



European Securities and
Markets Authority

Final Report

Technical advice under the Benchmarks Regulation



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1 Executive Summary

Reasons for publication

The European Commission proposed a draft Regulation on indices used as benchmarks in financial instruments and financial contracts¹ (Benchmarks Regulation) in September 2013 in the wake of the manipulation of various benchmarks.

On 24 November 2015, the European Parliament and the Council reached a preliminary political agreement² on a compromise text of the Benchmarks Regulation, an agreement that was confirmed on 9 December 2015 by the Permanent Representatives Committee of the Council of the European Union³. The European Parliament voted and approved the text of the Benchmarks Regulation in its plenary session on 28 April 2016. The Council adopted the same text on 17 May 2016. The Benchmarks Regulation⁴ has been published in the Official Journal of the European Union on the 29 June 2016 and entered into force the following day.

On 11 February 2016, ESMA received a request from the European Commission for technical advice on possible delegated acts⁵. The technical advice should be delivered within four months after the entry into force of the Regulation.

ESMA published a Discussion Paper (DP) on the Benchmarks Regulation⁶ on 15 February 2016. The DP included ESMA's policy orientations and initial proposals both for the technical advice to the Commission and the draft technical standards under the Benchmarks Regulation. A Consultation Paper⁷ (CP) focusing on the technical advice to the Commission was published by ESMA on 27 May 2016 and included a draft version of the text of the advice.

This Final Report is the follow-up of the CP with respect to ESMA's technical advice to the Commission. A separate Final Report on the draft technical standards only will be published by 1 April 2017.

Contents

This Final Report is organised in five chapters, each dedicated to one of the five areas for which the Commission requested a technical advice from ESMA, namely: (i) some elements of the definitions, (ii) measurement of the reference value of benchmarks, (iii) criteria for the identification of critical benchmarks, (iv) endorsement of a benchmark / family of benchmarks provided in a third country, and (v) transitional provisions. Each chapter summarises the relevant provisions and their objectives, summarises the market participants' responses to the CP as well as ESMA's own comments to the responses received and provides an explanation of the related policy issues. Each chapter includes also the technical advice text.

Next Steps

Delegated acts should be adopted by the Commission so that they enter into application by 1 January 2018, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3 months).

A second Final Report dedicated to the technical standards under the Benchmarks Regulation is planned to be published by 1 April 2017.

¹ The press release of the European Commission on the proposal:

http://europa.eu/rapid/press-release_IP-13-841_en.htm?locale=en

² See Commission statement : http://europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm?locale=en

³ See Council statement:

http://www.consilium.europa.eu/press-releases-pdf/2015/12/40802206220_en_635852608200000000.pdf

⁴ Benchmarks Regulation published in the EU Official Journal:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011>

⁵ The mandate for the technical advice is publicly available: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf

⁶ The Discussion Paper is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf

⁷ The Consultation Paper is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-723_cp_benchmarks_regulation.pdf

2 Technical advice on some elements of the Definitions in Article 3

Extract from the Commission's request for technical advice

Making available to the public

Article 3(1), point 1, defines an index as "any figure (a) that is published or made available to the public; (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys".

This definition is critical since it determines the scope of the Regulation. As stated in recital 8, the scope of the Regulation should be broad to provide a comprehensive preventative framework.

The concept of 'making available to the public' is a concept stemming from the EU acquis on copyright. Although of a different nature and not providing a legal definition of the concept, the discussion in that context may provide useful guidance for the preparation of the technical advice.

Administering the arrangements for determining a benchmark

Article 3(1), point 5, defines one of the elements of provision of a benchmark as "administering the arrangements for determining a benchmark". Given the variety of business models employed for the provision of benchmarks, it would be useful to further clarify what 'administering the arrangements' means in the context of benchmark determination.

Use of a benchmark

Article 3(1), point 7, lists five activities or situations which are considered to represent use of a benchmark under the Regulation. Some of the uses, such as point (a) "issuance of a financial instrument which references an index or a combination of indices", could benefit from further clarification in order to ensure a uniform application of the definition of 'use of a benchmark' across the Union.

ESMA is invited to provide technical advice on how to specify *what constitutes making available to the public for the purposes of the definition of an index*", taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying *what constitutes administering the arrangements for determining a benchmark taking into account different existing business practices*.

ESMA is invited to provide technical advice on specifying *what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark.*

2.1 Making available to the public

2.1.1 Framework

1. According to the Regulation (EU) 2016/1011 of June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (“BMR”) a figure, in order to be considered as an ‘index’, must *inter alia* be published or made available to the public. The definition of an index is the basis for the definition of a benchmark and hence sets the scope for application of the Regulation (EU) 2016/1011.
2. Recital 44 of the BMR states that the BMR has taken into account the IOSCO Principles for Financial Benchmarks⁸ (“IOSCO Principles”) as a global standard for regulatory requirements for benchmarks. The IOSCO Principles define the benchmarks in scope *inter alia* as “made available to users, whether free of charge or for payment.” The ESMA-EBA Principles for Benchmark-Setting Processes in the EU⁹ include a similar definition. Both definitions of a benchmark hence make reference to its availability to the group of ‘users’ and, additionally, in both cases it is recognised that such availability may be granted either “free of charge” or “for payment”, which is also reflected in Recital 11 of the BMR.
3. In its Consultation Paper of 27 May 2016, ESMA has proposed draft technical advice on the element of “making available to the public” of the definition of an index and has included the accessibility by a large and potentially indeterminate number of recipients, as a concept developed in the context of copyright law, as well as the accessibility of an index to an indeterminate number of people through its use by supervised entities, in line with existing definitions of a benchmark.

2.1.2 Feedback to the CP

4. ESMA’s proposal has been both met with criticism and approval. Most respondents agreed with ESMA’s wide approach and its reference to existing definitions in other areas of Union law, copyright law in particular. But many argued that the specific conditions for an index to have been made available to the public in the draft advice were partly too vague and needed further clarification.
5. Where ESMA proposed the condition of being “accessible by a large or potentially indeterminate number of recipients” several respondents advocated to delete the reference to a “large number” or at least introduce a threshold, with some referencing to the minimum

⁸ Link to the IOSCO Principles for Financial Benchmarks: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>

⁹ Link to the the ESMA-EBA Principles for Benchmark-Setting Processes in the EU: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-659_esma-eba_principles_for_benchmark-setting_processes_in_the_eu.pdf

recipients of 150 as set forth in the Prospectus Directive. Others proposed to only refer to “large” and saw that by reference to an “indeterminate number” alone, administrators could not determine precisely whether or not their figure is an index. Some respondents argued that this concept could create a loophole and an incentive for administrators to restrict access to their figures to keep them out of scope of the BMR.

6. Two respondents suggested to widen the concept of making available to the public and to extend it to all cases where investors are exposed to a figure or an index to capture all cases where a benchmark is referenced and where such reference directly or indirectly impacts members of the public.
7. One respondent argued that a figure should not be considered available to the public when it is only made available to investors in a specific financial instrument as this group is limited by the outstanding number of units.
8. Several respondents opposed to ESMA’s statement in the Consultation Paper that making available to the public of an index value should include the dissemination of such figures to a wider public through their incorporation into the coupons, strike prices, differentials, and values of financial instruments and investment funds referencing it “as the investor can isolate the index value therefrom” and argued that the value of a financial instrument would generally be determined by a variety of components such as volatility, current and expected interest rates, market rates and market values.
9. Some respondents also disapproved more generally of ESMA’s proposal to consider the use of the index as defined by Article 3(1)(7) of the BMR as a possible way to make the figure publicly accessible. This concept was partly considered as too wide and legally uncertain and it could entail that also bespoke indices could be captured when they are further used as a benchmark in the sense of the BMR. Some also argued that the concept of making available through the use of a benchmark would already be included in the more general concept of accessibility to an indeterminate group of recipients. Many respondents on the other hand agreed with ESMA’s proposal and some particularly welcomed the alignment with the concept of a benchmark under the IOSCO Principles. Some of the proponents stressed that including the accessibility of the figure through the use by a supervised entity in the specification of “making available to the public” was necessary and adequate to duly respect the legislators’ intention to protect all investors impacted by an index and to align it with the Recital 8 of the BMR.
10. To reflect the fact that some administrators may not be aware of such use of their indices, some respondents proposed to link the specification of making available to the public to the exception of the requirements of the BMR that Article 2(2)(h) provides, and to consider a figure only to be made available to the public if the administrator is aware of its accessibility to a wider group of people.
11. Respondents favoured the exclusion of cases where an administrator has provided the figure under the explicit contractual obligation not to disclose it, such as a non-disclosure agreement or another form of a binding contract, as some respondents favoured. Others

have proposed to include a number of other safe harbours, i.e. cases in which a figure will definitely not be considered as having been made available to the public.

