

ESMA Clarifies Third Country Transitionals Under the EU Benchmarks Regulation

ESMA has published a new Q&A clarifying the transitional arrangements for third country benchmarks under the EU Benchmarks Regulation (BMR).

Key Points:

- Non-EEA benchmarks that are being used in the EEA before 1 January 2020 can continue to be used post 1 January 2020. New use of such benchmarks post 1 January 2020 and the use of new non-EEA benchmarks to be provided after this date will not be permitted unless the administrator has taken formal steps to permit use of the benchmark in the EEA.
- EEA benchmark providers that provided benchmarks before 1 July 2016 will be permitted to launch new benchmarks prior to being authorised or registered, until 1 January 2020 at least.

Background

The BMR came into force on 30 June 2016, but most of its provisions do not apply until 1 January 2018. Among other things, the BMR requires that certain EEA users of in-scope benchmarks only use benchmarks that are provided by authorised EEA administrators, or non-EEA (so called “third country”) benchmarks that qualify for use in the EEA via one of three routes permitted by the BMR (recognition, equivalence or endorsement).

There are transitional provisions in relation to benchmarks provided by both EEA and third country administrators, but these provisions are ambiguous and their interpretation has been the subject of much industry discussion. Thankfully, ESMA has now clarified the interpretation of the transitionals for both EEA and non-EEA firms.

What is the issue?

The BMR transitional provisions for third country benchmarks state that, unless and until a benchmark qualifies for use in the EEA under the third country regime, the continued use of a third country benchmark that is already used in the EEA is only permitted when the reference to the benchmark in the relevant documentation was already included, or added, prior to 1 January 2020.

The provision does not, however, explain what “already used” in the EEA means for these purposes, leaving this open to varying interpretations.

ESMA guidance

EEA firms

The ESMA Q&As on the transitionals for EEA firms distinguish between:

- **Administrators already providing benchmarks before 1 July 2016** — can continue to provide benchmarks without authorisation or registration until 1 January 2020 or, if they have submitted an application for authorisation or registration by that date, until their application is refused. This means they may continue to provide benchmarks already provided before 1 January 2018 (including where updates or modifications are made to those benchmarks), and provide new benchmarks after 1 January 2018; and
- **Administrators who started providing benchmarks between 1 July 2016 and 31 December 2017** — may only continue to provide benchmarks already provided before 1 January 2018 (including where updates or modifications are made to those benchmarks). They cannot produce new benchmarks after 1 January 2018 unless they have become authorised or registered.

Non-EEA firms

- **Third country benchmarks already used in the EEA on or before 1 January 2020** — can continue to be used post 1 January 2020 where already referenced prior to 1 January 2020, or where a reference to the benchmark is added prior to 1 January 2020. Therefore, new references can be added up until 1 January 2020.
- **New third country benchmarks to be provided after 1 January 2020** — will need to take formal steps (e.g. recognition, endorsement or the appointment of an EEA administrator) to permit use of the benchmark in the EEA.

ESMA's guidance on the treatment of third country firms under the transitional arrangements is a relief for those index providers who were anticipating needing to take action before 1 January 2018 in order to continue to service EEA-based clients. These steps involve seeking recognition as an administrator or endorsement of the relevant benchmarks, or otherwise appointing an EEA administrator. This presented problems in terms of the timing of applications, with many European national competent authorities not opening their application windows until 1 January 2018, therefore creating a natural time lag in the ability to create new indices pending approval of the relevant applications. It also presented problems for third country firms seeking to rely on an EEA administrator to endorse an index where that administrator had not yet sought authorisation / registration thanks to the transitional regime applicable to EEA firms.

However, the position is somewhat of a surprise, given that it is more generous than the position for benchmarks produced by "new" EEA administrators. It seems a little difficult to justify allowing third country administrators to produce new benchmarks after 1 January 2018 without needing to comply with the full regime, but requiring EEA administrators who started administering benchmarks from 1 July 2016 to be authorised or registered before they can provide new benchmarks after 1 January 2018.

ESMA has also added another new Q&A on the scope of the BMR. This clarifies that the BMR does not apply to the provision of benchmarks that are used exclusively outside the EEA. More helpfully, it also clarifies that the BMR does not apply to the contribution of input data to a benchmark that is used exclusively outside the EEA.

What's next?

Third country index providers must still consider appropriate steps where they plan to provide new indices into Europe post 1 January 2020. However, the delay is extremely helpful in assisting those firms map out an appropriate plan, taking into account the consequences of Brexit.

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