

## Frequently Asked Questions for Benchmark Administrators

In recent years both the International Organization of Securities Commission (IOSCO) and the European Union (EU) have sought to create an overarching framework of principles and rules to enhance the accuracy, robustness and integrity of financial benchmarks and the benchmark setting process.

In July 2013, IOSCO published its final report of Principles for Financial Benchmarks ([IOSCO Principles](#)) and in June 2016 the EU passed [Regulation \(EU\) 2016/1011](#) on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (BMR). Both the IOSCO Principles and the BMR introduce measures to enhance the benchmark setting process, improve transparency and prevent conflicts of interest. These measures were introduced in light of concerns over the integrity and fragility of certain benchmarks raised following investigations and enforcement actions into the attempted manipulation of major interest rate benchmarks.

If you sponsor, own, control, calculate, maintain or contribute to a financial benchmark then you may need to review your internal policies and procedures to ensure that you comply with these recent changes. This FAQ seeks to provide answers to some basic questions and introduce some of the wider topics.

This FAQ document is specific to the BMR, which is an EU regulation. As noted above, the global standard is the IOSCO Principles, which many financial institutions are choosing to adopt.

### **Q1. Who is affected by the BMR?**

- A1.1 Administrators – If you provide an ‘in-scope’ benchmark for ‘use’ within the EU then you may need to comply with the BMR. You may need to comply with the BMR even if you are not located in the EU.
- A1.2 Users – If you are an EU ‘supervised entity’<sup>1</sup> and you ‘use’ an ‘in-scope’ benchmark within the EU then you will need to comply with the BMR. For more information on ‘use’ refer to A7 below.
- A1.3 Data providers – If you provide input data to an administrator for the purpose of calculating an ‘in-scope’ benchmark in the EU, then the administrator of that benchmark may require that you comply with certain obligations, even if you are not located in the EU.

<sup>1</sup> Art 3 1(17) BMR

**Q2. Who is an administrator?**

A2. Under the BMR an administrator is:

- either an individual or a corporate entity;<sup>2</sup>
- who has *control* over the ‘provision’ of an ‘in-scope’ benchmark. The ‘provision’<sup>3</sup> of an ‘in-scope’ benchmark means:
  - administering the arrangements for determining a benchmark (i.e. managing the decision making of a benchmark);
  - collecting, analysing or processing input data for the purposes of determining a benchmark; and
  - 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.

**Q3. What if I have appointed a 3<sup>rd</sup> party index calculation agent?**

A3. In such circumstances you have ‘control’ of the provision of a benchmark. Typically 3<sup>rd</sup> party calculation agents calculate an index in accordance with the rules (methodology) provided by the index owner or sponsor. Even if the methodology is completely rules based (as opposed to a discretionary index) the index owner, or index sponsor, has the power to determine who calculates the index and how it is calculated (see A2 above). Typically a 3<sup>rd</sup> party calculation agent does not have the power to amend the rules, nor determine the constituents and weights unilaterally. However, this does not necessarily mean that the BMR applies to you. It will only apply if the benchmark is ‘in-scope’ (refer to A5 below).

Usually the index owner or sponsor will own the intellectual property rights of the index and the index will carry the index owner’s or sponsor’s branding.

**Q4. Am I an administrator if I sponsor an index?**

A4. Typically an index sponsor owns and/or controls the provision of a benchmark and the elements discussed in A3 above.

