



European Securities and  
Markets Authority

# Questions and Answers

On the Benchmarks Regulation (BMR)



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## 1. Purpose and status

1. The purpose of this document is to promote common, uniform and consistent supervisory approaches and practices in the day-to-day application of [Benchmarks Regulation](#) ((EU) 2016/1011, “BMR”). It does this by providing responses to questions asked by the public, financial market participants, competent authorities and other stakeholders. The question and answer (Q&A) tool is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Further information on ESMA’s Q&A process is available on our website.
2. ESMA intends to update this document on a regular basis and, for ease of reference, ESMA provides the date each question was first published as well as the date/s of amendment beside each question. A table of all questions in this document and dates is provided in Section I.
3. Additional questions on BMR may be submitted to ESMA through the Q&A tool on our website ([here](#)). Please see the guidance available on our website before submitting your question.

## 2. Legislative references and abbreviations

### Legislative references

<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>1</sup>
<i>BMR</i>	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 investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance) <sup>2</sup>

### Abbreviations

<i>EU</i>	European Union
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<sup>1</sup> OJ L 331, 15.12.2010, p. 84

<sup>2</sup> OJ L 171, 29.6.2016, p. 1–65



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### 3. Summary table

Subject	Q	Topic of the question	Level 1 / Level 2 provision	Last updated
Scope of BMR				
	4.1	Central banks	Article 2(2)(a) BMR	29/09/2017
	4.2	Single reference price	Article 2(2)(d) BMR	29/09/2017
	4.3	BMR outside the EU	Article 2(1) BMR	08/11/2017
	4.4	Commodity benchmarks	Article 2(2)(g) BMR	05/02/2018
	4.5	Delegated Regulations	Title III BMR	30/01/2019
Definitions				
	5.1	Family of benchmarks	Article 3(1)(4) BMR	29/09/2017
	5.2	Use of a benchmark	Article 3(1)(7) BMR	29/09/2017
	5.3	Calculation agent	Article 3(1)(7) BMR	11/07/2018
	5.4/5/6	Investment funds	Article 3(1)(3) BMR	05/02/2018
	5.7	Regulated data benchmark	Article 3(1)(24) BMR	11/07/2018
	5.8	Systematic internalisers	Article 3(1)(16) BMR	26/09/2018
	5.9	Certificates	Article 3(1)(7) BMR	26/09/2018
	5.10	NAV	Article 3(1)(24) BMR	26/09/2018
	5.11	Bilateral agreement on exchanged collateral	Article 3(1)(7) BMR	07/11/2018
	5.12/	Methodology and input	Article 3(1)(14) BMR	18/12/2018
	5.13	data	Article 3(1)(24) BMR	18/12/2018
Supervised contributors				
	6.1	Requirements during transitional period	Article 16 BMR	22/03/2018
Authorisation and registration				
	7.1	Requirements for administrators	Article 34(4) BMR	14/12/2017
	7.2	Endorsment application	Article 33(1) BMR	26/09/2018
	7.3	Benchmark statement	Article 27 BMR	26/09/2018
Requirements for users				
	8.1	Written plans timing	Article 28(2) BMR	14/12/2017
	8.2/3	Written plans features	Article 28(2) BMR	26/09/2018
	8.4	Prospectuses	Article 29(2) BMR	24/05/2018
Transitional provisions				

9.1	EU index providers providing benchmarks as of 30/06/16	Article 51(1) BMR	05/07/2017
9.2	EU index providers providing benchmarks after 30/06/16	Article 51(3) BMR	05/07/2017
9.3	Third country benchmarks	Article 51(5) BMR	08/11/2017

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## 4. Questions and Answers on the scope of the Regulation

### Application of the Regulation to EU and third country central banks

Updated: 29/09/2017

#### **Q4.1 Does the BMR apply to EU and third country central banks and the benchmarks they provide?**

**A4.1** Point (a) of Article 2(2) of the BMR states that the BMR does not apply to “a central bank”. ESMA considers that the term “a central bank” encompasses both EU central banks (i.e. members of the European System of Central Banks) and non-EU central banks, and therefore that the BMR does not apply to EU nor to third country central banks.

Benchmarks provided by EU and third country central banks are not to be included in the register referred in Article 36 of the BMR, but ESMA considers that supervised entities in the Union are nevertheless allowed to use such benchmarks.

Where a supervised entity in the Union uses a benchmark provided by a central bank, ESMA considers that the supervised entity should, in relation to such benchmark, produce and maintain the written plans referred to in Article 28(2) of the BMR.

Finally, ESMA considers that Article 16 of the BMR is to be applied to EU supervised contributors contributing input data (according to Article 3(1)(8)) to a central bank.

