# Benchmark Regulation: Response to the European Commission's 2019 Review

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## Financial Markets Law Committee[1]

**This paper has been prepared by the FMLC Secretariat.[2]**

[1] Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

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## 1. EXECUTIVE SUMMARY AND INTRODUCTION

1.1. The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2. Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "**BMR**") came into effect on 1 January 2018. The primary objective of the BMR is to ensure the accuracy, robustness and integrity of financial benchmarks, which it does by placing requirements on administrators of, supervised users of, and supervised contributors to, benchmarks. The BMR regulates the governance and controls administrators must have in place, the quality of input data and methodologies used by benchmark administrators and the conduct of contributors to benchmarks.

1.3. On 11 October 2019, the European Commission published a public consultation document on the review of the BMR (the "**Consultation**").[3] The European Commission is mandated by Article 54 of the BMR to conduct a review of certain provisions of the BMR. The Consultation seeks stakeholders' views on several aspects of the regime including, *inter alia*, critical benchmarks, authorisation and registration procedure, scope of the BMR, and non-E.E.A. benchmarks. The Committee is grateful for the opportunity to comment on a few key issues.

## 2. ISSUES OF LEGAL UNCERTAINTY

**Critical benchmarks and non-E.E.A. Benchmarks**

2.1. The Consultation has been issued during a period of turbulence for financial benchmarks. This complexity has two, well-publicised contributing factors: (1) the ongoing reform of interbank offered rates ("**IBORs**") and the anticipated orderly cessation of one or more critical benchmarks; and (2) the U.K.'s impending withdrawal from the E.U. ("**Brexit**").

2.2. Articles 20 to 23 of the BMR set out a regime for the regulation of "critical" benchmarks and introduces specific rules which only apply to such benchmarks. Article 20(1)

[3] European Commission, *Public Consultation: Report pursuant to Article 54 of the Benchmark Regulation* (11 October 2019), available at: https://ec.europa.eu/info/law/better-regulation/initiatives/finance-2019-benchmark-review/public-consultation_en.

explains that a critical benchmark is one provided by an administrator located in the Union which is used as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion on the basis of all the range of maturities or tenors of the benchmark or is based on submissions by contributors the majority of which are located in one Member State and is recognised as being critical in that Member State. The European Commission maintains a list of critical benchmarks.[4] Once a benchmark is added to that list, the relevant national competent authority has increased powers—such as powers to require mandatory administration of, and mandatory contributions to, that benchmark—so as to ensure its representativeness and continuity.

2.3. The BMR permits financial institutions in the E.U. to use only those benchmarks which are registered with the European Securities and Markets Authority ("**ESMA**"). Administrators of benchmarks in Third Countries have to register their benchmarks with ESMA on the basis of: (i) a positive equivalence decision; (ii) recognition of the Third Country administrator by the competent authority of its "Member State of Reference"; or (iii) endorsement by an E.U. administrator, with full authorisation, of the Third Country benchmark(s). One of the critical benchmarks recognised by the European Commission is LIBOR which is provided by the U.K.-based ICE Benchmark Administration.[5] In July 2017, the Financial Conduct Authority ("**FCA**") announced that it would not guarantee the survival of LIBOR after the end of 2021.[6] No successor rate has been adopted on a market-wide basis yet and the question of establishing term rates has proven particularly challenging. After the U.K.'s withdrawal from the E.U., LIBOR and, later, any successor rates will likely become Third Country benchmarks.

2.4. In order to mitigate the impact of a failure by benchmark providers to secure recognition at the date of the application of the BMR, the Regulation also includes transitional provisions in Article 51, the first of which is a two-year grandfathering or grace period (the "**transitional period**"), following the entry into application of the BMR in January

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[4] For the most recent (22 March 2019) list published by the European Commission, see Commission Implementing Regulation (EU) 2019/482 establishing a list of critical benchmarks used in financial markets pursuant to Regulation (EU) 2016/1011.

[5] *Ibid*.

[6] See, FCA, "The future of LIBOR": Speech by Andrew Bailey, Chief Executive of the FCA, at Bloomberg London, (27 July 2017), available at: https://www.fca.org.uk/news/speeches/the-future-of-libor. Since the announcement, the transition from LIBOR to the Secured Overnight Financing Rate ("**SOFR**"), Sterling Overnight Index Average ("**SONIA**") and the other chosen risk-free rates has occupied the derivatives, securities and loan markets.

