

FCA Consults on UK Implementation of EU Benchmarks Regulation

FCA proposes amendments to UK rules and clarifies timing for applications by benchmark administrators.

Key Points:

- The FCA is consulting on consequential changes to the Handbook, plus additional UK aspects of implementation.
- Draft forms for authorisation and registration of benchmark administrators are still awaited, but will be made available for comment from 6 July 2017.
- Benchmark administrators will not be able to make formal applications for authorisation or registration until 1 January 2018, but will be able to submit draft applications from October 2017.

The FCA has published its [Consultation Paper](#) (CP17/17) on UK implementation of the EU Benchmarks Regulation (BMR). As the BMR is a directly applicable regulation, UK implementation largely consists of consequential deletions of and amendments to existing UK regulatory rules, which are required to make them compatible with the new EU rules.

However, the FCA is also proposing some additional domestic rules, in areas not covered by the BMR. Further, the FCA is setting out its proposals in relation to application fees and periodic fees for benchmark administrators. Importantly, the consultation also provides an update on the expected timing of applications for authorisation or registration by UK benchmark administrators.

Update on Applications

There has been some confusion over the timing of applications and notifications for benchmark administrators. The FCA provides some clarity by confirming that it will only be possible for administrators to apply for authorisation or registration from 1 January 2018. However, it is planning for firms to be able to submit draft applications from 1 October 2017, presumably to increase the chances of their formal application being deemed complete on 1 January 2018, and reducing the overall time required for the FCA to process the application.

The FCA will publish draft forms for comment on 6 July (including forms for third country administrators), with a one-month consultation period. It has also confirmed that applications will need to be made through its Connect system.

The FCA acknowledges that uncertainty over the transitional provisions in the BMR remain, noting that ESMA guidance will follow. The FCA indicates that it is working on the assumption that benchmarks in

use before 1 January 2018 can continue to be used during the two year transitional period before an administrator is required to be authorised or registered (or at least have applied for authorisation or registration), but any new benchmarks created after that date can only be used if the administrator is authorised or registered.

This means that a problem remains in relation to new benchmarks created after 1 January 2018, as given the timing set out above an administrator cannot become authorised or registered by that date. They will potentially have to wait two to four months post 1 January before their new benchmarks can be used. Although the FCA is trying to be helpful by allowing draft submissions and stating that it will engage with firms to help clarify what is required, this does not resolve the unsatisfactory timing issues.

UK Implementation

The FCA is proposing a handful of amendments to its rules and guidance dealing with areas not addressed by the BMR.

Approach to Individuals (overlap with the Senior Managers and Certification Regime)

Administrators

For benchmark administrators that are already authorised firms, the FCA is proposing that the Senior Managers Regime or Approved Persons Regime will continue to apply to those firms, with some modifications.

Newly authorised administrators will (for a short time) be subject to a modified version of the Approved Persons Regime. However, this approach will change when the Senior Managers and Certification Regime (SMCR) is extended to all authorised firms in 2018, as the FCA states that it plans to include all benchmark administrators in that extension. The consultation on these proposals is expected this summer.

Administrators that are subject to the SMCR must allocate responsibility for benchmark activities to a senior manager. The Certification Regime will not apply to any roles related specifically to benchmarks.

For firms subject to the Approved Persons Regime (pending the SMCR extension), the FCA will require notification of the senior manager who has been given responsibility for the firm's benchmark activities. The FCA is proposing to disapply various controlled functions that it sees as overlapping with the BMR (including the benchmark administration function), such that it expects many administrators will only require approval for individuals performing the governing functions.

Contributors

Supervised contributors must inform the FCA of the individual responsible for its benchmark contributions. The benchmark submission function will be disappplied in relation to firms subject to the Approved Persons Regime.

Prudential Requirements

As the BMR does not address prudential requirements, the FCA is proposing to maintain the prudential regime in the Market Conduct sourcebook, but only in relation to administrators of 'critical' benchmarks. It is not intending to impose any prudential requirements on other administrators.

Compulsion

Under the BMR, the FCA may in certain circumstances compel an administrator of a critical benchmark to continue to publish that benchmark, or compel contributors to a critical benchmark to continue providing input data.

The BMR does not include any explicit right of appeal for administrators or contributors that are so compelled, and so the FCA is proposing to include some guidance on how it would allow such parties the opportunity to make representations if they wish to challenge a decision to compel them. The affected party would be able to make written representations, prompting the FCA to review its decision. The FCA also highlights that, in any case, judicial review would always be available to affected parties.

Notification of Suspected Manipulation

The FCA expects administrators to inform the FCA without delay of any notification they receive from contributors about suspected manipulation of a benchmark. The FCA is also considering making a rule to require any contributor that is an authorised firm to notify the FCA directly of any suspected manipulation.

UK Branches of Third Country Firms

There is remaining uncertainty about whether the BMR applies to EEA branches of third country firms that contribute to a benchmark administered by a firm in the EEA.

On the assumption that the BMR does not apply in this scenario, the FCA is proposing domestic rules to apply the contributor obligations under the BMR to UK branches of third country firms that are regulated in the UK.

Third Country Benchmarks

Unfortunately, no new information or clarification is provided in relation to the regime or transitionals for third country benchmark administrators.

Competent Authority

The FCA expects that it will be designated as the sole UK competent authority for the BMR, and so that applications for authorisation or registration will need to go to the FCA, even if an administrator is already an authorised firm and is authorised by the PRA. Because of this, the PRA is considering whether it will need to make any consequential changes to its Rulebook, which it may consult on later this year.