### Exemption on single reference price

Updated: 29/09/2017

#### **Q4.2 Article 2(2)(d) BMR exempts the application of the BMR for “the provision of a single reference price for any financial instrument listed in Section C of Annex I to Directive 2014/65/EU”. What does “single reference price” mean?**

**A4.2** Article 2(2)(d) BMR excludes prices from the scope of the Benchmarks Regulation that are only reflecting the value of “any financial instrument.” With its singular use of the term, the exclusion would not cover e.g. a basket of securities or an index based on the price of more than one financial instrument.

Similarly, Recital 18 of the BMR states that single prices or single value reference prices should not be considered benchmarks under the BMR and it includes the example of a price of a single security the provision of which does not include any calculation, input data or discretion.

Following Recital 13 of the BMR on the types of use of a benchmark, the setting and reviewing weights within a combination of benchmarks, which is generally also only

based on a simple average or similar figure if any, should not amount to the provision of a benchmark as such an activity does not involve discretion. This discrimination further supports the exemption of single reference prices, based on little or no calculation and with no discretion involved, by way of analogy.

Other EU legislation refers to a price of a financial instrument published by one trading venue and referred to by another trading venue as a “reference price” (Article 4(1)(a) of Regulation (EU) 600/2014 (MiFIR)). Such “reference prices” as published by trading venues may also include a simple calculation, e.g. a re-calculation as a “per unit” price or an averaging, but no complex methodology is applied, nor is additional data being processed. ESMA considers that the term “single reference price” should be interpreted similarly.

## Application of the Regulation outside the EU

Updated: 08/11/2017

### **Q4.3 Does the provision of and contribution to benchmarks that are used outside the European Union only fall within the scope of the BMR?**

**A4.3** The scope of the Benchmarks Regulation is defined in Article 2(1) of the BMR. As a general rule Article 2(1) of the BMR provides that the BMR “*applies to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the Union*”. The term “*provision of a benchmark*” is defined in point (5) Article 3(1) of the BMR.

The BMR’s objective is to ensure the proper functioning of the European market and a high degree of consumer and investor protection *vis-à-vis* benchmarks *at Union level*, as underlined in Recital 6 of the BMR. In contrast, it is not the ambition of the BMR to protect users of benchmarks worldwide, possibly conflicting with any applicable third country regimes. Accordingly, Article 29 of the BMR refers to the use of a benchmark *in the Union*.

ESMA therefore considers that the BMR does not apply to the provision of benchmarks that are exclusively used outside the Union. The same reasoning would apply to the contribution of input data with respect to a benchmark that is exclusively used outside the Union. An administrator providing a benchmark exclusively to users outside the Union would have to comply with any applicable third country regimes with respect to benchmarks.

## Commodity benchmarks

Updated: 05/02/2018



**Q4.4 How should the threshold for the exemption for commodity benchmarks under Article 2(2)(g)(ii) of the BMR be calculated?**

**A4.4** Article 2(2)(g) of the BMR excludes from the scope of the BMR a commodity benchmark that is based on submissions from contributors the majority of which are non-supervised entities and which both of the following conditions apply:

- I. it is referenced by financial instruments for which a request for admission to trading has been made on only one trading venue or which are traded on only one such trading venue; and
- II. the total notional value of financial instruments referencing the benchmark does not exceed EUR 100 million.

The last condition refers to the “*total notional value of financial instruments*”. Financial instruments is defined in Article 3(1)(16) of the BMR as any of the instruments listed in Section C of Annex I of MiFID II for which a request for admission to trading on a trading venue has been made or which are traded on a trading venue or systematic internaliser. Unlike the thresholds mentioned in Article 20 (*critical benchmarks*) and Article 24 (*significant benchmarks*) of the BMR, the second condition in Article 2(2)(g) does not refer to financial contracts (a term defined in Article 3(1)(18) of the BMR).

In order to perform the calculation for the thresholds of critical benchmarks (Article 20(1)(a)) and of significant benchmarks (Article 24(1)(a)), Article 20(6)(a) of the BMR empowers the Commission to adopt delegated acts to specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed.

The Commission Delegated Regulation (EU) 2018/66<sup>3</sup> on this matter has been published in the EU Official Journal on 17/01/2018 and does not directly apply to commodity benchmarks. Nevertheless, ESMA considers that the methodology to be used for calculating the total value of financial instruments referencing a commodity benchmark under Art.2(2)(g)(ii) of the BMR should follow the specifications included in Commission Delegated Regulation (EU) 2018/66.

**Scope of application of the Commission Delegated Regulations adopted under the BMR**  
Updated: 30/01/2019

<sup>3</sup> The text of the Commission Delegated Regulation (EU) 2018/66 is available here: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.012.01.0011.01.ENG&toc=OJ:L:2018:012:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.012.01.0011.01.ENG&toc=OJ:L:2018:012:TOC)

**Q4.5 Is the scope of application of the Commission Delegated Regulations adopted pursuant to the BMR identical to the scope of the related requirements in the BMR?**

**A4.5** Yes, the scope of application of the Commission Delegated Regulations adopted pursuant to the BMR (the “Delegated Regulations”) is identical to the scope of the corresponding requirement specified in the BMR, including the transitional provisions of Article 51 of the BMR<sup>4</sup>.