2018.[7] This transitional period was to end on 1 January 2020. On 26 March 2019 the European Parliament adopted a legislative resolution on low carbon and positive carbon impact benchmarks (the "**low carbon legislative resolution**"), which will, if it comes into effect, extend the 1 January 2020 deadline for Third Country benchmarks to 31 December 2021.[8]

2.5. The primary problem arising in the context of Brexit, which the FMLC has analysed in previous publications, is that, in the absence of registration by one of the three means provided, E.U.-supervised entities will be prevented from using a U.K.-administered benchmark (for the special case of central bank rates, see paragraph 2.7 below) in the E.U.[9] In an evolving global financial system, where market-critical benchmarks are moving away from the centre of Europe, questions about how to ensure the robustness of critical benchmarks are increasingly complicated. While the FMLC agrees, in principle, that the expansion of the powers of competent authorities as set out in section 2 of the Consultation might be useful, it would like to note that the issues are equally relevant in the context of benchmarks which might fulfil the quantitative criteria set out in Article 20 of the BMR but are provided by Third Country administrators. This paper refers to such benchmarks as "**key Third Country benchmarks**". LIBOR and its successors will not be "provided by an administrator located in the Union" after Brexit and will become a key Third Country benchmark. The BMR does not contemplate the possibility of the existence of a key Third Country benchmark and the Consultation, in both sections mentioned above, does not hint that the application of the BMR to key Third Country benchmarks might be assessed.

2.6. Should Brexit occur before the end of 2021 (i.e., the date by which LIBOR is phased out), which seems likely, U.K.-administered benchmarks may be used in the E.U. by supervised entities—subject to what is said below concerning central banks—in the period between Exit Day and the day on which the new transitional provisions end—

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[7] During the transitional period, E.U. benchmark providers may apply for authorisation or registration and Third Country benchmarks may, subject to conditions, be referenced in legacy contracts. In the latter case, where benchmarks provided by administrators located in Third Countries, are "already used in the Union" as a reference for legacy financial instruments, financial contracts, or for measuring the performance of an investment fund ("**in-scope instruments**"), Article 51(5), as an additional stability measure, permits the use of such benchmarks after the end of the transitional period for such in-scope instruments that already reference such benchmarks on, or which add a reference to such benchmarks prior to, 1 January 2020.

[8] See, European Parliament legislative resolution of 26 March 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks (COM(2018)0355 – C8-0209/2018 – 2018/0180(COD)), available at: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0237_EN.html.

[9] See, for example, FMLC, *Report: Brexit Analysis on Third Country Regimes in E.U. Legislation*, (13 July 2017), available at: http://fmlc.org/report-u-k-withdrawal-from-the-e-u-13-july-2017/.

i.e., 31 December 2021—if (1) they were already in use in the E.U., and (2) only insofar as they are referenced in legacy contracts. If the transition from LIBOR occurs *after* Brexit but *before* the end of the transitional period, it will be necessary for any wholly new successor rate (for example, new term rates), provided by a commercial entity,[10] to meet the requirements of Article 51(5) of the BMR in order to ensure continued use in legacy contracts after 31 December 2021. The new successor rate will need to be established as "already used" in the E.U. and contracts which currently reference LIBOR will need to reference the new rate before 31 December 2021. Given that LIBOR will be phased out "at the end of 2021", there may be a vanishingly small period of time during which legacy contracts will have to begin to reference the new rate so as to be able to continue to do so after 31 December 2021 (in the absence of registration). For the legacy contract market, which relies upon continuity, this could cause systemic problems. At any rate, the new successor benchmark may only be used in new contracts after an equivalence decision has been adopted by the European Commission, the U.K. administrator has been registered or the U.K. benchmark has been endorsed.

2.7. A second difficulty arises from the scope of the BMR. Article 2 of the BMR states that the BMR does not apply to central banks. Observers have highlighted to the FMLC the many questions which arise from this exemption, including whether it applies to E.U. central banks only or Third Country central banks too. The lack of specificity raised several questions in the period immediately after the BMR entered into force concerning the immunity provided to other entities engaging with central bank-administrated benchmarks. For example, if the BMR excludes central banks from its scope when they are administrators of benchmarks, it is unclear whether the exemption extends to other requirements placed on users and contributors. If benchmarks administered by central banks need not be recorded on ESMA's register as per the requirements of Article 36, that raises further questions in relation to the "use of a benchmark" as set out Article 29 of the BMR which states that a supervised entity may use a benchmark in the E.U. only if the administrator or benchmark (as applicable) is "included in the register referred to in Article 36". Similar questions arise in relation to rates administered by central banks to the extent they rely on submissions from, or delegations to, commercial entities. The questions arise both in relation to E.U. and Third Country central banks.