2.1.3 Content of the technical advice

12. Where respondents commented on the terms of a “large” or “indeterminate” group of recipients, ESMA would like to point out that it is invited to specify making available to the public and that it believes that a truly restricted access and a limited impact to investors should in fact not result in a figure to be public. At the same time, the concept of an “indeterminate number” means that in order to qualify as an index a figure would have to be accessible by an open group of recipients, i.e. that this group could potentially change in size and composition whereas the concept of a “large” number cannot reflect this adequately. ESMA also thinks it is preferable to keep the term of an “indeterminate number” as it is developed and established in other areas of Union legislation where “made available to the public” had to be further defined (in particular, in copyright law). The technical advice consequently now refers to accessibility by an “indeterminate number” alone.
13. ESMA believes that opening the concept of making available to the public to all forms of direct or indirect exposure is not compatible with the conceptual construction of the BMR, that sets out in Article 3(1)(1) that out of the wide range of figures, only those should be considered as an index that are “published or made available to the public”. ESMA thinks that these two forms should be read together and that extending the definition to any form of exposure, including an indirect exposure without the actual knowledge of the figure, would not be within the realm of what can commonly be understood as “public”. Additionally, by enlarging the concept as said above, there would hardly be any figure that would not qualify to fulfill the requirements of Article 3(1)(1)(a) of the BMR and this criterion would then essentially be emptied out.
14. In reply to the respondent requiring to carve out figures that are made available only to investors in a specific financial instrument, ESMA is of the opinion that such exception would run counter to the concept of an indeterminate group, as investors typically trade their financial instrument and the group of holders changes over time. At least potentially, any person can obtain ownership of the relevant financial instrument, which is also reflected in the term “public offer” that would apply to most of them, and thereby have access to and be impacted by the figure. An exception from the concept of having been “made available to the public” for these cases, and consequently from the application of the requirements of the BMR seems therefore unjustified.
15. In so far as ESMA states that “the investor can isolate the index value” from incorporation of an index into the coupons, strike prices, differentials, and values of financial instruments and investment funds referencing it, ESMA acknowledges that an index value cannot always be derived from other public figures as initially proposed but is convinced that whenever it can, the respective figure should be considered made available to the public. ESMA also has amended its proposal to clarify that it is the accessibility of an index value (as a figure) through the use of an index as a benchmark that determines its being made available to the public.

16. ESMA believes that, although it may be considered a subset of the more general specification of making available to the public, there is merit in explicitly specifying that a figure can also be made available when it is used as a reference index by a supervised entity and can be extrapolated from another public figure related thereto. ESMA also would like to underline the aspect of investor protection and clarifies in its proposal that the decisive aspect of its accessibility by the public of a figure is its potential impact on an open group of recipients, be it directly or indirectly.
17. Where respondents proposed to consider a figure only to be made available to the public if the administrator is aware of its accessibility to a wider group of people, ESMA is of the opinion that such condition would not conceptually fit to a specification of “making available” as the availability is independent of whether or not the administrator knows about it. Additionally, it is precisely the purpose of the limitation of scope in Article 2(2)(h) of the BMR to protect administrators from liabilities that stem from a use of their benchmark of which they are not and could not reasonably have been aware. This case should be separated from the case where an administrator has provided the figure under the explicit contractual obligation not to disclose it, such as a non-disclosure agreement or another form of a binding contract, as some respondents favoured.
18. ESMA believes that its proposal is sufficiently clear and unambiguous to define whether or not a figure is made available, it nonetheless sees merit to explicitly exclude, as some respondents suggested, those figures that have been calculated by one supervised entity, are not used as a reference index in a financial instrument traded or admitted to trading on a trading venue but which can only be accessed by a group of employees or contractors of that entity. In ESMA’s opinion, such internal use should not amount to public availability.

2.2 Administering the Arrangements

2.2.1 Framework

19. Article 3(1)(5) of the BMR states three components of the “provision of a benchmark” out of which ESMA is requested to define the first, “(a) administering the arrangements for determining a benchmark.” It is important to note that Article 3(1)(6) of the BMR by contrast defines an “administrator” as “a natural or legal person that has control over the provision of a benchmark” – hence including but not limited to the “administering” of the arrangements for the benchmark determination.
20. Recital 16 of the BMR mentions that an administrator should be able to outsource to a third party one or more of the aspects of the provision of a benchmark and points out that the decisive element for a person to be an administrator is whether or not it has control over the whole provision process. Consequently, Recital 24 of the BMR acknowledges that the provision of a benchmark frequently involves outsourcing of important functions but that administrators should thereby not be relieved of any of their obligations and responsibilities. These responsibilities are fulfilled by the oversight function that “ensure[s] oversight of all aspects of the provision of their benchmarks”, Article 5(1) of the BMR.

21. In developing its proposal ESMA has taken into account Principle 1 of the IOSCO Principles that states the overall responsibility of the benchmark administrator for all aspects of the determination process and breaks it down into further components. ESMA has aimed to align its understanding of the provision of a benchmark in Article 3(1)(5) of the BMR with these components and consequently proposed in its Consultation Paper that administering the arrangements should mean the ongoing management of infrastructure and personnel and the setting and maintenance of a specific methodology. Governance procedures by contrast were – deviant from ESMA's initial proposal in the Discussion Paper – assigned to the control over the provision process (Article 3(1)(6) of the BMR) because they are essentially linked to the administrator and should not be allowed to be outsourced to third parties (as all components of the provision process may be).

2.2.2 Feedback to the CP

22. Most of the respondents agreed fully or to a very large extent with ESMA's proposal. Several respondents supported ESMA's approach to align the specification of what constitutes administering the arrangements with Principle 1 of the IOSCO Principles to the largest possible extent, but one respondent pointed out, that the relevant IOSCO Principle would also continue aspects of governance that ESMA has neglected. Other respondents agreed with ESMA's understanding that the governance procedures were a part of the control over the provision process – as held by the administrator – and not part of the provision process itself. Stakeholders also appreciated that ESMA acknowledges that it is widespread business practice to outsource components of the provision process and that this should be possible with all aspects as long the administrator retains full control over the process in general, as required by Article 3(1)(6) of the BMR. But on top of this, there was also the model, as some explained, of the independent benchmark administrator and the benchmark or index sponsor, where the benchmark including its methodology was developed by one entity but its control was then relinquished to another party with the initial administrator retaining some of the intellectual property in the benchmark. This case was different from that of outsourcing parts of the provision by the administrator who would keep his responsibilities.

23. Two respondents asked ESMA to clarify in its technical advice that the management of infrastructure may also be conducted by third parties and that this should not make them administrators of the benchmark. One stakeholder suggested that the concept of the “determination process” in ESMA's proposals should be further clarified to include policies for error handling and elements of all steps of the process, including collection, validation, calculation and dissemination of data.

24. One respondent stressed that an entity should be able to develop or provide input to the methodology without becoming an administrator. On the other hand, a stakeholder said such partial fulfilling of a single element of the provision process – or, in particular, the administering of the arrangements for determining a benchmark as specified by ESMA – would allow entities to escape their responsibilities as an administrator through outsourcing. Another respondent argued that administering the arrangements would

always be the ultimate responsibility in the process, should always lie with the administrator and should cover the supervision of all aspects of the provision process.

25. Several answers to the Consultation Paper pointed out that there should always only be one administrator and that this entity would need to be clearly identified or at least identifiable. Two other stakeholder said that the role could be split and that there could be co-administrators.
26. Some respondents pointed to the importance of the methodology and said that it was typically set by the administrator. The specification of “administering the arrangements for determining a benchmark”, as others argued, should focus not so much on the development but on the (ongoing) control of the methodology. Two respondents added that while the Regulation 2016/1011 required an annual review of the methodology this would be obsolete where the methodology is “rules-based.”