Title III of the BMR provides specific requirements for different types of benchmarks. In particular,

- Article 17 of the BMR provides the requirements for **regulated-data benchmarks** and specifies that some of the requirements on input data, and in particular Article 11(3) of the BMR, do not apply. Therefore, Article 3 of the Delegated Regulation on input data<sup>5</sup> does not apply to those benchmarks. Further, the governance and control requirements for supervised contributors (Article 16 of the BMR) and the requirements on the code of conduct (Article 15 of the BMR) are not applicable to regulated-data benchmarks. Therefore, the related Delegated Regulations on supervised contributors<sup>6</sup> and on code of conduct<sup>7</sup> also do not apply to regulated-data benchmarks;
- Article 18 of the BMR defines the requirements for **interest rate benchmarks**. It specifies that Annex I shall apply to the provision of, and contribution to, interest rate benchmarks in addition to, or as a substitute for, the requirements of Title II. Therefore, all of the Delegated Regulations adopted pursuant to the BMR apply to interest rate benchmarks, except for:
  - the Delegated Regulation on the oversight function<sup>8</sup>, and

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<sup>4</sup> See question on “Article 16 during transitional period”

<sup>5</sup> The Commission delegated regulation (EU) 2018/1638 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further how to ensure that input data is appropriate and verifiable, and the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark has to ensure are in place where the input data is contributed from a front office function: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0006.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0006.01.ENG&toc=OJ:L:2018:274:TOC)

<sup>6</sup> The Commission delegated regulation (EU) 2018/1640 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the governance and control requirements for supervised contributors: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0016.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0016.01.ENG&toc=OJ:L:2018:274:TOC)

<sup>7</sup> The Commission delegated regulation (EU) 2018/1639 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0011.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0011.01.ENG&toc=OJ:L:2018:274:TOC)

<sup>8</sup> The Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0001.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0001.01.ENG&toc=OJ:L:2018:274:TOC)

- the Delegated Regulation on supervised contributors.

Instead, paragraph 3 of Annex I on the oversight function and paragraphs 6 to 12 of Annex I on the contributor systems and controls apply.

- Article 19 of the BMR defines the requirements for **commodity benchmarks**. It specifies that Annex II shall apply instead of the requirements of Title II to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities. Moreover, for critical commodity benchmarks whose underlying asset is gold, silver or platinum, the requirements of Title II shall apply instead of Annex II. Accordingly, the Delegated Regulations related to the requirements of Title II shall apply only to commodity benchmarks subject to the corresponding requirements in Title II.
- Article 25 of the BMR defines the requirements that an administrator may choose not to apply for **significant benchmarks**. In particular, administrators of significant benchmarks may opt out from the requirements related to the contribution of input data from a front office function (Article 11(3) of the BMR) and the minimum elements of the code of conduct (Article 15(2) of the BMR). Therefore, the corresponding provisions in the Delegated Regulations may not apply to significant benchmarks. These provisions are:
  - Article 3 of the Delegated Regulation on input data;
  - the Delegated Regulation on the code of conduct, as it is a further specification of the elements listed in Article 15(2) of the BMR.

It must be noted, however, that, pursuant to Article 25(3) of the BMR, a competent authority may decide that the administrator of a significant benchmark has nevertheless to apply one of these requirements. In such case, the corresponding provisions in the Delegated Regulations also apply.

- Article 26 of the BMR sets out the requirements that the administrator may choose not to apply for **non-significant benchmarks**. In particular, such administrator may choose not to apply the required minimum elements of the code of conduct (Article 15(2) of the BMR). The Delegated Regulation on the code of conduct is a further specification of Article 15(2) of the BMR, it shall therefore not apply to non-significant benchmarks whose administrators have opted not to apply Article 15(2) of the BMR. In addition, Article 5(5), Article 11(5), Article 13(3) and Article 16(5) of the BMR specify that the corresponding Delegated Regulations shall not cover or apply to

the provision of, or contribution to non-significant benchmarks. Instead, ESMA's guidelines on non-significant benchmarks apply.

## 5. Questions and Answers on definitions

### Family of benchmarks

Updated: 29/09/2017

#### **Q5.1 How can benchmarks be grouped into a family? Can critical, significant and non-significant benchmarks be part of the same family of benchmarks?**

**A5.1** The BMR allows administrators to group benchmarks into families when they publish the benchmark statement (as per Article 27(1) BMR) and, provided that the benchmarks are based on a similar methodology, when they publish the key elements of the benchmarks' methodology (as per Article 13(1) BMR). Furthermore, administrators may also develop a single code of conduct for a family of benchmarks (as per Article 15(3) BMR), and third country benchmarks may be grouped into families when an administrator or any other supervised entity located in the Union applies to the relevant competent authority for their endorsement (as per Article 33(1) BMR).

