A&L Goodbody

Benchmark Regulations Q&A

On 29 June 2016, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the **Regulations**) was published in the Official Journal of the European Union (**OJEU**).

The Regulations are a European legislative response to the LIBOR scandal and the allegations and subsequent investigations into manipulation of the setting of LIBOR, EURIBOR and other benchmarks.

What is a Benchmark?

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 purpose of tracking the return of such index or of defining the asset allocation of a portfolio or used for computing the performance fees of an investment fund.

Who is affected by the Regulations?

The Regulations apply to entities involved in the following three activities carried out in the EU in relation to a benchmark:

- the provision of a benchmark - the party carrying out this activity is an **Administrator**
- the contribution of input data to a Benchmark - the party carrying out this activity is a **Contributor**
- the use of a benchmark - the party carrying out this activity is a **User**[1]

When do the Regulations Apply?

EU Administrator that provided a benchmark on 30 June 2016

You have until 1 January 2020 to apply for authorisation as an EU Administrator providing a benchmark where the benchmark was already being provided in the EU before 1 January 2018. You may continue to provide existing benchmarks and new benchmarks, and supervised entities may continue to use these benchmarks, until 1 January 2020, or, if you have made an application for authorization / registration, until the date on which the application is refused.

EU Administrator who starts providing a benchmark after 30 June 2016 but before 1 January 2018

Benchmarks which begin being used during this period may continue to be used until 1 January 2020, or, if you have made an application for authorisation / registration, until the date on which the application is refused.

EU Administrator who starts to provide benchmarks after 30 June 2016 and provides a new benchmark after 1 January 2018

You will not be allowed use the newly provided benchmark until you have obtained authorisation / registration.

EU Administrator who starts to provide benchmarks after 1 January 2018

You must first obtain authorisation / registration before providing benchmarks in the EU.

Non-EU Administrator providing a benchmark in the EU on or before 1 January 2022

Non-EU Administrators have until 1 January 2022 to satisfy the requirements necessary to enable the benchmarks they provide to be used in the EU by a User (through the equivalence,

[1] UCITS and AIFs would fall under this category.

recognition or endorsement regimes).
The European Commission announced on 25 February 2019 that the initial deadline of 1 January 2020 would be extended.

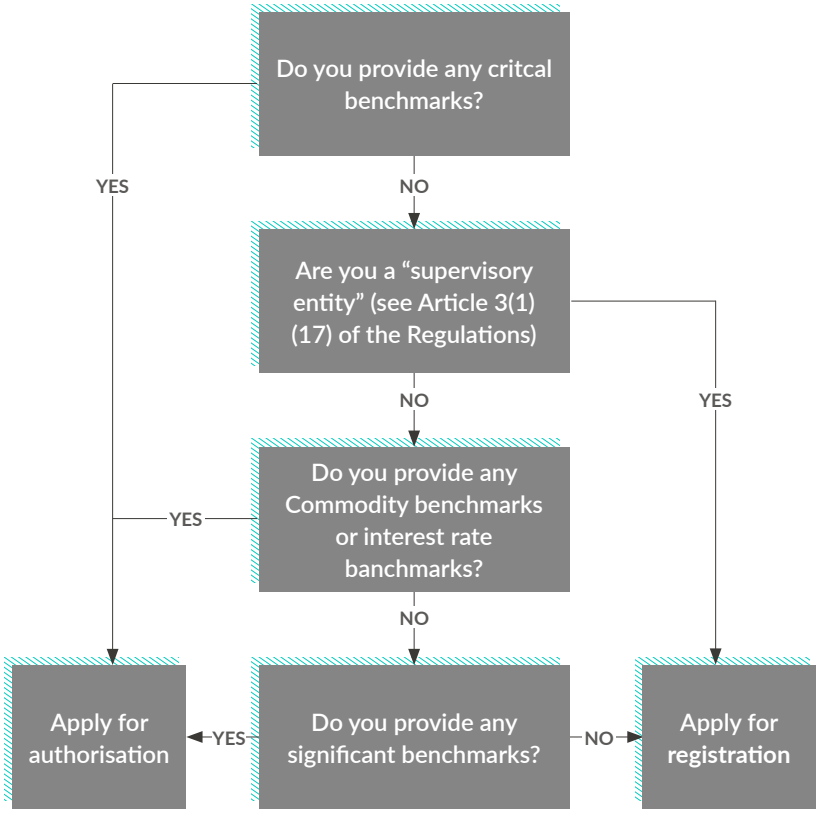
Who is an Administrator?

Providers of "Critical Benchmarks" - The European Commission announced on 25 February 2019 that the initial deadline of 1 January 2020 would be extended to 1 January 2022 for "critical benchmarks" such as EURIBOR and EONIA.

The Regulations define an Administrator as a natural or legal person that has control over the provision of a benchmark.

Provision of a benchmark is defined as:

- administering the arrangements for determining a benchmark
- collecting, analysing or processing input data for the purpose 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 provided for that purpose



Do I need to be Authorised or Registered as an Administrator?

There are two ways in which an EU entity can be approved under the Regulations - authorisation and registration. The diagram below will help you decide which route to take.

The process for obtaining authorisation or registration will depend on the Administrator's home EU Member State and the procedures adopted by the competent authority of that EU Member State. Further information for applying for authorisation or registration by the UK FCA is available here.

What are the equivalence, recognition and endorsement regimes?

Where grandfathering is not available, these methods facilitate use of a benchmark in the EU provided by a non-EU Administrator.

