

Clarifications to Key Concepts Under The EU Benchmarks Regulation

The European Commission is consulting on delegated acts clarifying the meaning of certain key terms.

On 22 June 2017, the Commission published four draft delegated acts under the EU Benchmarks Regulation (BMR).¹ These acts build on the technical advice provided by ESMA in November 2016 and are intended to clarify certain key terms used in the BMR, to try to ensure consistent interpretation and application of the Regulation across the EU.

Conscious of the impending main BMR application date of 3 January 2018, there is only a four-week consultation period (ending 20 July 2017). The Commission will then consider the feedback received in finalising its proposals, and submit the delegated acts to the Parliament and Council for scrutiny before publication in the Official Journal.

This *Client Alert* summarises the key areas addressed by the draft delegated acts.

Clarifications to Key Terms

Making Available to the Public

In order for a benchmark to be within scope of the BMR it must, among other things, be published or made available to the public. The Commission has sought to define further what is meant by “made available to the public” for these purposes, as this phrase is open to various different interpretations.

The Commission proposes that a figure should be considered to be made available to the public if it is “made accessible to a potentially indeterminate number of legal and natural persons”. However, this would not include a figure made accessible only to the index provider itself, or to a “determined” number of recipients connected or related to the index provider (on the basis that this is making available, but not making available to the public). Thankfully, the Commission has removed ESMA’s proposed reference to a “large” number of recipients — a term bound to lead to inconsistent interpretations.

The Commission’s draft keeps the meaning wide by providing that a figure is made available to the public when it is made accessible to a potentially indeterminate number of legal and natural persons *directly or indirectly as a result of its use* as a reference figure by a supervised entity. Therefore, providing access to a referenced figure (rather than just the name of the index used) would constitute making it available to the

public. Further, an index that is used in only one product that is in turn sold to a potentially indeterminate number of investors would also be caught.

The recitals highlight that a figure can be made available in various forms at the same time, or consecutively either through the provider itself or by the recipients of the figure passing it on. The draft provisions stress that access can take place through various methods and different types of media.

Administering

The delegated acts will also expand upon what is meant by “administering the arrangements for determining a benchmark” — one of the elements required for someone to be considered a benchmark administrator.

The Commission proposes that this activity include both:

- Ongoing management of the provider’s structures and of the provider’s personnel involved in the determination process of a benchmark
- Setting, adaptation, and ongoing maintenance of a specific methodology for determining a benchmark

Force Majeure, Frustrate, Breach

The BMR transitional provisions allow for the continued use of a benchmark that does not meet the BMR requirements in certain situations. The national competent authority of the Member State in which the provider is located may permit continued use of the benchmark, if ceasing or changing the benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract, financial instrument, or the rules of any investment fund that references the benchmark.

The Commission is proposing to provide the following non-exhaustive list of factors to be taken into account by national competent authorities when considering whether to grant such permission, highlighting that these factors should be applied on a case-by-case basis:

- Changing the benchmark would require a material change to elements of the benchmark provision (such as the methodology) that would lead to a significantly different value. One of the recitals explains that such changes might include a sudden discontinuity in time series of the index, or a different degree of volatility.
- Changing the nature of the input data or methodology to make the benchmark BMR-compliant would cause a change in the nature of the benchmark (for example, by undermining the benchmark’s representativeness of the market).
- There is no substitute BMR-compliant benchmark that measures the same market or economic reality.
- The relevant documents referencing the benchmark do not provide for a substitute or do not contain rules dictating substitute selection.
- A change of administrator would lead to a substantial change in the benchmark. A recital clarifies that this may be the case when an index measures a very particular market and relies heavily on the reputation, judgement, or expertise of the index provider.

Unfortunately, for technical reasons, the Commission did not retain ESMA’s helpful proposal that ESMA should publish a list of relevant benchmarks whose continued use has been permitted.

Critical Benchmarks

One of the criteria a benchmark must fulfil to qualify as “critical” under the BMR is as follows. In the event the benchmark ceases to be provided, or is provided on the basis of input data that is unreliable or no longer fully representative, there would be “significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States”.

The Commission is proposing a non-exhaustive list of factors that national competent authorities should take into account when considering whether a benchmark meets this criterion. It also emphasises that, where it is expected that a significant and adverse impact will occur in more than one Member State, this assessment should be conducted at a national or market level (for each relevant Member State), as well as at EU level.

The draft delegated act sets out a separate list of factors for each area in which a significant adverse impact might occur. It does not, however, specify any numerical thresholds for national competent authorities to use — the Commission wishes to avoid being too prescriptive at the expense of flexibility.

Benchmark Categorisation

Under the BMR, the administrator must calculate the total value of financial instruments, financial contracts or investment funds referencing a benchmark, in order to categorise that benchmark as critical, significant or non-significant.