Art. 3(1)(4) BMR states that benchmarks by the same administrator may be grouped into a family:

- (i) if they are determined from input data of the same nature, and
- (ii) if this input data provides specific measures of the same or similar market or economic reality.

In ESMA's view, examples of input data of the same nature can be:

- input data of identical type (e.g. reported transactions, quoted prices, committed quotes or expert judgement). Consequently, the proportionality concept of grouping benchmarks into families would not apply to an administrator's benchmarks if one of them is based on expert judgement and another on raw transaction data;
- input data qualifying the benchmark as a particular type of benchmark as defined by the BMR (interest rate or commodity benchmark).

Examples of input data providing specific measures of the same or similar market or economic reality can be:

- input data relating to markets trading comparable assets (e.g. precious metals or other specific types of commodities, equity shares of the same sector or the same geographical region, sovereign bonds, cash deposits);
- input data measuring different aspects of the same economic reality (e.g. household income, GDP, or rent).

Finally, ESMA considers that benchmarks of all levels of reference values (i.e. critical, significant and non-significant) can be grouped into the same family because a benchmark's degree of use is not part of any of the elements of Article 3(1)(4) of the BMR defining a family of benchmarks.

## Use of a benchmark

Updated: 29/09/2017

**Q5.2** In Article 3(1)(7), “use of a benchmark”, is defined, in paragraph (b), as meaning “determination of the amount payable under a financial instrument . . . by referencing an index or a combination of indices”. In which circumstances would one or more supervised entities be viewed as using a benchmark under paragraph (b) in relation to a derivative, i.e. a financial instrument in Section C of Annex I to Directive 2014/65/EU, paragraphs (4) – (10)?

**A5.2** The following supervised entities would be viewed as using a benchmark under paragraph (b) in relation to the determination of an amount which is payable by reference to an index or a combination of indices under a derivative in the scope of the BMR (see definition for relevant financial instruments in Article 3(1)(16)):

- a) a trading venue, where the derivative is the subject of a request for admission to trading on such trading venue or is traded on such trading venue (each as defined in point (24) of Article 4(1) of Directive 2014/65/EU), to the extent the applicable trading venue has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced;
- b) the investment firm acting in the capacity of a systematic internaliser, where the derivative is traded via a systematic internaliser (as defined in point (20) of Article 4(1) of Directive 2014/65/EU), to the extent such systematic internaliser has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced;
- c) a CCP, where the derivative is cleared by such CCP, to the extent that the CCP has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced; or

- d) each party to a transaction of a derivative, where none of points (a) to (c) applies, particularly if the parties trade on an OTF that has not set the terms of the contract.

### Calculation agents

Updated: 11/07/2018

#### **Q5.3 Is a calculation agent to be considered a user of benchmarks if it is appointed by an issuer of securities?**

**A5.3** Issuers of securities frequently appoint third parties to perform the calculation of payments due under a financial instrument, e.g. under floating rate notes. These third parties, often referred to as “calculation agents”, usually do not set the terms of the financial instrument and do not decide which benchmark is referred to by the instrument. Their role is simply to calculate, on behalf of the issuer, the payment due on the basis of pre-determined terms (including the benchmark to be used), which they cannot amend.

ESMA considers that calculation agents are not users of benchmarks under Article 3(1)(7) of the BMR if the issuer of securities has set the terms of the financial instrument that references the benchmark<sup>9</sup>.

### Definition of a benchmark in relation to investment funds

Updated: 05/02/2018

#### **Q5.4 What types of investment funds are considered to be using an index for the purpose of “tracking the return of [an] index”?**

**A5.4** Article 3(1)(3) of the BMR defines a benchmark, inter alia, as an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index.

ESMA considers that investment funds using indices to measure their performance with the purpose of tracking the return of such indices include:

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<sup>9</sup> See also BMR Q&A on “*use of a benchmark*” and the relevance of setting the terms of a derivative contract.

1. investment funds the strategy of which is to replicate or track the performances of an index or indices e.g. through synthetic or physical replication; and
2. structured investment funds that provide investors with algorithm-based payoffs that are linked to the performance, or to the realisation of price changes or other conditions, of indices.

**Q5.5 What types of investment funds are considered to be using an index for the purpose of “defining the asset allocation of a portfolio”?**

**A5.5** Article 3(1)(3) of the BMR defines a benchmark, inter alia, as an index that is used to measure the performance of an investment fund with the purpose of defining the asset allocation of a portfolio.

ESMA considers that an index is used to measure the performance of an investment fund with the purpose of defining its asset allocation when the documentation, and in particular its investment policy or investment strategy, define constraints on the asset allocation of the portfolio in relation to an index. For example the investment policy or strategy may require the investment fund to invest a percentage or the whole portfolio in securities that are constituents of an index. Investment funds using indices to measure their performance with the purpose of defining the asset allocation thus may include investment funds that are actively managed (where the manager has discretion over the composition of its portfolio subject to the investment objectives and strategies as opposed to a fund that tracks the return of the index).