**Q5. What is an ‘in-scope’ benchmark?**

A5. For the purposes of the BMR an ‘in-scope’ benchmark is:

- Any index (meaning any figure) that is:
  - published or made available to the public<sup>4</sup> (see A6 below)
  - regularly calculated using a formula or other method, or by an assessment on the basis of the value of one or more underlying assets or prices, actual or estimated interest rates, quotes and committed quotes or other values or surveys<sup>5</sup>

<sup>2</sup> Art 3 1(2) BMR

<sup>3</sup> Art 3 1(5) BMR

<sup>4</sup> Art 3 1(1)(a) BMR

<sup>5</sup> Art 3 1(1)(b) BMR

- referenced by a financial instrument or a financial contract to determine amounts payable under such instrument or contract
- referenced by a financial instrument or a financial contract to determine the value of such instrument or contract
- used to measure the performance of an investment fund to track the return of such fund
- used to define the asset allocation of a relevant portfolio
- used to compute performance fees of an investment fund

**Q6. What does it mean to be ‘made available to the public’?**

A6. An index is only within the scope of the BMR if it is published or made available to the public. A figure shall be in-scope if it is made accessible to a potentially indeterminate number of legal or natural persons – excluding the index provider or a specific number of recipients connected to or related to the index provider.

If access to a figure is truly restricted and has a limited impact on investors, this should not result in the figure being regarded as public.

This means that even small proprietary indices could potentially come within scope of the BMR if the index could be available to a potentially indeterminate number of people.

**Q7. What is ‘use’ of a benchmark?**

A7.1 Use<sup>6</sup> in respect of Financial Instruments and Financial Contracts:

- 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 a combination of indices
- Being a party to a financial contract which references an index or a combination of indices
- Providing a borrowing rate calculated as a spread or mark-up over an index or combination of indices solely used as a reference in financial contract(s).

A financial instrument is defined in Annex I(C) MiFID II and is traded (or subject to a request for trading) on a MiFID II trading venue or is traded via a systematic internaliser.

Financial contracts are limited to certain consumer credit finance contracts and mortgages.

Issuance means the creation of transferable securities, money market instruments, or units in collective investment undertakings to be sold to potential investors by way of a public offer or placement by way of their admission to trading on a MiFID II trading venue.

Use of indices for non-traded derivatives should not come within scope of the BMR.

A7.2 Use in respect of Investment Funds:

Used to measure the performance of an investment fund through an index or a combination of indices for the purposes of:

- tracking the return of such index or combination of indices

<sup>6</sup> Art 3 1(7) BMR

- defining asset allocation of a portfolio
- computing performance fees

**Q8. Does an exemption apply?**

A8. The BMR does not apply to:<sup>7</sup>

- Central banks
- Public authorities
- CCPs (in their capacity of providing reference prices or settlement prices used for risk management and settlement purposes)
- Providing a single reference price for any financial instrument
- Commodity benchmarks based on submissions from contributors where the majority are non-supervised entities, if the benchmark is referenced by financial instruments traded on a trading venue and the total notional value of financial instruments referencing the benchmark does not exceed €100,000,000
- The provider of an index that is unaware and could not reasonably have been aware that the index is used as a benchmark.

**Q9. What are my obligations under the BMR as an administrator of an ‘in-scope’ benchmark?**

A9. Benchmark administrators are subject to a number of requirements aimed at maintaining the integrity and reliability of the relevant benchmark including:<sup>8</sup>

- Robust governance requirements, including the identification, management and prevention of conflicts of interest
- Oversight function
- Control framework
- Accountability framework
- Record keeping requirements
- Controls over outsourcing
- Requirements in relation to input data (sufficiency and accuracy)
- Content and transparency requirements for benchmark methodologies
- Reporting infringements
- Code of conduct for input data contributors

A benchmark administrator located in the EU must apply to its national competent authority (NCA) for ‘authorisation’ or ‘registration’. Non-EU benchmark administrators must also apply to a relevant NCA if they want to provide their benchmarks in the EU.

<sup>7</sup> Art 2 2 BMR

<sup>8</sup> Arts 4 to 15 (inclusive) BMR

**Q10. What are my obligations if I use an index?**

A10. Supervised entities can only ‘use’<sup>9</sup> (see A7) a benchmark in the EU if it is provided by a benchmark administrator authorised, registered or recognised under the BMR or whose benchmarks have been endorsed.

Supervised entities may acquire, hold or trade financial instruments that reference an index where the administrator is non-compliant with the BMR.