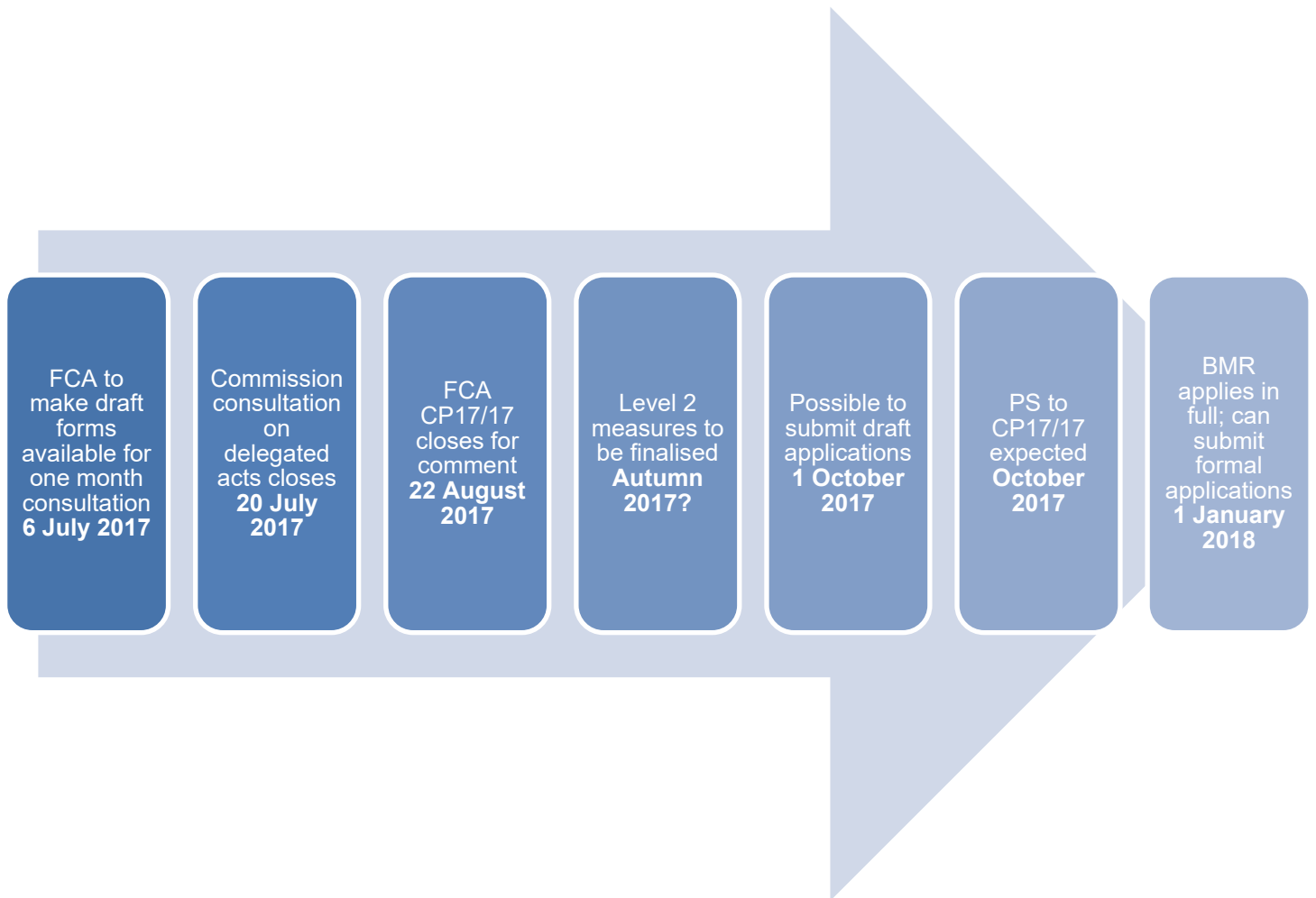
To try to ensure the consistent categorisation of benchmarks across the EU, one of the delegated acts will define how the nominal amount of financial instruments (other than derivatives), the notional amount of derivatives, and the net asset value of investment funds should be calculated for these purposes.

The draft delegated act also includes provision for the use of alternative amounts and values in situations where the data required are not available. This would allow an administrator to make the calculation on a “best effort” basis and to the best of the administrator’s ability, based on the available data. However, if using alternative sources, the administrator would need to provide its national competent authority with a written specification of the data sources used.

The draft delegated act also specifies that calculations should be expressed in Euros, and makes provision for how administrators should approach the calculations in relation to benchmarks that are indirectly referenced within a combination of benchmarks.

Timing

The diagram below provides an overview of key timings for BMR implementation from a UK perspective.



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Endnotes

- ¹ Commission Delegated Regulation supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation *available at* https://ec.europa.eu/info/law/better-regulation/initiative/31917/attachment/090166e5b331d84a_en; Commission Delegated Regulation supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed *available at* https://ec.europa.eu/info/law/better-regulation/initiative/31851/attachment/090166e5b331c89f_en; Commission Delegated Regulation supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to specifying how the criteria of Article 20(1)(c)(iii) are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States *available at* https://ec.europa.eu/info/law/better-regulation/initiative/31878/attachment/090166e5b331c496_en; Commission Delegated Regulation supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks *available at* https://ec.europa.eu/info/law/better-regulation/initiative/31899/attachment/090166e5b331de8e_en