**Q5.6 Does the use of a benchmark to measure the performance of an investment fund include the sole mentioning of an index as a comparison?**

**A5.6** No. ESMA considers that indices referenced in the documentation of an investment fund solely to compare the performance of the investment fund should not be included in the scope of this definition, where no investment constraint on the asset allocation of the portfolio is established in relation to the index. This is without prejudice to other European or national rules governing the mentioning of indices in fund documentation.

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**Regulated data benchmarks**

Updated: 11/07/2018

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**Q5.7 Can a benchmark qualify as a ‘regulated-data benchmark’ if a third party is involved in the process of obtaining the data?**

**A5.7** The BMR subjects the provision of regulated-data benchmarks to fewer requirements, given that the input data stems entirely from sources which are themselves subject to regulation. The notion of “*entirely and directly*” in Article 3(1)(24)(a) precludes, in principle, the involvement of any third party in the data collection process. The data



should be sourced entirely and directly from a trading venue without the involvement of third parties, even if these third parties function as a pass-through and do not modify the raw data. However, pursuant to Article 3(1)(24)(a)(vii), if an administrator obtains regulated data through a third party service provider (such as a data vendor) and has in place arrangements with such service provider that meet the outsourcing requirements in Article 10 of the BMR, the benchmark still qualifies as regulated data benchmark.

## Financial instruments and systematic internalisers

Updated: 26/09/2018

### **Q5.8** When are financial instruments traded on a systematic internaliser in scope of the BMR?

**A5.8** ESMA considers that “*traded via a systematic internaliser*” as referred to in Article 3(1)(16) BMR should be read to cover:

- a) all instruments described in reference data provided by a systematic internaliser in compliance with Article 27 of Regulation (EU) No 600/2014 (MiFIR) (even if traded outside that systematic internaliser); and
- b) all other instruments that are actually traded on a systematic internaliser, regardless of any requirement of the systematic internaliser to provide reference data.

## Use of benchmarks in certificates

Updated: 26/09/2018

### **Q5.9** When are banks issuing certificates “*users of benchmarks*”?

**A5.9** Many banks issue certificates where the underlying is a portfolio composed of different components. The value of the portfolio is regularly determined and may also be regularly published pursuant to the Prospectus Regulation (Commission Regulation (EC) No 809/2004)<sup>10</sup>. The terms index, basket, reference portfolio, reference index, benchmark and variations of these terms are used by market participants in a manner that does not reflect the BMR terminology.

<sup>10</sup> Commission Regulation (EC) No 809/2004:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0809-20130828>

See item 4.2.2 of Annex XII of Commission Regulation (EC) No 809/2004 states: “A statement setting out the type of the underlying and details of where information on the underlying can be obtained: (...) an indication where information about the past and the further performance of the underlying and its volatility can be obtained”.



There may be cases where the used portfolio fulfills the BMR definition of an index in Article 3(1)(1), provided that the level of the portfolio is “*published or made available to the public*” as required by point (a) in the definition of an index. In these cases, if the certificate is a financial instrument in the sense of Article 3(1)(16), a referenced portfolio should be considered a benchmark under Article 3(1)(3) and its provider should be considered an administrator under the Regulation.

In these cases, the bank’s activity of issuance of a certificate referencing the portfolio (which is selected by the same bank), fulfills the BMR definition of use of a benchmark in Article 3(1)(7). The fact that the benchmark is both provided and used by the same supervised entity does not preclude the fulfillment of the definition of “*use of a benchmark*”, as there is no requirement for the provider and the user of a benchmark to be distinct entities.

## NAV of investment funds

Updated: 26/09/2018

### Q5.10 Can NAV of investment funds qualify as benchmarks?

**A5.10** No. The net asset value (NAV) of an investment fund is its value per share or unit on a given date or at a given time. It is calculated by subtracting the fund’s liabilities from its assets, the result of which is divided by the number of units to arrive at the per share value. It is the most widely used determinant of the fund’s market value and very often, particularly for exchange traded funds (ETF), it is published on any trading day.

But, according to BMR Article 3(1)(24) point (b), the NAVs of investment funds are data that, if used solely or in conjunction with regulated-data as a basis to calculate a benchmark, qualify the resulting benchmark as a regulated-data benchmark. The Regulation thereby treats NAVs as a form of input data that is regulated and, consequently, ESMA considers that NAVs should not be themselves considered indices as defined in Article 3(1)(1) of BMR.

Investment funds providing NAVs for regulatory purposes (e.g. UCITS Directive - Directive 2009/65/EC) should therefore be considered, from the perspective of the BMR, providers of potential input for regulated-data benchmarks and not providers of benchmarks.

