



**The EU Benchmark Regulation and  
practical implications of the third  
country regime**

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# Introduction

The EU Benchmark Regulation (EU BMR) became effective on 1 January 2018 and whilst the transitional provisions mean that many of the requirements are not fully effective until 1 January 2020, benchmark administrators – particularly those based outside of the European Union (EU) – should already be taking action to ensure preparedness for that date.

In this report, we explore the scope of the legislation on benchmark administrators based outside of the EU and the options available for them to ensure their benchmarks can continue to be used in the EU after 1 January 2020.

## What is a third country administrator?

Any benchmark administrator based outside of the EU that provides benchmarks or indices that are used in the EU by a supervised entity<sup>1</sup> will be subject to the third country regime requirements of EU BMR and thus defined as a third country administrator. Subject to the transitional requirements discussed further below, for the benchmarks administered by a third country administrator to continue to be used in the EU after 1 January 2020, the third country administrator must comply with the requirements of EU BMR.

# Options for third country administrators

The legislation provides third country administrators with three options to comply with the requirements and continue to administer their benchmarks for use by EU supervised entity post 1 January 2020. In choosing which option is suitable, third country administrators should consider a number of factors including the benchmark's current and potential future presence in the EU, the number of benchmarks in scope as well as the complexity of administering the benchmarks.

## Equivalence

Consistent with Equivalence regimes set out under other pieces of EU legislation, EU BMR provides that the competent authority (i.e. the local relevant financial markets regulator) of the third country should adopt legislation or rules equivalent to EU BMR in their local jurisdictions and then seek approval from the EU for Equivalence.

The Equivalence option is dependent on third country competent authorities electing to seek Equivalence with the EU. Given that we are a number of months into the transitional period, we would encourage engagement between third country administrators and their competent authority as soon as possible to discuss whether Equivalence will be sought.

Where Equivalence is granted, the scope of any new rules or legislation implemented in the third country will be dependent on ESMA's assessment of the third country's current legal framework and supervisory practice; for example, depending on whether ESMA determines that the third country's legal and supervisory framework is equivalent to the requirements set out in EU BMR or, at least equivalent to, the requirements of the IOSCO principles. Whatever the requirements, it is likely that third country administrators would need to apply for authorisation from their local third country competent authority.

Additionally, third country competent authorities may choose to limit the Equivalence regime to specific benchmarks and/or administrators. Therefore, if a third country benchmark administrator is not included in the scope of the Equivalence regime then they will need to select one of the two alternative options discussed further below (i.e. Recognition or Endorsement).

## Recognition

Recognition requires an administrator located in a third country to have legal representation in the EU through which the regulatory oversight is affected by an EU competent authority. The EU legal representative will be required to carry out oversight responsibilities and will effectively be accountable for the provision of the third country benchmarks within the EU.

The location of the EU legal representative will be dependent on the third country administrator's presence in the EU or where their existing third country benchmarks are being used in the EU. The regulation sets out a waterfall of requirements on Article 32(4) that assists third country administrators to determine the location of the EU legal representative.

As part of the Recognition application, it is suggested that the EU legal representative needs to consider evidencing the third country administrator's compliance with the IOSCO principles to the relevant EU competent authority. This can be achieved either by engaging an external independent assurance provider to carry out an independent assessment or by a certification provided by the relevant third country competent authority.

## Endorsement

In order to seek Endorsement, third country administrators will need to engage an authorised EU benchmark administrator. The authorised benchmark administrator will then apply to its local competent authority for Endorsement of the third country administrator's benchmarks (for example, this could be achieved through a commercial arrangement with the EU benchmark administrator providing this service).

The EU benchmark administrator must demonstrate that it will have a well-defined role within the accountability framework of the third country administrator and that it will supervise the administration of the endorsed third country benchmarks on an on-going basis.

The EU administrator will also need to prove to its competent authority that it has the necessary capabilities to monitor the provision of the third country benchmarks. Note, however, the regulation stipulates that the endorsing administrator needs to provide an explanation of the objective reason for the provision of the endorsed benchmark in a third country and for it to be endorsed in the EU.

# Timeline and transitional arrangements

The Q&A from ESMA issued on 8 November 2017 provided further clarity on third country transitional arrangements under EU BMR which differ from the transitional arrangements for EU countries. Figure 1 below highlights that third country benchmarks are able to be used in the EU throughout the duration of the transitional period, to 31 December 2019.

Additionally, third country benchmarks that existed prior to 1 January 2020 can continue to be used in existing contracts post 1 January 2020 until maturity, without the need for administrator complying with EU BMR.