2.8. The phasing-out of LIBOR has brought these issues into sharp focus. There is the possibility that that the key benchmarks which will replace LIBOR will be provided by

[10] It has been suggested that SONIA might replace LIBOR in the U.K. SONIA is currently administered by the Bank of England. Article 2 of the BMR states that the Regulation does not apply to central banks.

central banks and, increasingly, by central banks outside Europe. In the U.K., the Sterling Overnight Index Average ("**SONIA**"), provided by the Bank of England, may replace LIBOR; in the U.S., the Alternative Reference Rates Committee has recommended that institutions replace USD LIBOR with the Secured Overnight Financing Rate ("**SOFR**") provided by the Federal Reserve Bank of New York. It might assure legal certainty if the exemption for central banks is clarified upon review of the BMR.

2.9. The FMLC has made these points in previous publications but appreciates the opportunity to bring them to the European Commission's attention. Its responses to specific questions are provided in the paragraphs below.

**Question 9: Continued use of a non-compliant benchmark**

2.10. Article 35(3) of the BMR provides for the possibility that immediate cessation of use of a benchmark in existing contracts may not be appropriate and makes provision for legacy use of individual benchmarks to continue where an administrator's authorisation has been suspended. Article 51(4) provides competent authorities the power to permit the continued use of a non-compliant benchmark if its cessation or any change to make it compliant after the transitional period would result in a *force majeure* event, frustrate or otherwise breach the terms of a financial contract. Question 9 of the Consultation asks whether the powers of competent authorities to permit continued use of a benchmark when cessation of that benchmark would result in contract frustration are appropriate.

2.11. The FMLC has commented in the past on this provision.[11] The FMLC observed that it would not be correct to state that replacing a non-compliant benchmark with a compliant benchmark will result in frustration unless the contract provides for a substitute benchmark.[12] Frustration may be one possible outcome in a case of benchmark transition—although it would be a very unusual one for commercial contracts—but it will only occur where the parties to the contracts can be said to have wholly failed to allocate the risks of benchmark withdrawal. The parties may, however, be taken—either expressly or impliedly, in common law—to have allocated these risks in a number of different ways, of which reference to a substitute benchmark is only one. The doctrine of *force majeure*, on the other hand, which has origins in French law, can be

[11] FMLC, *Issues of Legal Uncertainty arising from a Discussion Paper on Benchmarks Regulation by the European Securities And Markets Authority*, (March 2016), available at: http://fmlc.org/wp-content/uploads/2018/03/fmlc_response_to_esma_discussion_paper_on_the_benchmarks_regulation.pdf.

[12] *Ibid*, pp. 15-17.

triggered by an event "which the parties to the contract could not reasonably have foreseen". The doctrine is not, however, recognised in Common law jurisdictions, such as the U.K. and Ireland—other than as the simple rule that courts will give effect to any *force majeure* clause which the parties have incorporated in their contract to reflect their commercial agreement. *Force majeure* clauses are increasingly common in market standard financial contracts and will be applied by the courts notwithstanding the parties have apparently foreseen that certain kinds of events may occur and have made contractual provision for them. In the context of Brexit, the European Commission may wish to consider further the situation where benchmark transition is likely to trigger *force majeure* clauses in market standard financial contracts but where frustration—a common law doctrine—might not be at issue.

2.12. As to the specific question of permitting the continued use of non-compliant benchmarks, the FMLC notes that this power is only available to competent authorities in a limited context and neither Article 35(3) nor Article 51(4) applies to Third Country benchmarks. Article 35(1) provides competent authorities with the ability to withdraw the authorisation or registration of an administrator under specific conditions when the administrator's action or inaction have made the benchmark non-compliant and, in the event that this would result in frustration of the contract or a *force majeure* event, the competent authority may permit, under Article 35(3), the continued use of the benchmark in instruments or contracts which already reference it. The issue with regards to U.K.-based administrators and benchmarks, however, is that the provisions of Article 35 only apply to those administrators which have been authorised and registered under the BMR. Article 34, which contains the specific provisions for authorisation and registration, applies to a "natural or legal person located *in the Union* that intends to act as an administrator" (emphasis added). After Brexit, the FMLC assumes U.K. administrators will not remain registered under Article 34. In a Statement published in March 2019, ESMA stated that ICE Benchmark Administration Limited and other administrators located in the U.K. (or whose applications for recognition or endorsement were approved by the FCA) which currently appear on ESMA's register of approved benchmarks/administrators will be removed from the register in the case of a no-deal Brexit unless and until they obtain recognition, endorsement or equivalence.[13] The FCA, similarly, will no longer be a Member State competent authority. The provisions in Article 35 for the continued use of a benchmark

[13] See, ESMA, Statement on its approach to the application of some key MiFID II/MIFIR and Benchmark (BMR) provisions should the UK leave the EU under a no-deal Brexit (7 March 2019), available at https://www.esma.europa.eu/sites/default/files/library/esma70-155-7253_public_statement_mifidii_bmr_provisions_under_a_no_deal_brexit.pdf.

when its cessation may result in disruption will not be relevant in the context of the transition for LIBOR.

