

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (BENCHMARKS)
(AMENDMENT) REGULATIONS 2018

2018 No. 204

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (S.I. 2018/135) (“the Benchmarks Regulations”) gave effect to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investments and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (“the EU Benchmarks Regulation 2016”). Regulation 61 of the Benchmarks Regulations makes transitional provision in respect of existing benchmark administrators, not currently regulated under the Financial Services and Markets Act 2000 (c.8), who were administering benchmarks on or before 30th June 2016.
- 2.2 The Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018 (“the Amending Regulations”) make a required amendment to the transitional provision made by regulation 61 of the Benchmarks Regulations. The amendment is required because the transitional provision made by regulation 61 of the Benchmarks Regulations only applies to existing benchmark administrators in respect of benchmarks they were administering on or before 26th February 2016 (“existing benchmarks”).
- 2.3 These Regulations amend regulation 61 so that the transitional provision made in regulation 61 applies both in respect of existing benchmarks and benchmarks administered by existing administrators after 26th February 2016.
- 2.4 These Regulations come into force on 26th February i.e. before the Benchmarks Regulations come into force. This is to ensure that the Benchmarks Regulations come into force as amended by this instrument. Relevant existing benchmark administrators who wish to administer benchmarks other than those they were administering on or before 30th June 2016 including during the transitional period under regulation 61 (“new benchmarks”) will therefore be able to do so.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is to be made under the negative resolution procedure. The European Securities and Markets Authority (“ESMA”) has published Questions and Answers clarifying how the transitional provision in the EU Benchmarks Regulation 2016

should be treated and the amendment to the Benchmarks Regulations will ensure that the UK adopts that interpretation of the transitional provision. That interpretation ensures that relevant benchmark administrators are not required to be authorised by the FCA until May 2020.

- 3.2 HM Treasury needs to breach the 21 day rule for laying this instrument to ensure that it takes effect before 27th February which is the date on which the Benchmarks Regulations come into force. If the amendment to regulation 61 of the Benchmarks Regulations is not in force for 27th February then existing benchmark administrators who wish to administer new benchmarks during the transitional period will need to be regulated under the Financial Services and Markets Act 2000 and existing administrators who have started administering new benchmarks without FCA permission after 30th June 2016 will be committing an offence as from 27th February.
- 3.3 As this instrument corrects an error in the Benchmarks Regulations it will be offered free of charge to persons who purchased a copy of the Benchmarks Regulations.

Other matters of interest to the House of Commons

- 3.4 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This instrument amends regulation 61 of the Benchmarks Regulations to ensure that existing benchmark administrators, without Part 4A permissions, who were administering benchmarks on or before 30th June 2016 are able to administer new benchmarks once the Benchmarks Regulations come into force without requiring permission from the FCA. Without the amendment, relevant benchmark administrators would not be able to rely on the transitional provision made by regulation 61 of the Benchmarks Regulations in respect of new benchmarks.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 After HM Treasury laid and published the Benchmarks Regulations an issue was spotted that prevents firms from relying on a transitional provision in the EU Benchmarks Regulation 2016.

- 7.2 The narrow drafting of paragraph (1) of regulation 61 meant that existing administrators of benchmarks will only be able to rely on the transitional provisions in respect of existing benchmarks when the policy intention was to apply the provisions to existing and new benchmarks.

Consolidation

- 7.3 HM Treasury does not propose to consolidate any legislation in consequence of this instrument.

8. Consultation outcome

- 8.1 ESMA published a Consultation Paper (CP) on the EU Benchmarks Regulation 2016 on the 29 September 2016. The CP included a first version of the draft technical standards. Their final report can be found [here](#).
- 8.2 The FCA consulted on their Handbook changes to reflect the application of the Regulation and considered responses before publishing their final rules. Their policy statement can be found [here](#).
- 8.3 The Government did not carry out any separate consultation.

9. Guidance

- 9.1 The FCA will publish Rules and guidance for persons affected by this instrument.

10. Impact

- 10.1 There is no direct impact on business, charities or voluntary bodies. Any impact stemming from the enforcement of these powers is as a result of EU regulation, not from these domestic amendments.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared as there are no direct costs on business associated with this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 The EU Benchmarks Regulation 2016 itself categorises benchmarks by significance and regulates accordingly, and as such small businesses will face lighter requirements than administrators of interest rate benchmarks or others with systemic importance. The FCA has committed to maintain this proportionality when it creates the rules which the Benchmarks Regulations enable, and has taken consultation responses into account. More broadly, the FCA takes a risk based approach to supervision in general, which means that businesses are supervised in accordance with the risk they present to the financial sector or consumers.

12. Monitoring & review

- 12.1 The Benchmarks Regulations, which this instrument amends, will be reviewed and a report published setting out the conclusions of the review within five years of this instrument coming into force.

13. Contact

- 13.1 Kate Hinchy at HM Treasury Telephone: 020 270 7809 or email: kate.hinchy@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.