Parties to a derivative referencing a benchmark are not considered to ‘issue’ a financial instrument, although they could be using a benchmark in terms of determining amounts payable under the derivative (assuming the derivative is a financial instrument).

Supervised entities must produce robust written plans setting out the action they would take if the benchmark materially changes or ceases to be provided.

**Q11. What if I am an administrator located outside of the EU?**

A11. If you provide in-scope benchmarks in the EU, you will need to use 1 of 3 available routes to facilitate use of those benchmarks in the EU:

- Equivalence<sup>10</sup>
- Recognition<sup>11</sup>
- Endorsement<sup>12</sup>

Alternatively, you may decide to select one of the options discussed in A15 and A16 below.

**Q12. What are my obligations if I provide input data to an index?**

A12. Where a benchmark is based on input data from contributors, the benchmark administrator must develop a code of conduct for such benchmark setting out the contributor’s responsibilities in relation to the contributed input data.

Most of the provisions of the BMR do not impose direct requirements on contributors (other than supervised entities that contribute input data).

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

**Q13. When does the BMR apply?**

A13. The BMR applied from 1 January 2018. There are transitional provisions, which means most existing and new benchmarks can continue to be used until 1 January 2020.

<sup>9</sup> Art 29 BMR

<sup>10</sup> Art 30 BMR

<sup>11</sup> Art 32 BMR

<sup>12</sup> Art 33 BMR

**Q14. Are there any transitional arrangements?**

A14. Yes, although the BMR applied from 1 January 2018, it does provide for a phased implementation. This means that existing (and in some cases new) in-scope benchmarks can continue to be used in the EU until 1 January 2020, even though the relevant benchmark administrator, or the benchmark(s) (non-EU), has not yet been 'approved' by an NCA (i.e. the benchmark administrator is not authorised, registered, operating under an equivalence decision, recognised nor endorsed). The transitional provisions,<sup>13</sup> provide the following:

- EU Administrators – If you provided a benchmark(s) before 30 June 2016, that benchmark(s), as well as any new benchmark(s) (i.e. a benchmark(s) provided after 1 January 2018) can continue to be used in the EU until 1 January 2020.
- EU Administrators – If you did not provide a benchmark(s) before 30 June 2016, but provided a benchmark(s) between 1 July 2016 and 1 January 2018, that benchmark(s) can continue to be used in the EU until 1 January 2020 but new benchmarks (i.e. benchmark(s) you may provide after 1 January 2018) cannot be used in the EU until you are authorised or registered under the BMR.
- Non-EU Administrators – If you provide a benchmark(s) before 1 January 2018, your existing and new benchmarks can continue to be used in the EU until 1 January 2020.

After 1 January 2020, an EU administrator must either be authorised or registered and a non-EU administrator must either be able to rely on equivalence, be a 'recognised' administrator or have its benchmark(s) endorsed, in order for its benchmark to be 'used' in the EU.

**Q15. If I am subject to the BMR, what are my options?**

A15. If the BMR applies to you and you do not meet one of the exemptions, you will need to comply with the requirements of the BMR, as highlighted in A9 above, and apply to an EU NCA for approval – for EU administrators that will be either authorisation or registration and for non-EU administrators that will be equivalence, recognition or endorsement.

Alternatively, you can: (a) appoint a 3<sup>rd</sup> party to act as the benchmark administrator on your behalf (see A.16 below); (b) sell the indices to a 3<sup>rd</sup> party; or (c) terminate the indices.

**Q16. What is independent benchmark administration?**

A16. Index owners or sponsors can appoint an independent 3<sup>rd</sup> party administrator to perform the duties of a benchmark administrator. In this case, the client transfers the 'administration' or control over the indices to the independent administrator.

For firms who own or operate their own indices and want to learn more about working with S&P Dow Jones Custom Indices as an independent benchmark administrator, please get in touch to understand how we can help ensure continuity of use and compliance with the BMR.

Please contact [customindices@spglobal.com](mailto:customindices@spglobal.com).

<sup>13</sup> Art 51 BMR

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