2.2.3 Content of the technical advice

27. Many of the comments have indicated that there may be different understandings of the element of “administering the arrangements for determining a benchmark” and its importance for the determination of a benchmark's administrator. As set out above, the element ESMA is asked to specify is one of three elements that constitute the process of the provision of a benchmark in Article 3(1)(5) of the BMR. ESMA would like to stress that in its understanding this needs to be clearly conceptually separated from the definition of the administrator whose role is defined in Article 3(1)(6) of the BMR as the person having control over the whole process of the provision of the benchmark, i.e. the elements (a) to (c) of paragraph (1)(5) of the same Article. It is ESMA's understanding that this role should be held by only one natural or legal person as the entity who is ultimately responsible to comply with the requirements applying to administrators under the BMR. As explained in the Consultation Paper, part of the administrator's control over the provision process is exercised through governance arrangements that consequently ESMA proposes not be considered as part of the provision process itself – but as a measure of control over this very process.
28. There was disagreement among stakeholders whether or not there could be more than one administrator of a benchmark and some argued that the role of the administrator should be explicitly agreed. ESMA acknowledges that the definition of administrator sets forth that it is “a natural or legal person that has control over the provision of a benchmark” but it is not clear whether this can be interpreted as “one person” or rather as “any person” which would allow for more than one administrator. It is beyond ESMA's mandate to specify this aspect but in ESMA's view it will be only one natural or legal person that can exercise ultimate control over the whole provision process in most practical cases and this should be the ultimate indication for capacity of the administrator.
29. In ESMA's view it is still important to point out that any or all of the elements (a) to (c) of Article 5(1)(5) of the BMR may be outsourced to third parties, and that this will not automatically impact the identity of the administrator. Where respondents therefore argued

that certain aspects should or should not fall within the specification of “administering the arrangements for determining a benchmark” because of their relation to the quality of being an administrator, ESMA believes that those arguments are only relevant where they relate to the exercise of control over the whole provision process as required in Article 3(1)(6) of the BMR. ESMA acknowledges that there are business models where the initial administrator has relinquished control over the provision process, most of the elements of the process are covered by other parties and only some intellectual property or other rights remain with the initial administrator, as some respondents have explained, and that this is not a case of outsourcing as ESMA has referred to in its Consultation Paper. But given the above interpretation of what determines the administrator, it is conceptually clear that this role has been taken over by another person (who now has ultimate control over the provision process), and there is no need to amend ESMA’s proposed specification of point (a) of the definition of “provision of a benchmark.”

30. ESMA appreciates that some respondents have pointed out that with respect to the methodology it is not (or not only) the initial setting that should be an essential element of the specification of what constitutes “administering the arrangements” but that it is its ongoing control. In its Consultation Paper ESMA already proposed to include the maintenance of the methodology, but it is appropriate to further underline this aspect and amend the technical advice accordingly. It is important to stress that having ongoing control over the methodology, as part of administering the arrangements for determining a benchmark, does not equate having control over the provision of the benchmark more generally, which should be seen as control of a higher level. Following the respective comments, ESMA acknowledges in its proposal that administering the arrangements includes the setting of the methodology, its adaptation to ensure it is fit for purpose on a continuous basis as well as its ongoing maintenance where such adaptation is not required.

2.3 Issuance of a financial instrument

2.3.1 Framework

31. The definition of a “use of a benchmark” in Article 3(1)(7) of the BMR contains five modalities, of which ESMA is requested to specify the first one, “(a) issuance of a financial instrument which references an index or a combination of indices.”
32. ESMA has analysed existing Union law but as opposed to the term “issuer” has not identified a prior definition of “issuance” in relevant European securities legislation. Given this background, it is important to point out that ESMA's proposal is strictly limited to the context of the BMR and should not create precedent for the interpretation of the term in other areas of Union legislation.
33. It was highly relevant to ESMA to analyse the scope of the definition, more precisely, whether or not derivatives included in Annex I, Section C, paragraphs (4) to (10) to the Directive 2014/65/EU would fall within the definition of “issuance”, which in ESMA's understanding would be the offering of securities other than derivatives by parties seeking to raise funds or to finance their business. Derivatives by contrast are generally understood

as bilateral contracts that derive their value from an underlying asset, and that may be “written” or “entered into” but not “issued”. ESMA has therefore proposed in its Consultation Paper not to include derivatives in the scope of the definition of issuance but to rather allocate it to another modality of the use of a benchmark, i.e. the “determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices”, Article 3(1)(7) of BMR.

34. ESMA also indicated that the activities of market operators in connection with the admission to trading and trading of derivatives as well as the activities performed by CCPs may amount to the “issuance” of financial instruments, but in its Consultation Paper proposed to exclude activities normally performed by market operators and CCPs for the purpose of the trading or clearing of derivatives referencing a benchmark from this specification. ESMA suggested that these activities would rather amount to the use of a benchmark as defined in Article 3(1)(7)(b) of the BMR as “determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices.”

2.3.2 Feedback to the CP

35. Respondents agreed with ESMA’s proposal that the specification of “issuance of a financial instrument” for purposes of defining use of a benchmark should not extend to the reference of benchmarks by derivatives.
36. Respondents however were divided as to the extent to which such reference would amount to a “use of a benchmark” under point (b) of Article 3(1)(7) of the BMR. While some respondents said that the determination of the final amount payable under a derivatives contract would be conceptually the core of that definition, others argued that exchanges and clearing houses would not benefit economically from the value of an index, would not be subject to a conflict of interest and should therefore not be covered by the requirements of the BMR. Another respondent was concerned that defining any calculation of amounts payable in respect of derivatives for any purpose as a use of benchmark would unjustifiably widen the scope of the BMR to include e.g. the calculation of margin by systemic internalisers.
37. Another commentator asked ESMA to specify whether or not the negotiation on third country trading venues would be covered by ESMA’s proposal.

2.3.3 Content of the technical advice

38. As no respondent argued for the widening of ESMA’s proposal in the Consultation Paper to include derivatives, ESMA thinks it is appropriate to retain the scope of “issuance of a financial instrument” as proposed in the CP.
39. As far as the range of trading venues on which an offering or placing can amount to an issuance is concerned, ESMA does not believe that it is necessary, useful nor legitimate to include a specific limitation. The concept of issuance is a sub-term of the wider definition

of the use of a benchmark in Article 3(1)(7) of the BMR and is in this context limited to the issuance of financial instruments as defined in Article 3(1)(16) of the Regulation (EU) 2106/1011. This definition in turn limits financial instruments to those traded on trading venues as defined in point (24) of Article 4(1) of the Directive 2104/65/EU, or for which a request for such trading has been made. ESMA is therefore bound in its proposal by the definition of “financial instrument”.

40. Additionally, Article 29(1) of the BMR explicitly limits the specification of benchmarks that may be used by supervised entities to their use in the Union. An infringement of Article 29(1) of the BMR through an unjustified “use” by issuing a financial instrument on a third country venue would therefore be without further consequences in terms of enforcement of the BMR.

2.4 Technical advice on some elements of the Definitions in Article 3

Making available to the public

1. A figure shall be deemed to be made available to the public in the meaning of Article 3, paragraph 1, point 1(a), of Regulation (EU) 2016/1011 if the figure is made accessible to a potentially indeterminate number of (legal or natural) persons outside of the provider's legal entity.
2. To be made available to the public as defined in paragraph 1, a figure may be accessed either directly or indirectly (as a result, *inter alia*, of its use by one or more supervised entities as a reference for a financial instrument it issues or to determine the amount payable under a financial instrument or a financial contract, or to measure the performance of an investment fund, or to provide a borrowing rate calculated as a spread or mark-up over such figure), and through a variety of media and modalities, set out by the provider or agreed between the provider and the receiving persons, free or upon payment of a fee, (including, but not limited to, telephone, File Transfer Protocol, internet, open access, news, media, through financial instruments, financial contracts or investment funds referencing the figure or by way of request to the users).