2.13. Article 51 provides a two-year transitional period (now extended by an additional year) during which benchmark administrators are to apply for authorisation and registration in accordance with Article 34. By implication, the continued use provision in Article 51(4) applies to benchmark administrators located in the E.U. which have not gained authorisation by the end of the transitional period.[14] The FMLC would recommend that the European Commission consider expanding the provisions permitting the continued use of Third Country benchmarks.

**Question 24: Providing Third Country benchmarks in the E.U.**

2.14. Section 9 of the Consultation focuses on non-E.E.A. ("**Third Country**") benchmarks. As stated above, administrators of benchmarks in the U.K., will have to register their benchmarks with ESMA on the basis of: (i) a positive equivalence decision; (ii) recognition by the competent authority of its "Member State of Reference"; or (iii) endorsement by an E.U. administrator, with full authorisation, of the Third Country benchmark(s). Question 24 of the Consultation asks which improvements should be made in respect of the procedures for the registration of Third Country benchmarks.

2.15. Article 31 empowers ESMA to withdraw the registration of a Third Country administrator but that is currently the only remedy available to it. It would be helpful if ESMA were empowered to reach agreement with Third Country administrators for the purpose of information-sharing in connection with key Third Country benchmarks. Such agreements may seek to ensure the establishment of processes and arrangements for cooperation in carrying out some or all of the tasks and exercising some or all of the powers of oversight over these key benchmarks. One issue highlighted to the FMLC by stakeholders is the requirement in Article 33(1)(c) for administrators in the E.U. which wish to endorse a Third Country benchmark to have "an objective reason to provide the benchmark or family of benchmarks in a third country and for the said benchmark or family of benchmarks to be endorsed in the Union". That provision has been generally understood to be satisfied in circumstances in which a benchmark provider was established in a Third Country for commercial or operation reasons unrelated to the

[14] Article 51(5), as an additional stability measure, permits the use of those benchmarks which are provided by Third Country administrators and are "already used in the Union" as a reference for legacy financial contracts that already reference such benchmarks on, or which add a reference to such benchmarks prior to, the end of the transitional period. The FMLC has explored the uncertainties in relation to this provision in previous publications. See: FMLC, *"Onshoring" Statutory Instruments Comment Series: Benchmark Regulation*, (23 October 2019), available at: http://fmlc.org/onshoring-statutory-instruments-comment-series-benchmark-regulation-23-october-2019/, paragraphs 2.1-2.9.

BMR, or because its founders or key staff are located in a third country. Guidance on what would be accepted as an objective reason would be helpful.

**Question 10: Scope**

2.16. Section 4 of the Consultation Paper observes that the impact assessment supporting the original proposal for the BMR did not delineate the scope of the Regulation to specific categories of benchmarks, such as critical benchmarks or to specific underlying markets which are particularly vulnerable to manipulation. As a result, the scope of the BMR is very broad with the main trigger being the existence of products that link to the index. Question 10 asks which adjustments might be made to the regulatory framework applying to non-significant benchmarks.

2.17. Article 3(1)(a) of the BMR requires the index to be published or "made available to the public". Further clarity is provided on this in Commission Delegated Regulation (EU) 2018/65 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 (the "**Commission Delegated Regulation**"). Article 1 of the Commission Delegated Regulation provides

> 1. A figure shall be considered to be made available to the public for the purposes of Regulation (EU) 2016/1011 where the figure is made accessible to a potentially indeterminate number of legal and natural persons other than the index provider or other than a determined number of recipients connected or related to the index provider
>
> 2. A figure is made available to the public where it may be accessed by such persons either directly or indirectly as a result, inter alia, of its use by one or more supervised entities as a reference for a financial instrument it issues or to determine the amount payable under a financial instrument or a financial contract, or to measure the performance of an investment fund, or to provide a borrowing rate calculated as a spread or mark-up over such figure.

It is unclear whether Article 1(1) and 1(2) are cumulative or alternative.