## Use of benchmarks: bilateral agreement on exchanged collateral

Updated: 07/11/2018

**Q5.11 Does the reference to an index in a bilateral agreement on the interest to be paid on exchanged collateral under various OTC derivatives amount to “use of a benchmark”?**

**A5.11** No. According to Article 3(1)(7)(b) BMR “*use of a benchmark*” can be the determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices. Counterparties often exchange collateral under a bilateral agreement for a variety of OTC derivatives (some of which may be “*financial instruments*” as specified by Article 3(1)(16) BMR). ESMA considers that the calculation of interest to be paid on these exchanged collateral is not equal to the determination of the amount payable under a financial instrument and therefore does not amount to “*use of a benchmark*”.

## Methodology and input data

Updated: 18/12/2018

**Q5.12 Can the methodology of a benchmark include factors that are not input data?**

**A5.12** Yes, the methodology of a benchmark can include factors that are not input data.

These factors should not measure the underlying market or economic reality that the benchmark intends to measure, but should instead be elements that improve the reliability and representativeness of the benchmark. This should be considered as the essential distinction between the factors embedded in the methodology and input data.

For instance, the methodology of an equity benchmark may include, together with the values of the underlying shares, a number of other elements, such as the free-float quotas, dividends, volatility of the underlying shares etc. These factors are included in the methodology to adjust the formula in order to get a more precise quantification of the equity market that the benchmark intends to measure, but they do not represent the price of the shares part of the equity benchmark.

A possible way to distinguish these parameters of the methodology (i.e. factors that are not input data) from the underlying input data is to consider the following difference between the two. Input data changes are taken into account by the methodology every time the value of the benchmark is to be updated, as they reflect the changes in the underlying economic reality measured by the benchmark. By contrast, changing values of the factors are not taken into account in every computation of the benchmark, but only in instances pre-determined by the methodology.

For example, the methodology of an equity benchmark could state that every quarter (i.e. four times a year) the market capitalisation of an issuer could be considered in order to decide whether its shares should still be part of the benchmark or not.

Similarly, the methodology could include liquidity, volatility or free-float tests to be performed on the constituents of the benchmark e.g. on an annual basis. These and similar parameters when included in the methodology should not be considered input data. If instead, for instance, the methodology of an equity benchmark includes the use of one or multiple FX rate(s) every time the value of the benchmark is updated, then such FX rate(s) should be considered as input data and treated accordingly (see obligations in BMR Article 11 on input data).

Factors that are not considered input data are relevant elements of the methodology, it is important that such factors comply with the requirements of Article 12 BMR on Methodology (e.g. benchmark being robust and reliable, clear rules on the exercise of any discretion, traceability and verifiability of the benchmark etc.) on an ongoing basis. Administrators are expected to use these factors in accordance with the pre-defined and BMR-compliant methodology and to ensure that all of the requirements of Article 12 are met whenever the methodology is implemented and the benchmark is determined.

**Q5.13 Can the methodology of a regulated-data benchmark include factors that are not covered by Article 3(1)(24) BMR?**

**A5.13** Article 3(1)(24) BMR defines a regulated-data benchmark as a benchmark determined by the application of a formula from specific input data. Thus, regulated-data benchmarks cannot include input data that are not covered by this definition.

However, the methodology of a regulated-data benchmark can include factors that are not covered by Article 3(1)(24) BMR only if those factors are not considered input data i.e. they do not measure the underlying market or economic reality that the benchmark intends to measure, but instead are elements that improve the reliability and representativeness of the benchmark (see previous Q&A).

## 6. Questions and Answers on supervised contributors

### Article 16 during the transitional period

Updated: 22/03/2018

**Q6.1 How should supervised contributors apply Article 16 during the transitional period?**

**A6.1** During the transitional period (i.e. as long as the transitional provisions of Article 51 apply), and until the administrator of a benchmark is authorised or registered, there may be cases where it is not clear to a supervised entity that provides data used in an index which BMR provisions apply to it and how they should be complied with. It is therefore important to clarify how Article 16 of the BMR “*Governance and control*

*requirements for supervised contributors*” should be applied in this period and how it interacts with any code of conduct of the administrator.

Article 16 sets out a number of requirements that apply directly to supervised entities when they contribute input data to an administrator located in the Union, i.e. when they are “*supervised contributors*”, as defined in point (10) of Article 3(1). Article 16 is relevant only to those supervised entities which “*contribute input data*” as defined in point (8) of Article 3(1).

For supervised contributors to interest rate benchmarks, points 5 to 12 of Annex I BMR apply in addition to Article 16, while Article 16(5), re. the regulatory technical standards under this Article, does not apply.

The provisions of Article 16 and of Annex I of the BMR apply from 1 January 2018, as Article 51 of the BMR does not contain transitional provisions applicable to governance and control requirements for supervised contributors. The provisions of Article 16(1) include elements that refer to the “*code of conduct referred to in Article 15*” of the BMR. Also points 6 and 12 of Annex I of the BMR refer to the “*code of conduct*”.

Supervised contributors are not responsible for the compliance of a code of conduct with the requirements of Article 15, as this provision applies to administrators. The development of a code of conduct in line with the provisions of Article 15 is an obligation that only administrators can comply with.