Administering the arrangements for determining a benchmark

The administration of the arrangements for the determination of a benchmark in Article 3, paragraph 1, point 5, letter (a), of Regulation (EU) 2016/1011 means:

- the ongoing management of the provider's structures and of its personnel that are involved in the determination process of a benchmark, and
- the setting, adaptation and ongoing maintenance of a specific methodology for the determination of a benchmark.

Issuance of a financial instrument

The issuance of a financial instrument referred to in Article 3, paragraph 1, point 7, letter (a), of Regulation (EU) 2016/1011 means the creation of transferable securities, money market instruments or units in collective investment undertakings, to be sold to potential investors by way of a public offer or placement or by way of their admission to trading on a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU or multilateral trading facility as defined in point (22) of Article 4(1) of Directive 2014/65/EU and / or of their trading on an organised trading facility as defined in point (23) of Article 4(1) of Directive 2014/65/EU or systematic internaliser as defined in point (20) of Article 4(1) of that Directive.

3 Technical advice on the measurement of the reference value of a benchmark

Extract from the Commission's request for technical advice

For critical benchmarks, recital 35 makes clear that the failure of a critical benchmark would have important implications for the Union or individual Member States. Therefore Article 20 and recital 36 indicate that several methods are available to designate such critical benchmarks. In particular, point (a) and point (c) of paragraph 1 of Article 20 refer to two thresholds of EUR 500 billion and EUR 400 billion, respectively, in order to ascertain whether a benchmark is critical.

Similarly, recital 40 explains the rationale for significant benchmarks, and paragraph 1 of Article 24 provides two methods for their designation, one of which relies on a threshold of EUR 50 billion.

The empowerment in paragraph 6 of Article 20 is limited to the specification of how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds can be determined. It does not mention other possible ways in which the total value of financial instruments, contracts and funds using a benchmark could be determined.

It does, however, address the question how indirect reference to a benchmark within a combination of benchmarks could be taken into account. The main issue to be discussed in the technical advice is whether the value of a financial instrument, contract or fund should be taken into account fully or only partially in the calculation of the total value of a benchmark if that financial instrument, contract or fund uses a combination of benchmarks.

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes of assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

3.1 Framework

41. ESMA was requested by the European Commission to provide technical advice on the appropriate measurement of the following amounts and value (for comparison against the thresholds in Art 20(1) and 24(1)(a) of Regulation (EU) No. 2016/1011 (BMR)):

- the nominal amount of financial instruments other than derivatives;
- the notional amount of derivatives; and
- the net asset value of investment funds.

42. For all these three elements, the measurement would include both the direct case and the case of the indirect reference to a benchmark within a combination of benchmarks.
43. The general approach presented in the Consultation Paper (CP) was to start by listing the financial instruments, as defined in the Directive 2014/65/EU¹⁰ (MiFID II), Section C of Annex 1, to be considered for the calculation, and the existing obligation reports under the EU legislation, in order to identify the data for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds. The issue of determining these measures should be considered together with the availability of the data needed for the calculation. ESMA completed an overview of the current and upcoming European legislation that could be considered as input data for the measurement of the reference value of a benchmark.
44. Article 3(1)(16) of the BMR defines a financial instrument as any of the instruments listed in Section C of Annex I to 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 via a systematic internaliser. The instruments listed under points (4) to (10) of Section C, as well as point (c) under the “transferable securities” definition (see Article 2(1)(29) of Regulation (EU) No 600/2014 (MiFIR)¹¹), are considered derivatives. The financial instruments that are not derivatives are therefore the following:
- Point (a) and (b) under the ‘transferable securities’ definition (Article 4(1)(44) of MiFID II):
 - shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
 - bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
 - Money-market instruments (as defined in Article 4(1)(17) of MiFID II): instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;
 - Units in collective investment undertakings; and
 - Emission allowances, consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme)¹².
45. As outlined in the CP, the above list of financial instruments other than derivatives includes “Units in collective investment undertakings”. The empowerment under Article 20(1) point (a) requires ESMA to specify how to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds. Article 3(1) point (19) of the BMR states that “investment fund” means

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=FR>

¹¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0600&from=EN>

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0046:en:PDF>

AIFs as defined in point (a) of paragraph 1 of Article 4 of Directive 2011/61/EU (AIFMD)¹³, or UCITS falling within the scope of Directive 2009/65/EU (UCITS Directive)¹⁴.

46. The category of units in collective investment undertakings is thus fully included in the definition of investment fund in Article 3(1) point (19) of the BMR. The presence of units in collective investment undertakings within the set of financial instruments other than derivatives and, at the same time, the reference to net asset value of investment funds under the empowerment in Article 20(1) point (a) could lead to a double counting of units in collective investment undertakings in the calculation of the reference value of a benchmark. For this reason, ESMA is proposing to consider the value of units in collective investment undertakings under the assessment of the net asset value of investment fund only, so as to avoid double counting which was welcomed by the responses to the DP.
47. The new MiFID II / MiFIR regime introduces provisions regarding “reference data” of financial instruments. In particular, with regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs or systematic internalisers (see Article 27 of MiFIR), trading venues / systematic internalisers will have to provide competent authorities with identifying reference data that summarise the core characteristics of the financial instruments. Competent authorities will in turn provide the reference data to ESMA who will make it available on its website.
48. ESMA has developed regulatory technical standards¹⁵ specifying the market data details that trading venues will have to report to competent authorities. The “reference data” table¹⁶ to be used by the trading venues / systematic internalisers presents different sections according to the type of the financial instruments. A section is dedicated to “bonds or other forms of securitised debt related fields” that includes the field “total issued nominal amount”, for which the content to be reported is the “total issued nominal amount in monetary value”. The other sections are dedicated to different asset classes of derivatives. All remaining types of instruments fall within the general fields which do not include an item in relation to the nominal amount.
49. As outlined in the CP in relation to the category of shares in companies within the MiFID II transferable securities definition, under point (a) there may be some particular types of equity-like instruments linked to benchmarks, such as “preferente aandelen” in the Netherlands, which can refer to a floating interest rate linked to a benchmark. ESMA and as confirmed by responses to the DP believes that there are no cases in which “standard” shares reference a benchmark.
50. A separate category of financial instruments other than derivatives is emission allowances. As explained in the CP, within the EU emissions trading system (EU ETS), an emission allowance gives the holder the right to emit one tonne of carbon dioxide (CO₂), or the equivalent amount of two other greenhouse gases. The EU ETS works on the ‘cap and

¹³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>

¹⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>

¹⁵ https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

¹⁶ http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/160714-rts-23-annex_en.pdf

trade' principle. The overall volume of greenhouse gases that can be emitted each year by the entities covered by the system is subject to a cap set at EU level. Within this Europe-wide cap, companies receive or buy emission allowances. Auctioning is the main method of allocating allowances. Considering the mechanics of the EU ETS, ESMA - and as confirmed by responses to the DP - believes that emission allowances do not reference benchmarks.

51. In relation to derivatives, the BMR Article 20(1) point (a) makes reference to the “notional amount”, which is a concept common to other EU legislations, such as MiFIR and EMIR¹⁷. The category of derivatives is available as independent sections in the reference data¹⁸: one section includes all derivatives and the other sections are split according to the different asset classes of the derivatives. The reference data does not include a field for notional amount except for the case of options where the notional amount can be measured as the strike price multiplied by the price multiplier.
52. The minimum details of the data to be reported to trade repositories (TRs) prescribed by Commission Delegated Regulation (EU) No 148/2013 (EMIR) includes the item “notional amount”, described as “original value of the contract”. In the context of the review of the reporting obligation under EMIR, ESMA has published a Final Report with new draft standards¹⁹. These new technical standards further specify the identification of the underlying asset. When measuring the notional amount of derivatives, ESMA proposes the use of the “Trade Repositories approach” based on EMIR reporting.
53. The relevant European sectoral legislation applicable to investment funds (i.e. Directive 2009/65/EC (UCITS Directive) and Directive 2011/61/EU (AIFMD)) includes an obligation on investment managers to disclose the net asset value of investment funds. However, the current reporting system does not allow singling out the investment funds using any benchmark for the determination of their performance or to define the asset allocation of a portfolio or to compute the performance fees.
54. As explained in the CP, managers of UCITS funds have to publish annual and half-yearly reports for each UCITS they manage including the Net Asset Value of funds. According to Article 68(2) of the UCITS Directive, these reports shall be published within the following time limits, with effect from the end of the period to which they relate: four months in the case of the annual report; or two months in the case of the half-yearly report. In addition, the AIFMD provides that managers of AIFs “shall also ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation” (Article 19(3) of the AIFMD). AIFMs are responsible for the publication of the net asset value (Article 19(10) of the AIFMD). The latest net asset value of the AIF has also to be made available to AIF investors before they invest in the AIF (Article 23(1)(m) of the AIFMD).

