recognition, or endorsement. All of these require compliance with standards equivalent to the UK BMR.

The UK has extended the transitional provisions under this regime so that the transitional period for third country benchmarks will run until 31 December 2025. This means that UK supervised users can continue to use third country (including EU) benchmarks in the UK for the time being, without such benchmarks needing to qualify for use in the UK.

At present, under the EU BMR the same transitional period will only run until 31 December 2023. Therefore, UK benchmark administrators that provide their benchmarks in the EU have limited time to ensure that their benchmarks can continue to be used in the EU.

The BMR third country regime has proved controversial and the transitional provisions have been extended several times, amid concerns that third country administrators were not prepared to qualify under the regime. Timing also became an issue due to Brexit, as suddenly UK and EU administrators became third country administrators under each other's regimes.

Given that the BMR goes much further than the IOSCO Principles, it is likely that not all third country benchmarks will be able to qualify for use in the UK (or EU) and that not all third country administrators will want to make the changes necessary to qualify under the third country regime. Consequently, it remains to be seen whether the UK will maintain this regime under the UK BMR going forwards.

CONTACTS



Nicola Higgs

Partner, London
T +44.20.7710.1154
E nicola.higgs@lw.com



Becky Critchley

Associate, London
T +44.20.7710.4519
E becky.critchley@lw.com



Ella McGinn

Associate, London
T +44.20.7710.4649
E ella.mcgin@lw.com