The administrator’s compliance with Article 15 is subject to scrutiny by the relevant National Competent Authority during the application process for authorisation or registration and to ongoing supervision once the administrator has obtained either.

ESMA considers that the adherence by supervised contributors to a code of conduct not yet considered as compliant by the relevant National Competent Authority (because the administrator is not authorised or registered) does not impede a supervised contributor to be compliant with the BMR. In this case, supervised contributors should comply with Article 16, and where applicable points 5 to 12 of Annex I, also where such BMR requirements are more stringent than the elements included in the code of conduct.

In case no code of conduct exists, ESMA considers that supervised contributors should comply with Article 16, and where applicable points 5 to 12 of Annex I, only to the extent that these provisions are applicable without a code of conduct.

## 7. Questions and Answers on authorisation, registration and endorsement

### Authorisation and registration vis-à-vis the applicability of the requirements of the BMR

Updated: 14/12/2017

#### **Q7.1 Are EU index providers required to comply with the obligations laid down in the BMR before they are authorised or registered?**

**A7.1** Article 34(2) of the BMR “Authorisation and registration of an administrators” states that “*an authorised or registered administrator shall comply ‘at all times’ with the conditions laid down in the Regulation*”. This wording suggests that only an authorised or registered administrator is required to comply with the BMR’s conditions. “Conditions”, in this context, should be understood as encompassing the requirements imposed by the BMR on administrators.

Paragraph (4) of the same Article states that “*the applicant [index provider] shall provide all information necessary to satisfy the competent authority that the applicant has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation*”. Also this paragraph clearly indicates that index providers, in order to be authorised or registered as administrators, must be in a position to meet the requirements of the BMR at the time of authorisation or registration, i.e. not before that date. Therefore EU index providers are required to comply with the obligations laid down in the BMR only at the time of authorisation or registration.

### Family of benchmarks in the application for endorsement

Updated: 26/09/2018

#### **Q7.2 Can a single application for endorsement include family of benchmarks?**

**A7.2** Yes. ESMA is of the view that BMR Article 33(1) on “endorsement” grants administrators and other supervised entities the right to provide the relevant NCA with a single application for a family of benchmarks but that the applicant needs to disclose all members thereof. This is to ensure that the NCA can submit to ESMA a list of all endorsed benchmarks to allow ESMA to publish in its register all information required by BMR Article 36(1). At the same time, ESMA considers that administrators do not have to apply anew whenever benchmarks change within the endorsed family. Instead, the endorser should notify the NCA and demonstrate e.g. why a new benchmark would belong to an endorsed family.

## Language of the benchmark statement

Updated: 26/09/2018

### **Q7.3 In which language benchmark statements should be published?**

**A7.3** ESMA believes that benchmark statements should be published in a language that is accepted by the NCA of the relevant Member State. Administrators are clearly free to publish the benchmark statements also in other additional languages for commercial reasons.

## **8. Questions and Answers on requirements for users of benchmarks**

### Written plans for cessation or material changes of a benchmark

Updated: 14/12/2017

### **Q8.1 Are supervised entities, other than administrators, required to have robust written plans for cessation or material changes of a benchmark and to reflect them in the contractual relationship with clients as of 1 January 2018?**

**A8.1** Yes, Article 28(2) of the BMR applies as of 1 January 2018. Therefore, as of this date, supervised entities, other than administrators, are required to produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark they are using materially changes or ceases to be provided.

ESMA considers that supervised entities, other than administrators, are required to reflect such plans in the contractual relationship with clients in contracts entered into after 1 January 2018. In relation to contracts entered into prior to 1 January 2018 and still existing at that date, ESMA expects supervised entities, other than administrators, to amend them where practicable and on a best-effort basis.

### Written plans under Article 28(2)

Updated: 26/09/2018

### **Q8.2 When are the written plans robust?**

**A8.2** ESMA considers that written plans are robust if they determine operational procedures in writing and if they include detailed courses of action, relevant

communication channels and arrangements for different scenarios and contingencies. Written plans should be thorough and adequate. They should reflect the nature and size of the individual benchmark and the scale of its use in the markets. ESMA further considers that maintaining the robust written plans requires supervised entities to continuously monitor relevant factors and update arrangements as appropriate.

**Q8.3 How should users reflect written plans in the contractual relationship with clients?**

**A8.3** The contractual relationships with clients are governed by national contract law and, accordingly, the legally adequate reflection of the written plans may vary among Member States. However, ESMA considers that supervised entities should be able to demonstrate to the NCA that they have communicated their written plans to their clients and that the written plans are legally effective under applicable Member States law.

For example, prospectuses may be contractual documents under national law and supervised entities may then opt to update outstanding prospectuses approved prior to 1 January 2018 in order to guarantee that all new investors in an investment fund are subject to such terms. In other cases, supervised entities may opt to include a reference to their written plans in other contractual documents that they formalise with new investors.