¹⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN>

¹⁸ http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/160714-rts-23-annex_en.pdf

¹⁹ https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf

55. Where a financial instrument is not traded in EUR, the nominal amount of the financial instrument, or the notional amount of the financial instrument or the Net Asset Value of the investment fund shall be converted into EUR, for which ESMA considers appropriate to use the official daily spot foreign exchange rate i.e. where available, the daily euro foreign exchange reference rates published by the European Central Bank on its website²⁰.
56. ESMA provides in its technical advice a long term solution to be applied as soon as the new technical standards on EMIR TR data and data from the MiFID II / MiFIR reporting requirements will be available. As outlined in the CP in the “Transitional regime”, due to apply in the meantime, the different values can be measured using private providers. Reference is not only made to info-providers but also to market operators, based on the assumptions that, when a benchmark is widely referenced by financial instruments, a significant market of futures and options traded on trading venues develops and that market operators usually calculate, on a daily basis, the open interest for the derivatives markets they manage.

3.2 Feedback from stakeholders

57. The majority of the respondents to the CP supported the transitional regime approach regarding the use of alternative private providers of information available to administrators pointing out the importance of not creating new reporting obligations for market participants. However, several respondents highlighted the insufficient details included in the transitional regime and that an administrator relying on data provided by private vendors should not be penalised in case the data is unintentionally erroneous or inaccurate or incomplete. These respondents suggested to include a standard of reasonable efforts based on the available data. Moreover, it was argued that the reliance on different private providers would imply that the regulator and the administrator using different data bases may not match their respective measurement because the administrator has not based its measurement on the same data as the regulator. Respondents further suggested that any discrepancies can be cured and this process should be a discussion between the benchmark administrator and the regulator instead of a strict liability standard immediately resulting in sanctions. To this respect one respondent suggested to add the following to the technical advice: “The following measures, expressed in EUR (..), should be taken into account *to the best of the administrator’s ability based on the available data*, when assessing benchmarks under the thresholds [...]”
58. Respondents also expressed their concerns in relation to the administrative process of collecting the required data which appears very challenging because of the different formats of the available data which would require a significant manual effort to understand and collate it. In this respect a number of respondents reiterated their response to the Discussion Paper stating that it should be for ESMA to provide the relevant data to administrators and to create or maintain a central registry to keep information that is beyond the visibility of administrators.

²⁰ <https://www.ecb.europa.eu/stats/exchange/eurofxref/html/index.en.html>

59. A number of respondents proposed that the collection of data and proxies be derived also from NCAs and suggested to clarify that administrators or NCAs will not require the disclosure of data by supervised entity users, where such a provision is not foreseen by a regulatory requirement.
60. Respondents further suggested the following amendments to the technical advice paragraph d): “Whenever data as set out above in paragraphs a), b) and c) is not available to an administrator or a competent authority according to the relevant case, or is not sufficient, when assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a) [...]”
61. One respondent also mentioned in relation to the proxy used in the transitional regime that in case a trading venue makes available such data as open interest – which is currently not legally required – such publication usually includes notional data as well.
62. Regarding the period of time during which the transitional regime would apply, one respondent stressed that the transitional regime should be limited in time and should not be considered in the longer run as a stable solution. Moreover, it was stated that reporting obligation need to be in relation to AIFMD and the UCITS Directive and this issue should be raised with the European co-legislators as an urgent issue that needs addressing with a Level 1 solution.
63. Regarding benchmarks used to measure the performance it was also argued that the usage of benchmarks as measures of performance should not be included in the calculation of the threshold although the BMR would fully capture performance benchmarks in scope. This respondent highlighted the difficulties in establishing for such benchmark use accurate figures and the less proportionate approach to managing the risks of benchmarks as it would lead to more benchmarks falling within the critical or significant benchmarks categories based on their use in measuring the performance even though they pose less risk to consumers and the EU economy. This respondent further highlighted that this would not be consistent with Recital 9 of the BMR stating that: “This Regulation should also provide for a proportionate response to the risks that different benchmarks pose.”
64. Regarding the proposed calculations, respondents had several suggestions in relation to the Notional amount of derivatives:
- One respondent asked for a further clarification of the calculation for futures and options stating that it is not always relevant to include the strike or settlement price in the formula and further suggested to use open interest to calculate the notional amount.
 - Another respondent proposed to change the formula used for the calculation of Exchange Traded Derivatives (ETDs) and to use the following for futures: “number traded contracts * contract size * underlying price” with the contract size, defined as “the deliverable quantity of commodities or financial instruments underlying futures and option contracts that are traded on an exchange” and replacing the “settlement price” by the “underlying price” of the future stating that the “settlement price” could be difficult to be obtained. For Options: “number of traded contracts * contract size * strike price”. With the “number of contracts”

defined as “the quantity of the underlying security that the holder of an option possesses the right to buy or sell”. Furthermore, in both cases the number of trades should be counted single sided only.

65. The measurement of financial instruments other than derivatives based on the reference data nominal amount was subject to comments in two different areas. First the scope, one respondent highlighted that there are currently unsolved discussions between NCAs and markets participants as regards the nature of structured financial products. It was further stated that within these discussions it has become clear that at least some structured financial products are to be classified as derivatives rather than securities. This respondent proposed to change the technical advice paragraph a) by the following “For bonds, money market instruments and other forms of securitized debt including structured finance products *other than derivatives*”.
66. Finally, in relation to the costs generated by this measurement, several respondents stressed that the transitional regime should not result in extra costs for administrators and the Trade Repositories foreseen provision of public data should have transparent costs with published price list and fees. Furthermore, one respondent also stated that the second sentence under d), “In such cases, the competent authority or administrator shall provide written justification of this use, in particular in relation to the non-availability of the regulatory data”, imposes an unnecessary burden on administrators. One respondent also highlighted that the reference data should be easy to use and service oriented in order mainly for small index providers to mine data.
67. Nearly half of the respondents were in favour of the proposal to perform the calculation at a specific point in time and some of these respondents suggested to further specify this measurement by stating that the nearest date of data availability should be used. The respondents that didn’t support ESMA’s proposal stated that the measurement at a specific point in time may produce false positives or false negatives in the case of a variation at the specific date of the calculation whereas in general the benchmark exceeds/is below the threshold. Moreover, it was stated that for the specific case of commodity benchmarks falling within the scope of Title II of BMR and more in general in order to take into account the seasonality in relation to financial instruments such as the NAV of investment funds respondents highlighted several proposals: a benchmark should be considered critical or significant only if it exceeds the respective threshold for - a minimum period of time (one respondent); for at least six months average (2 respondents); through an average value based on several valuations done at regular intervals over a period of time (one respondent); a yearly average because a six-month average is not adequate as the seasonality tends to be spread over the whole year for commodity benchmark (5 respondents). One respondent also highlighted that the same rule should apply for all type of instruments (year-end or year average).
68. Regarding the use of licensing agreements to identify benchmarks, respondents generally did not support ESMA’s proposal stating that any mandatory use of licensing agreements would be highly burdensome because only a small but however unknown number of licensees is using data for the purposes of a benchmark as covered by the BMR. Furthermore, respondents argued that there is no legislative mechanism for responses to

questionnaires to be made obligatory. These respondents stated that the use of licensing agreements should be considered on a voluntary basis. It was also highlighted that these agreements include confidential information and personal data that would prevent an administrator from providing competent authorities with information such as a list of licensees. Several respondents further mentioned that for many products (varying across administrators) no license agreements are necessary. Therefore, these agreements would not cover the full range of benchmarks used.