2.18. Whilst the public access requirement as specified in the Level 2 is theoretically an important limitation, there remain interpretative uncertainties as to whether access to an index can be considered sufficiently private or restricted to fall outside the scope of the

regulation. The result is that even narrowly-used bespoke indexes potentially come within scope of the BMR.

2.19. Third Country benchmark administrators applying for registration with ESMA on the basis of an equivalence determination face an uphill struggle. The BMR lays down, in Articles 32 and 33, specific requirements which must be fulfilled for either recognition or endorsement to occur and which may, in part, be satisfied by demonstrating compliance with certain international standards. No Third Country has enacted a comprehensive code like the BMR for benchmark regulation (although that will change when the U.K. leaves the E.U. and onshores the BMR). As noted in the Consultation, other jurisdictions have opted to implement the Principles of Financial Benchmarks published by the International Organization of Securities Commissions ("**IOSCO**") through an approach whereby regulation and supervision is limited to the most critical or systemic financial benchmarks. The combination of the expansive scope of the BMR and the limited availability of equivalence decisions gives rise to a degree of practical uncertainty for E.U. market participants concerning the use of non-E.U. indexes (and ultimately restricts E.U. market access for such indexes).

2.20. Although the Consultation does not contain a specific question about the categories of entities that are prohibited from using benchmarks that are not BMR-compliant, there is legal uncertainty in this context. In particular, the definition of a "supervised entity" under Article 3(17) of the BMR has the perhaps-unintended consequence of bringing into the scope of the BMR Third Country entities which are not otherwise required to be authorised under E.U. financial services legislation. For example, the term "supervised entity" includes "an investment firm *as defined in* point (1) of Article 4(1)" (emphasis added) of Directive 2014/65 on markets in financial instruments ("**MiFID II**"). An "investment firm" under MiFID II includes

> any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis

The open-ended nature of the reference to MiFID II is in contrast to analogous provisions under other E.U. legislation. For example, Article 3(3) of Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (the "**SFTR**") defines financial counterparty with reference to "investment firms *authorised in accordance with*" MiFID II, capturing only those firms which are in the scope of the latter

legislation.[15] It is unclear whether Third Country entities, which may fall within the definition of investment firm under MiFID II but which aren't authorised by it, have compliance obligations under the BMR. It would be helpful if additional guidance on this was issued by the European Commission or ESMA.

**Question 7: Authorisation and Registration**

2.21. Article 35 of the Regulation addresses the situation when it may become necessary to suspend or withdraw a benchmark administrator's authorisation or registration and thus prevent the use of its benchmarks, either permanently or for the duration of a suspension. The Consultation Paper notes that the provision to suspend or withdraw operates at administrator level and exercising this power might result in preventing use of all benchmarks provided by the administrator. Question 7 therefore asks if it is necessary to clarify that a competent authority has the option to suspend or withdraw authorisation or registration in respect of one or more individual benchmarks, without having to suspend the authorisation for the administrator itself.

2.22. Article 35(1) provides the following four situations in which authorisation might be suspended. These include where the administrator:

a) expressly renounces the authorisation or registration or has provided no benchmarks for the preceding 12 months;

b) has obtained the authorisation or registration, or has endorsed a benchmark, by making false statements or by any other irregular means;

c) no longer meets the conditions under which it was authorised or registered; or

d) has seriously or repeatedly infringed the provisions of this Regulation.

The FMLC notes that the wording of Article 35(1) refers explicitly to circumstances in which the administrator has fallen short of his obligations. While the power to suspend or withdraw authorisation or registration in respect of one or more individual benchmarks provided by the administrator, which the Consultation Paper describes, would indeed be less disruptive, Article 35 would need to be redrafted to make its

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15 Regulation (EU) 2012/648 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") similarly defines financial counterparty in Article 2(8) with reference to "investment firms *authorised in accordance with*" Directive 2004/39/EC on markets in financial instruments which pre-dated MiFID II.

availability—and the specific circumstances in which the suspension would applies only in respect of one rather than all benchmarks—clear.

## 3. CONCLUSION

3.1. The FMLC welcomes the European Commission's review of the BMR. The BMR has had significant impact on the financial markets and efforts to review the application of the legislation are greatly appreciated. The Committee has highlighted in this paper the key areas—some of which do not entirely fall into scope of the questions in the Consultation Paper—which have been the cause of legal uncertainty in respect of the BMR. Of these, the uncertainties arising from the interplay of Brexit and the transition from LIBOR might have been unforeseen at the time the BMR was being drafted but now give the FMLC greatest cause for concern.

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