

# Benchmarks

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*Today, the European Commission published its proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts. The European Commission's proposal comes in light of recent scandals of manipulation on the LIBOR and EURIBOR indices. Indices represent the change in a predetermined basket of underlying data, which when its price is used as a reference for a financial instrument, becomes a benchmark.*

## Benchmarks

The Benchmarks Regulation comes in conjunction with earlier proposals for stricter rules, tabled in the Market Abuse Regulation (MAR) and the Market Abuse Directive (MAD). These are looking to implement a raft of new measures to tighten rules and better control the manipulation and abuse of indices by market participants in the European Union. Although the latter two legislative proposals change the sanctioning regimes to better define administrative or criminal sanctions, the Benchmarks text aims to tackle possible problems at their source; that is, the governance and controls of the benchmarks process by administrators and contributors.

The European Commission aims to improve these controls to mitigate conflicts of interest between administrators and participants, improve the quality of data used, and ensure the adequate foundations for benchmark-use, by giving the relevant competent authority the power to order contributors to supply data. The eventual objective is to better protect consumers and investors with the added transparency that the following measures provide, but also by improving and setting adequate rights of redress and assessments of suitability for the latter.

The proposal will apply to all published benchmarks referencing financial instruments and that are traded on a regulated venue, as well as those that measure the performance of an investment fund. It will provide an adequate set of rules designed for the governance and control of administrators that include:

1. An oversight function of its benchmarks
2. A control framework ensuring adequate application of the Regulation
3. An accountability framework ensuring the administrator implements adequate record keeping, auditing and complaints processes in compliance with the Regulation

The European Commission will assign a clear and defined set of rules to a list of benchmarks it has adopted. Specific requirements will be imposed on those that are deemed critical such as for inter-bank interest rate and commodity benchmarks.

The data used in the provision of benchmarks will have to be sufficient, accurate and obtained from a reliable and diverse set of contributors that have adhered to a predetermined code of conduct provided by the administrator, who in turn, will determine the benchmark with a consistent and transparent methodology. The European Commission shall be empowered to adopt delegated acts to further specify controls in respect to input data.

To provide enhanced transparency and investor protection, administrators of benchmarks will have to publish the underlying data to allow users better benchmark choice whilst banks will have to undergo a suitability assessment that targets their dealings with consumers. Furthermore, an administrator will notify the relevant authority if it suspects a breach of MAR or manipulation of a benchmark.

Finally, the proposal gives the relevant and competent authorities the power to authorise or suspend administrators and may charge a fee for these tasks. The authority may delegate certain tasks to ESMA who in turn must notify Member States of this delegation.

## Analysis

The European Commission has decided to press forward with this legislative proposal despite a short timeframe to negotiate the file under this legislative mandate of the Commission and the European Parliament. Whether the negotiations will be started in the next year is doubtful, especially considering the political priority of the Banking Union and the nearing climax on the MiFID and Omnibus II. On the one hand the Commission has increased the likelihood of swift negotiations by adopting a proposal that is far less contentious than previous drafts, for example relating to liability and supervision (ESMA or at national level). On the other hand, Member States and the European Parliament might still decide to deal with other issues first to see what will flow from on-going international work streams and due to remaining contentious issues such as a wide scope, a strict third-country regime and detailed technical and organisational provisions.



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