69. One respondent further stated that a harmonised approach should be applied in order to avoid regulatory arbitrage towards different kinds of licensing agreements: either all kinds of users are compelled to provide information or none are. One other respondent proposed that the NCA or other regulatory authority issues a mandatory survey to report the value of financial instruments, financial contracts and investment funds leveraging the benchmarks.
70. One respondent proposed a preferred approach including the use of instruments identifiers instead of ISINs because of a number of material concerns in using this identifier and the practicality of its application to derivative venues in particular: ISINs codes are allocated within twenty-four hours of request whereas for derivative markets the creation of new financial instruments can occur intraday.
71. One respondent proposed that for non-significant benchmarks a declaration in good faith by the administrator should be sufficient and any other obligations would at the moment – not knowing how the indices are used in detail and what values are involved – be not feasible to meet.
72. Respondents also asked ESMA for clarifications in the following different areas:
- Whether the threshold calculation should apply to the notional value of financial instruments where the trade has been conducted on a non-EU venue or between non-EU counterparties.
 - The frequency of the calculation an administrator is expected to make and the time frame after the observation period has ended the administrator is expected to have submitted its report to the NCA (if a benchmark has become significant or ceased to be significant).
 - The instances where a derivative or a financial instrument other than a derivative can indirectly reference a benchmark. This respondent commented that any index that is publicly available could be used for comparison purposes to a critical benchmark and according to the specification, in its current state, could be categorised as a critical benchmark by association. Ultimately, this could lead to every benchmark being deemed critical due to their publicly available characteristic.
73. ESMA's responses to the comments from stakeholders are included in the following sections. For some of the requests of clarification that may not be dealt with in this technical advice, ESMA could possibly come back with further guidance when elaborating level 3 measures.

3.3 Content of the technical advice

74. In relation to the measurement of financial instruments other than derivatives, respondents to the CP highlighted the importance of the use of existing regulatory framework and not create new burden on users. However, one respondent raised the current discussions between NCAs and market participants in relation to the nature of structured finance products stating that some of these products would be classified as derivatives. In order to further clarify the technical advice and since these discussions are still on-going, ESMA amended the technical advice and included the structured finance products other than derivatives in the measurement of the nominal amount of financial instruments other than derivatives. One market participant also commented on the use of MiFID II / MiFIR reference data reporting stating that it should be easy to use and service oriented, ESMA mentions that as specified in the corresponding commission delegated regulation²¹ paragraph 6 of Article 7 “*ESMA shall publish the reference data in an electronic, downloadable and machine readable form*”.
75. Regarding the measurement of derivatives, the main concern outlined in the CP related to the non-availability of the data to benchmarks administrators. ESMA mentioned in the CP that it is considering the merit of broadening the regime for publicly available trade repositories data and was likely to include this matter in a Consultation Paper in relation to the review of EMIR second level measures. The responses to the CP were generally in favour of this proposal.
76. As indicated in the CP, the Trade Repositories reporting includes a field to identify the venue of execution of the contract i.e. a unique code is associated for each venue. Where a contract is admitted to trading on a trading venue but is traded OTC a specific code is reported to the Trade Repositories allowing them to identify these trades.
77. In relation to the comments made by market participants to the calculation of derivatives, in particular, regarding ETDs futures and options, two respondents highlighted the non-availability of the settlement price for the calculation of futures. One of these respondents proposed to amend the formula used in the technical advice and substitute the settlement price by the underlying price. ESMA acknowledges this issue and is amending the technical advice in order to include the case where the settlement price is unknown, in this case - and as already included in EMIR TR reporting - the end of day price of the underlying at the effective date of the contract should be used. The same respondent suggested to amend the number of contracts by the number of traded contract and the number of units by the contract size. ESMA agrees that the formula needs to be clarified and is of the opinion to align this measurement to EMIR TR reporting and calculation and therefore suggests the use of the same wording as defined in the corresponding RTS in order to have a harmonised and consistent measurement across different Regulations.

²¹ COMMISSION DELEGATED REGULATION (EU) .../... of 14.7.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/160714-rts-23_en.pdf.

78. As suggested by one respondent to the CP, ESMA is amending the reference to the net asset value per unit as published under article 19(10) of the AIFMD in point c) of the technical advice. The Level 2 measures under the Regulation No 231/2013 further specify Article 22 of the AIFMD and provide for the total net asset value of investment funds without reference to the number of units (Article 104 in relation to the balance sheet or statement of assets and liabilities that should contain at least "(c) 'net assets', representing the residual interest in the assets of the AIF after deducting all its liabilities.").
79. In relation to the proposal of a market participant that questioned the inclusion, in the scope of this measurement, of investment funds for which benchmarks are used as measures of performance, ESMA reiterates that, in line with the Level 1 provisions, this measurement applies to benchmarks in the scope of the BMR and the financial contracts, financial instruments and investment funds referencing to them. As a consequence, it is not under the remit of ESMA to exclude from this measurement the reference value of any such benchmark in scope.
80. The current AIFMD reporting system does not allow determining whether the reporting AIF uses any benchmark for the determination of its performance. Moreover, there are no databases for UCITS funds. This approach based on the information to be disclosed under AIFMD and UCITS could be very burdensome in the sense that the benchmark could not be identified unless going through the marketing material of all individual investment funds. ESMA suggested, as an alternative, the use of private providers of information in order to identify the benchmarks used as reference in investment funds and be able to aggregate net asset value per referenced benchmark.
81. ESMA acknowledges the concerns by a market participant in relation to the time limit of this transitional regime and reiterates that it is not to be considered in the long run but until such time as EMIR TR data for derivatives and data from MiFID II / MiFIR reporting requirements for financial instruments other than derivatives are available. In relation to investment funds, the transitional regime is meant to be used in combination with the regulatory reporting (under the UCITS and AIFMD directive), in order to identify the benchmarks referenced in investment funds, if no other data to perform this identification is available, even in the long run or at least until such time as a regulatory solution develops in the relevant context. In order to highlight this, ESMA has changed the name of this regime into a "fall-back regime".
82. Respondents to the CP highlighted the insufficient details included in the technical advice in relation to the practical implementation of the fall-back regime. ESMA acknowledges this issue and specifies that non-reputable and non-reliable private providers cannot be used. To that purpose examples of non-reliable and non-reputable providers would be providers that have been convicted, or that have been involved in major scandals, in connection with a lack of accurateness and completeness of the information supplied. This assessment can imply using more than one private provider or market operator if necessary to come to a more complete picture of the benchmarks' reference value.
83. Moreover, ESMA acknowledges the concerns expressed by market participants in relation to the "best effort" approach that should apply to administrators and includes this

clarification to the fall-back regime part of the technical advice for which it is relevant. The other parts of the advice relate to public and regulatory data available to the administrator. Furthermore, and in order to tackle the issue of different data sources used by administrators and competent authorities this technical advice highlights that the process of measurement should be a discussion between the administrator and its relevant competent authority in order to come up with a common understanding of the measurement performed.

84. Some respondents proposed to include in the technical advice that administrators or NCAs will not require the disclosure by users of information not foreseen in the regulatory requirements. However, NCAs in the context of their supervisory activity, can ask supervised entities additional information if they deem these necessary for their assessment of the measurement performed by administrators. ESMA is further clarifying the wording of the technical advice with respect to the availability of data to administrators and competent authorities in the fall-back regime.
85. Regarding some concerns raised by market participants in relation to the cost of the fall-back regime, ESMA would like to highlight that additional costs arising from the application of this technical advice should be non-significant since the data to be used is restricted to the one already available to the administrator. Furthermore, in relation to the burden that would arise from the application of this fall-back regime through the provision of a written justification of the measurement, ESMA would like to further specify that the justification may consist just of the indication of the data sources used for the values provided.
86. Several respondents reiterated their concerns in relation to the challenging process of collecting data and proposed that ESMA would take a coordinated role to gather the data needed for these measurements. ESMA will gather reference data under MiFID II and will make them available on its website. However, for the purposes of the aggregation of data for derivatives, other entities are best equipped and already provide aggregated data at the level of asset classes and therefore are best suited to provide the information to the public.
87. As outlined in the CP, the assessment of the reference value of a benchmark and its comparison with the quantitative thresholds are intended under the BMR to be carried out by the competent authorities (in the case of the identification of benchmarks that are critical in a particular Member State), by the European Commission (in the case of the identification of benchmarks that are critical at European level), and by the administrators (for the distinction between the significant and the non-significant benchmarks they provide). ESMA tried to base its technical advice on public data - where available - giving priority to regulatory reporting in order to establish a reliable and lasting methodology. Regarding the proposal by a market participant to base the assessment for non-significant benchmarks on a declaration in good faith by the administrator, ESMA highlights that this provision is not compatible with the BMR, which clearly states in paragraph 3 of Article 24 and in paragraph 2 of article 26 that it is the responsibility of the administrator to notify its competent authority when the benchmark exceeds or falls below the thresholds.