However, the use of existing benchmarks provided by third country administrators in new contracts created after 1 January 2020 is not permitted, where the third country administrator has not complied with the third country requirements of the Regulation. Additionally, the use of benchmarks created by a third country administrator post 1 January 2020 is not permitted, unless the benchmark is in compliant with the third country requirements Regulation.

Figure 1: A summary of the timeline and transitional arrangements under EU BMR

	Pre-2020	Post-2020	
Existing	Existing third country benchmarks are allowed to be used in the EU	Use in existing contracts	Use in new contracts
		Third country administrators are not required to be authorised	Third country administrators are required to be authorised
New	New third country benchmarks are allowed to be used in the EU	Third country administrators are required to be authorised to administer new third country benchmarks to be used in the EU	

# Next steps

We set out below a series of considerations for third country administrators:

## **Consider if you want to continue to provide third country benchmarks in the EU**

Third country administrators should assess how widely and to what extent their benchmarks are currently used within the EU, as this will help them to evaluate whether EU BMR compliance is necessary from a commercial perspective. Compliance may entail significant cost, which may not be justifiable. Administrators may determine that a better course of action would be to limit the use of their benchmarks to non-EU supervised entities after the necessary deadlines per above. Should they wish to continue to provide benchmarks to EU supervised entities beyond the relevant timelines, third country administrators should consider the following next steps.

## **Establish whether an Equivalence regime will be come into effect**

Third country administrators should seek to establish with their local competent authority whether there are any current plans to seek Equivalence with ESMA.

If there are plans for Equivalence, third country administrators may need to comply with new rules or requirements, for example the IOSCO principles or, possibly, the requirements of the EU BMR which third country competent authorities may enforce locally. Third country administrators will need to be prepared as the changes could be significant.

## Evaluate whether Recognition or Endorsement is a better option

If no Equivalence regime is being sought, third country administrators will need to decide between the two remaining options: **Recognition or Endorsement**.

**Recognition:** There will be cost implications in setting up an EU legal representative. The significance of these costs will depend on whether the third country administrator is a subsidiary or part of a group which also comprises EU supervised entities. Notwithstanding, third country administrators will need to consider how much work is needed to make to align their overall governance and control framework to the IOSCO principles and across geographies. Furthermore, firms would need to factor in the costs and benefits involved in obtaining independent assurance from an independent external auditor.

The proposed changes to various EU regulations by the European Commission published on 20 September 2017 could add a layer of complexity to the decision making. Currently the regulation requires third country administrators, together with their EU legal representative, to apply to the relevant local EU competent authority to seek authorisation for Recognition. However, the proposed changes to ESMA's powers could mean that third country administrators, together with their EU legal representative, apply directly to ESMA instead. These proposals need to be agreed by the European Council and Parliament in negotiations and the entire process of finalising the rules can take 18 months or more. Firms should monitor any developments but at the current time follow existing requirements for seeking Recognition.

**Endorsement:** This will mean partnering with an authorised EU benchmark administrator that would likely be external to the company; firms must consider the suitability of this business relationship. Cost and operational considerations need to be assessed, as the endorsing company needs to be embedded within the firm's governance framework and have a well-defined role in the accountability framework. These need to be assessed against the strategic objectives of the company as well as regulatory efficiencies that Endorsement could bring to third party administrators. This suitability assessment will also depend on the quantum and complexity of benchmarks being endorsed.

### Prepare for sustained IOSCO compliance

The Third Country Regime defined under the EU BMR clearly indicates that as a minimum, third country administrators should comply with the IOSCO principles for whichever option has been selected. Hence, we would encourage third country administrators to appropriately align their governance, risk and control framework for their benchmarks administration operations to the IOSCO principles.

# Conclusion

Third country administrators should be considering the costs and benefits of each of the options under the Third Country Regime. As we near the deadline for transitional arrangement, firms will need to decide on next steps, and start to implement their plans, engaging with industry and regional forums throughout the transitional period and formulate communication strategies to their clients and the markets in which they operate.

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# Appendix

## Useful links

Original blog published regarding EU Benchmark Regulation:

<http://blogs.deloitte.co.uk/financialservices/2017/03/eu-benchmark-regulation-are-you-ready-for-implementation.html>.

Official Journal of the Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:171:TOC>

Latest ESMA technical paper: <https://www.esma.europa.eu/press-news/esma-news/esma-finalises-advice-future-rules-financial-benchmarks>

ESMA Draft technical standards under the Benchmarks Regulation:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-48\\_-\\_final\\_report\\_ts\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

Latest ESMA Q&A on the Benchmarks Regulation (BMR) – Updated 22 March 2018:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-114\\_qas\\_on\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf)

EC proposal paper 2017/0230 (COD) to amend various EU regulations including EU BMR – 20 September 2017: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0536&qid=1507606068715&from=EN>



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