Equivalence

ESMA may register a non-EU Administrator and the relevant benchmark if they meet certain equivalence provisions. This requires an equivalence decision to be adopted by the EU commission for the jurisdiction where the Administrator is located. At present there has been no indication that such a decision will be forthcoming for any particular jurisdictions.

Recognition

Until an equivalence determination is made, a non-EU Administrator may have its benchmark used in the EU if the Administrator is "recognised" by its "Member State of reference" in the EU.
To be recognised, the non-EU Administrator will need to comply with the requirements applicable to EU Administrators under the Regulations.
The non-EU Administrator must have a legal representative in the applicable Member State to perform an oversight function.

Endorsement

EU Administrators can endorse non-EU benchmarks where the EU Administrator (i) has a clear and well defined role in the accountability framework of the non-EU Administrator; (ii) can monitor the provision of the benchmark; and (iii) there is an objective reason to provide the benchmark and endorse it for use in the EU.

The process for obtaining recognition or endorsement will depend on the procedures of the relevant competent authority from which you are seeking that authorisation. For example, further information for applying for recognition or endorsement by the UK FCA is available here.

Who is a Contributor?

The Regulations define a Contributor as a natural or legal person contributing input data.

The definition of input data is the data in respect of the value of one or more underlying assets, or prices, including estimated prices, quotes, committed quotes or other values, used by an Administrator to determine a benchmark.

The definition of a contribution of input data is providing any input data not readily available to an Administrator, or to another person for the purposes of passing to an Administrator, that is required in connection with the determination of a benchmark, and is provided for that purpose.

What is use of a benchmark?

Use of a benchmark means:

- issuance of a financial instrument which references the benchmark
- determination of the amount payable under a financial instrument or financial contract by referencing the benchmark
- being a party to a financial contract which references the benchmark
- provides a borrowing rate calculated as a spread or mark-up above a benchmark
- measuring the performance of an investment fund through a Benchmark, for the purpose of tracking the return of such benchmark, of defining the asset allocation of a portfolio, or of computing the performance fees of an investment fund

Who is responsible for compliance?

While the Regulations primarily impact Administrators, they also impose certain obligations on Contributors and certain users.

Administrators

Administrators of proprietary indices will likely have to comply with the requirements for "non-significant" benchmarks, including:

- have a clear organisational structure with well defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark;
- take limited steps to prevent conflicts of interest and ensure discretion is independently and honestly exercised;
- establish a limited permanent oversight function;
- use sufficient input data, robust and reliable methodologies and provide appropriate transparent;
- develop a limited 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;
- report any manipulation of the benchmark under the EU Market Abuse Regulation;
- apply for authorisation and/or registration in the same way as for other types of benchmark (if all benchmarks provided by the administrator are non-significant then only registration is required); and
- publish a benchmark statement for each family of benchmarks containing certain prescribed information, including details relating to the exercise of any discretion.

Contributors

The Regulations establish a code of conduct and requirements for Contributors covering aspects of clarity of description of the input data identification of the persons that may contribute, policies to ensure that a Contributor provides all relevant input data, as well as the systems and controls that a Contributor is required to establish.

The Administrator is responsible for ensuring the Contributor adheres to the code of conduct. Provisions of the Regulations relating to governance and control apply directly to Contributors that are regulated entities.

Users

Supervised entities (i.e. credit institutions, investment firms, UCITS and AIFMs supervised in the EU) will be responsible for ensuring their use of a benchmark is in accordance with the Regulations. For example, they will be required to establish contingency plans for material changes or cessation of a relevant benchmark. They will also need to make certain disclosures in their offering documents where relevant.

What prospectus disclosure should a UCITS or AIF make?

If a UCITS fund references a benchmark, the UCITS' prospectus should include information on whether the benchmark provider complies with the Regulations. UCITS authorised after 1 January 2018 should include the disclosure. UCITS authorised before 1 January 2018 should make the disclosure at the next prospectus update and no later than 1 January 2019. A UCITS which provides for a performance fee payable on the out-performance of an index named in its prospectus and does not use the index as a reference should not need to comply with the disclosure requirement.

The Regulations do not require AIFs to make this disclosure.

What are the consequences of non-compliance?

Sanctions which may be applied by the competent authorities for breach of the Regulations are wide ranging and are set out in Article 42 of the Regulations. They include cease and desist orders, disgorgement of profits, withdrawal of authorisation for Administrators, prohibition on individuals from exercising management functions, public warnings as well as financial sanctions for corporate entities and for individuals.

Our team

Brian McDermott
Partner and Head of Asset Management & Investment Funds
+353 1 649 2307
bmcdermott@algoodbody.com

Michael Barr
Partner
+353 1 649 2327
mbarr@algoodbody.com

Stephen Carson
Partner
+44 20 7382 0820
scarson@algoodbody.com

Mary McKenna
Partner
+353 1 649 2344
mmckenna@algoodbody.com

Kerill O'Shaughnessy
Partner
+353 1 649 2422
koshaughnessy@algoodbody.com

Laura Butler
Partner
+353 1 649 2209
lbutler@algoodbody.com

Nollaig Greene
Associate & Knowledge Lawyer
+353 1 649 2359
ngreene@algoodbody.com

Ann Shiels
Associate & Knowledge Lawyer
+353 1 649 2396
ashiels@algoodbody.com

Chris Bergin
Associate
+44 207 382 0826
cbergin@algoodbody.com