**Update of prospectuses as per Article 29(2)**

Updated: 24/05/2018

**Q8.4 Should prospectuses include reference to the register of administrators and benchmarks?**

**A8.4** ESMA considers that prospectuses should include reference to ESMA register of administrators and benchmarks (*“the register”*) as follows.

In relation to prospectuses approved on or after 1 January 2018:

- Where the register already includes the relevant administrator by the time a prospectus under Directive 2003/71/EC or Directive 2009/65/EC is published, ESMA considers that such prospectus should include a reference to the fact that the administrator is listed in the register.
- Where the register does not include the relevant administrator by the time a prospectus is published, ESMA considers that such prospectus should include a statement to that effect. Additionally:



- Prospectuses published under Directive 2009/65/EC should be updated at the first occasion once the relevant administrator is included in the register.
- Prospectuses approved under Directive 2003/71/EC are not required under BMR to be systematically updated by means of a supplement once the relevant administrator is included in the register. This is without prejudice to the obligation under Directive 2003/71/EC of the issuer, offeror or person asking for admission to trading on a regulated market to assess on a case-by-case basis the significance and/or materiality of the specific situation.

In relation to prospectuses approved prior to 1 January 2018:

- Prospectuses approved under Directive 2009/65/EC should be updated at the first occasion or at the latest within 12 months after 1 January 2018. If by 1 January 2019 the relevant administrator is not included in the register, ESMA considers that these prospectuses should be updated to include a statement to that effect.
- Prospectuses approved under Directive 2003/71/EC are not required under BMR to be systematically updated by means of a supplement once the relevant administrator is included in the register. This is without prejudice to the obligation under Directive 2003/71/EC of the issuer, offeror or person asking for admission to trading on a regulated market to assess on a case-by-case basis the significance and/or materiality of the specific situation.

## 9. Questions and Answers on transitional provisions

### Transitional provisions applicable to EU index providers already providing a benchmark on 30 June 2016

Updated: 05/07/2017

**Q9.1** Where an EU index provider, that already provided a benchmark on 30 June 2016 and that has not yet been authorised or registered, provides a new benchmark after 1 January 2018, could such a benchmark be used by supervised entities in the Union under the transitional provisions of the Benchmarks Regulation?

**A9.1** Article 51(1) allows an EU index provider, already providing a benchmark on 30 June 2016, to apply for authorisation or registration until 1 January 2020. This transitional provision applies at the entity level.



ESMA considers that during such period, the EU index provider is allowed to continue its activity of provision of benchmarks in full and supervised entities in the Union are able to use all the benchmarks provided by EU index providers that qualify for the transitional provisions in Article 51(1).

This includes benchmarks already provided before 1 January 2018, updates and modifications of benchmarks already provided before 1 January 2018, as well as the provision of new benchmarks for the first time after 1 January 2018. The transitional provisions of Article 51(1) are to be applied unless and until the authorisation or registration of the EU index provider is refused.

### **Transitional provisions applicable to EU index providers starting to provide a benchmark between 1 July 2016 and 31 December 2017**

Updated: 05/07/2017

**Q9.2** Where an EU index provider that was not providing a benchmark on 30 June 2016 starts to provide benchmarks between 1 July 2016 and 31 December 2017, can these benchmarks be used by supervised entities in the Union? Can the same index provider provide new benchmarks after 1 January 2018 and before it is authorised or registered?

**A9.2** Article 51(3) allows an EU index provider to continue to provide an existing benchmark which may be used by supervised entities until 1 January 2020 or unless and until authorisation or registration is refused.

ESMA considers that the term “*existing benchmark*” used in Article 51(3) should be understood as “*existing on or before 1 January 2018*”, in light of the fact that Article 51(3) will be applicable as of 1 January 2018.

On this ground, ESMA’s understanding of the transitional provisions in Article 51(3) is the following: all benchmarks provided for the first time on or before 1 January 2018 by an EU index provider can be used by a supervised entity until 1 January 2020 or until and unless the authorisation or registration of the EU index provider is refused.

Therefore, if an EU index provider starts to provide benchmarks between 30 June 2016 and 1 January 2018, such benchmarks, including their updates and modifications, can be used by supervised entities on and after 1 January 2018 (even if the authorisation or registration is not yet granted) and until 1 January 2020 or until and unless the authorisation or registration of the EU index provider is refused.

However, in the case that an EU index provider starts to provide benchmarks after 30 June 2016 and provides a new benchmark after 1 January 2018, supervised entities will not be allowed to use such newly provided benchmark, unless the EU index provider obtains first authorisation or registration.

### **Transitional provisions applicable to third country benchmarks**

Updated: 08/11/2017

**Q9.3** In Article 51(5) of the BMR, what does “*where the benchmark is already used in the Union*” mean?

**A9.3** ESMA considers that the meaning of the term “*where the benchmark is already used in the Union*” in Article 51(5) of the BMR is “*where the benchmark is already used in the Union on or before 1 January 2020*”.