Other Handbook Changes

The FCA proposes to delete or amend most of the provisions in its Market Conduct sourcebook relating to the FCA's existing regulated benchmarks from 1 January 2018. However, it proposes that the current version of these provisions will continue to apply in relation to the administrators of and contributors to the eight benchmarks currently regulated domestically (LIBOR, ICE Swap Rate, SONIA, RONIA, LBMA Gold Price, LBMA Silver Price, ICE Brent Index, WM/Reuters London 4 p.m. Closing Spot Rate), until those administrators are authorised or registered under the BMR.

In terms of other planned consequential amendments to the Handbook, the FCA proposes that some parts will be disapplied entirely as they overlap with the BMR (including the threshold conditions and dispute resolution sourcebooks), others will be disapplied only to the extent that they overlap with the BMR, and others will be subject to technical amendments.

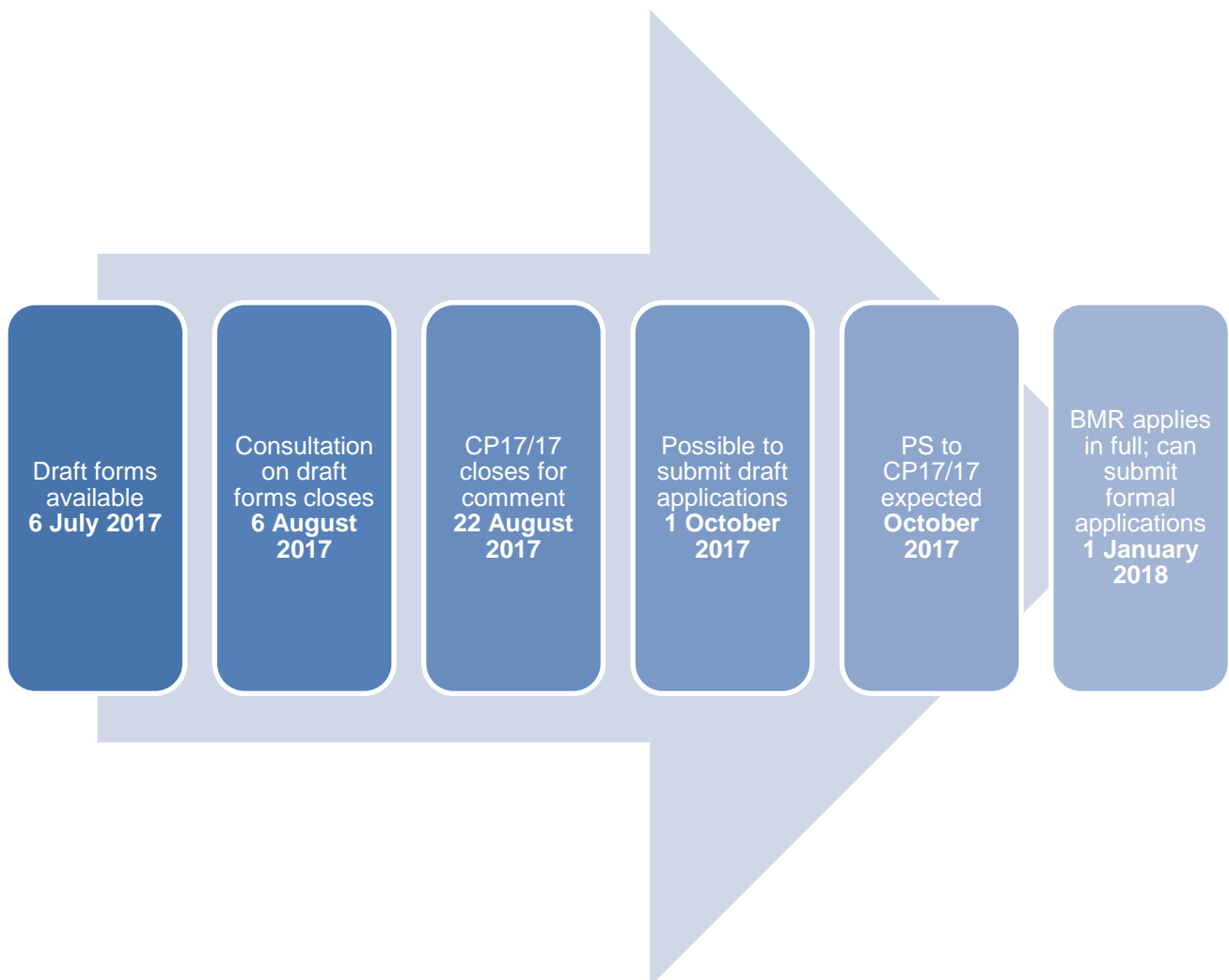
The FCA is also proposing to exclude benchmark administration from the compulsory jurisdiction of the Financial Ombudsman Service, and is proposing that benchmark administration will be outside the scope of the Financial Services Compensation Scheme.

Proposed Legislative Changes

As the UK already has an existing regime for regulating benchmarks, various changes will need to be made to UK legislation. The FCA expects HM Treasury will make a statutory instrument to amend the Regulated Activities Order to remove the existing benchmark administration regulated activity, replacing it with a new regulated activity (subject to transitionals to allow current authorisations to persist until an administrator is authorised or registered under the BMR). Further, it expects the regulated activity of providing information in relation to a specified benchmark to be removed (again, subject to transitionals keeping the authorisation in place until the administrator of the relevant benchmark becomes authorised or registered under the BMR).

Timing

The diagram below summarises the timings confirmed by the FCA in its consultation.



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