88. The Consultation Paper mentioned that a measurement of the reference value to be compared with the relevant quantitative threshold at a specific point in time is sufficient for a large number of benchmarks that are available on a daily basis such as Libor or Euribor and for which the degree of use tends to be more stable over the time. ESMA also considered that commodity benchmarks which are less available and stable over time are not under the scope of Article 24 - as mentioned in Article 19 of BMR: “Articles 24, 25 and 26 shall not apply to the provision of, and contribution to, commodity benchmarks.” – whereas, under certain specific conditions, they may fall in the scope of Article 20. Approximately half of the respondents to the CP objected to this proposal as outlined in the section on the feedback of stakeholders. ESMA acknowledges these responses and would like to emphasize that for significant benchmarks the relevant period for calculation is already provided for under Article 24 and that the BMR already provides for a review of the list of critical benchmarks to be conducted every two years. Furthermore, some of the data that are to be computed in order to assess the reference value of a particular benchmark would only be updated every six/twelve months (that is the case for the NAVs of investment funds; see above). Against this background, ESMA will not elaborate on this part of the measurement.
89. As mentioned in the CP, the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds need to be assessed for the purpose of determining whether a benchmark is critical or significant and this has to be done also “*in case of the indirect reference to a benchmark within a combination of benchmarks*”. Therefore, in case of a financial instrument, a derivative or an investment fund referencing a composite benchmark, ESMA proposed in the CP to apply the portion of the nominal amount of the financial instrument / notional amount of the derivative / net asset value of the investment fund which refers to the single benchmark (within a combination of benchmarks) when the weightings are available. The portion should also apply when the weightings can be approximated (e.g. when they can be derived from the marketing materials of the financial instrument). In the case where the combination of benchmarks is different from a weighted sum, for example when ‘best of’ or ‘worst of’ pay-out profile is used, then ESMA proposes to consider, as a calculation assumption, that all benchmarks are equally weighted within the combination.

3.4 Practical implementation of the measurement

90. As outlined in the CP, irrespective of the type of instrument, the identification of the underlying benchmark could be overly burdensome. The MiFID II / MiFIR database (reference data) identifies the underlying index or benchmark through a waterfall approach starting with an ISIN code when available, then through an index list defining 26 rate indices. The remaining benchmarks would fall within an alphanumeric field of up to 25 characters which is a free text field without any rules governing its definition.
91. In order to identify benchmarks in the context of MiFID II / MiFIR reporting framework and to enable automatic calculation, an ISIN code for the underlying of the financial instrument should be registered. As outlined in the feedback to the CP section, one respondent evidenced the difficulties with the timely assignment of differentiated ISINs to differentiated

derivative contracts. However, such an observation is not strictly pertinent in this context. On the one hand, the use of the ISIN code is included in the MiFID II/MiFIR and EMIR reporting framework and ESMA cannot amend this reporting in the context of the Benchmarks Level 2 measures. On the other hand, what is relevant in this context is the research of solutions to overcome the problem with the identification of the financial instruments referencing to a particular benchmark, lacking an internationally agreed and diffused codification for 'benchmarks'.

92. ESMA is aware that in the current state of the data available a precise measurement is difficult since the regulatory reporting mentioned above were designated for other purposes. Therefore, in order to improve the quality of the measurement and to be able to divide benchmarks according to the different categories defined in the BMR, ESMA highly recommends the European Commission to request the assignment of ISINs to indices from administrators.
93. Another alternative approach proposed in the CP was the use of the licensing agreements in order for users of benchmarks to provide the necessary information, in particular in relation to financial instruments referencing a benchmark. The majority of the respondents did not support this proposal and stated that any mandatory use of the licensing agreements would be highly burdensome especially since there is no legal obligation for users to reply to the questionnaires. Additionally, it has been highlighted that this solution could lead to a far from complete picture of the degree of use of a benchmark. Therefore, ESMA is of the opinion that the use of licensing agreements should be left to the discretion of administrators and be relied upon not in absolute terms.

3.5 Technical advice on the measurement of the reference value of a benchmark

1) In order to measure appropriately the reference value of a benchmark (for comparison against the thresholds in Art 20(1) and 24(1)(a) of Regulation (EU) No. 2016/1011 (BMR)), the amounts and values described below should be used:

The amount or value should be expressed in EUR, the official daily spot foreign exchange rate i.e. where available, the daily euro foreign exchange rate published by the European Central Bank on its website should be used for the conversion of any amount or value where necessary.

a) Nominal amount of financial instruments other than derivatives²²

For bonds, money market instruments and other forms of securitised debt including structured finance products other than derivatives, the total issued nominal amount in monetary value, as reported under Article 27 of Regulation (EU) No 600/2014 and in accordance with RTS 23 “Draft regulatory technical standards on supply of financial instruments reference data under Article 27 of MiFIR”, Table 3, field 14.

b) Notional amount of derivatives

The Notional amount as reported under Article 9 of Regulation (EU) No 648/2012 of the European Parliament and of the Council and in accordance with Commission Delegated Regulation (EU) No .../.., Table 2, field 20, with the following additional specifications:

- If the notional amount is negative, the absolute value should be taken into account;
- For credit derivative index transactions the notional amount should be applied to the index factor, as derived from Commission Delegated Regulation (EU) No .../.., Table 2, field 89.

The following additional measurement methods should be applied:

- In the case of swaps and forwards traded in monetary units, the reference amount from which contractual payments are determined in derivatives markets;
- In the case of options, Quantity * Price Multiplier * strike price; where Quantity is the number of contracts traded and Price Multiplier is the number of units of the financial instruments which are contained in a trading lot; for example, the number of derivatives represented by the contract. The quantity should be counted single sided.
- In the case of futures, Quantity * Price Multiplier * settlement price; where Quantity is the number of contracts traded and Price Multiplier is the number of units of the financial

²² In line with ESMA TS under MiFID II / MiFIR https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

instruments which are contained in a trading lot; for example, the number of derivatives represented by the contract. The quantity should be counted single sided.

- In the case of financial contracts for difference and derivative contracts relating to commodities designated in units such as barrels or tons, the resulting amount of the quantity at the relevant price set in the contract.
- In the case of derivative contracts where the notional is calculated using the price of the underlying asset and such price is only available at the time of settlement, the end of day price of the underlying asset at the effective date of the contract.

c) Net asset value of investment funds

For investment funds subject to Directive 2009/65/EC, the latest available net asset value per unit, as reported in the most recent annual or half-yearly report in accordance with Article 68(2) and Annex I, Schedule B of the same Directive, times the number of units.

For investment funds subject to Directive 2011/61/EU, the latest available net asset value published in accordance with Article 104(1)(c) of Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

2) Fall-back regime

Whenever any of the data as set out above in paragraphs a), b) and c) is not available to an administrator or a competent authority according to the relevant case or is not sufficient, when assessing the reference value of benchmarks under the thresholds in Article 20(1) and Article 24(1)(a), an administrator or a competent authority may use the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds, or proxies for these values, such as those reported by alternative private providers of information or the open interest data calculated and published by market operators, unless there exists an indication of non-reputability or non-reliability of the provider or operator. An administrator shall perform the measurement to the best of its ability, based on the available data, and shall provide a written specification of the data sources used to its relevant competent authority.

3) The indirect reference to a benchmark within a combination of benchmarks

For the purpose of assessing the reference value of a benchmark under the thresholds in Article 20(1) and Article 24(1)(a), where an investment fund, a derivative or a financial instrument other than a derivative makes indirect reference to that benchmark within a combination of benchmarks the following measures, expressed in EUR, should be taken into account:

- When the weighting of the benchmark, within the combination of benchmarks, is available or can be approximated on the basis of other available information, the portion

of the nominal amount of the financial instrument other than derivatives, notional amount of the derivative and net asset value of the investment fund indirectly referencing such benchmark;

- When the weighting of the benchmark, within the combination of benchmarks, is not available or cannot be approximated, the portions of the total nominal amount of the financial instruments other than derivatives, of the total notional amount of the derivatives and of the total net asset value of the investment funds indirectly referencing such benchmark, assuming an equally weighted combination of benchmarks.

4 Technical advice on the criteria referred to in Article 20(1)(c) subparagraph (iii)

Extract from the Commission's request for technical advice

ESMA is tasked to specify what would be significant and adverse impacts on a number of different economic factors: market integrity, financial stability, consumers, the real economy, and the financing of households and corporations in one or more Member States.

In particular, ESMA should consider whether numerical measures, in absolute or relative terms, could be developed to ensure objective consideration of these criteria. If so, ESMA should provide advice on such numerical measures and how they should be interpreted in the respective economic and financial context. The technical advice should allow competent authorities to base their assessment on objective grounds instead of subjective reasoning which is hard to assess.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

4.1 Framework

94. According to Article 20(1) of the Benchmark Regulation (BMR), the Commission should adopt implementing acts to establish and review at least every two years a list of benchmarks provided by administrators located in the Union which are critical benchmarks.

95. In order for a benchmark to be included in the list of critical benchmarks pursuant to Article 20(1)(c) of the BMR, all the criteria mentioned in that paragraph should be fulfilled. Therefore, for this paragraph to apply, a benchmark will have to be used as a reference for financial instruments or contracts, or for measuring the performance of investment funds, having a total value between EUR 400 billion and EUR 500 billion (although an exemption to this criterion is included in the BMR, see below). In addition, the benchmark should have no or very few appropriate market-led substitutes. Finally, ceasing to provide such a benchmark, or the benchmark's provision where its input data was unreliable or no longer fully representative of the intended market or economic reality, should have a significant and adverse impact in one or more Member State on:

- Market integrity;
- Financial stability;

- Consumers;
 - The real economy; or
 - The financing of households and businesses.
96. ESMA was requested by the Commission to provide technical advice on how the criteria specified in Article 20(1)(c)(iii) of the BMR should be applied, taking into consideration any numerical figure to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on the elements listed in subparagraph (iii). ESMA should take into account that these criteria might have to be applied to markets and market participants as well as to economic realities, in the various Member States, that could be of very different nature and size.
97. It is important to note that the criteria defined in the ESMA advice would apply to a benchmark with no or very few appropriate market-led substitutes, and that is used as a reference for financial instruments, contracts or investment funds having a total value between EUR 400 billion and EUR 500 billion. It would then be the responsibility of the European Commission to make the assessment and take a final decision, also based on the criterion of point (iii) of Article 20(1)(c), as further specified in a delegate act adopted pursuant to the suggested advice by ESMA.
98. Article 20(1)(c) also states that National Competent Authorities (NCAs) may identify a benchmark as critical even if the benchmark is used as a reference for financial instruments and contracts having a total value lower than EUR 400 billion, if such benchmark has no or very few appropriate market-led substitutes and if the criterion (iii) in Article 20(1)(c) (to be specified in the technical advice) applies. Under this second case, it would be a responsibility of the NCAs involved to make the assessment, also based on the criteria included in the said delegated act. The assessment will be then transmitted to the Commission which will adopt an implementing act including the benchmark in the list of critical benchmarks.
99. ESMA therefore needs to develop further specifications of the mentioned criterion under Article 20(1)(c)(iii) considering that such criterion will be used in both cases described above and therefore by different entities (the Commission in the first case, NCAs in the second one).
100. Finally, for the sake of completeness, it is worth recalling that a separate provision (Article 20(1)(b)) empowers an NCA to identify a benchmark as critical if this is based on submissions by contributors which are in majority located in the Member State of the NCA (no minimum “total value” is contemplated under this provision). Under this third “national” case, the criteria of technical advice would not apply: the text of the BMR already includes which conditions should be taken into account by the competent authority (Article 20(3)).

4.2 Feedback to the Consultation Paper

101. The comments received by market participants in relation to this piece of draft technical advice proposed in the Consultation Paper (CP) are generally positive. They expressed support for the non-exhaustive nature of the list, for the “relative impact approach”, and for the part of the advice stating that the criteria should be considered jointly in a holistic manner, and not all criteria will be always relevant for the benchmark under analysis.
102. A number of remarks and proposals was nevertheless included in the responses, and they are listed in the following paragraphs. ESMA’s reaction to the proposals are included in the next section of this chapter.
103. One respondent proposed to amend the criteria (e)(1) of the draft technical advice included in the CP [“the number of different types of derivative contracts that reference the benchmark, in the Member State(s) considered and its relevance in terms of an estimate of the total number of types of derivative contracts traded in the financial system of the Member State(s) considered”] as follows: “the number of derivative contracts that reference the benchmark, in the Member State(s) considered and whether this is a significant share of the total number of derivative contracts traded in the financial system of the Member State(s) considered”. The market participant argued with its proposal that ESMA should not consider the different types of derivatives, but just their number, as it is the number of contracts, rather than the number of different types of such contracts, that is the relevant factor to consider in assessing potential impacts on market integrity. Furthermore, it is said that classifying derivatives into ‘different types’ would introduce an unnecessary complication and require additional detailed consideration and stakeholder consultation. The proposal of the market participant also introduced the concept of “significant share of”, in line with other criteria included in the draft technical advice.
104. Another respondent stated that the most important factor that should exclude a benchmark from being designated as “critical” is substitutability. If there are any reasonable substitutes provided by another benchmark provider, then the users have a choice and can switch benchmarks. By definition the benchmark cannot then be critical because alternatives can be used/chosen.
105. Two respondents stated that it is their understanding that pension funds are not in the scope of the definition of “use of a benchmark” in the BMR, and that although they understand the possible reason behind the inclusion of criteria (i)(1) and (2) of the CP, they suggest ESMA to exclude these criteria for the assessment of a critical benchmark.
106. Another group of respondents suggested to delete criterion (f)(3) of the CP (“whether the benchmark is used for tax purposes”). The market respondents do not expect benchmark providers to create benchmarks for this purpose outright, and highlight the fact that there should not be the risk of false positives due to a lack of definition or criteria how such a benchmark use should be identified. It was therefore suggested to cancel criteria (f)(3) due to the difficulty in clearly defining it. One of these respondents also suggested the deletion of criterion (k) of the CP (“The value of financial instruments, financial contracts and investment fund that reference the benchmark, directly or indirectly within a

combination of benchmarks, in the Member State(s) and whether this is a significant share of the gross national product of the Member State(s) considered”) as it is considered too generic and of little value.

107. One respondent suggested that the share of financial instruments, financial contracts and investment funds that reference the benchmark in the gross domestic product of the Member State must be assessed taking into account the custodial role of some asset holders within that Member State. It is argued that some entities act as custodians for a disproportionate volume of assets relative to the size of their jurisdictions’ GDP and therefore, within certain Member States a greater concentration of holdings referencing the benchmark can be observed. Similarly, there could be holdings referencing benchmarks held by EU residents domiciled in offshore jurisdictions. Their performance and continuity also has an impact on the real economy criteria. Thus, the respondent suggests that where a disproportionate volume of assets referencing the benchmark within a Member State is held by custodians, the ultimate beneficiaries of those assets must be taken into account.
108. Finally, one respondent said that criticality should be based on size and liquidity, not complexity, highlighting that there may be the possibility that the national competent authorities may delegate this assessment to the administrators and that administrators will struggle to have the technical resources and macro-economic data necessary to make an accurate assessment and could unfairly be penalised for this shortcoming. The same market participant believes that it is imperative that there is an ability to appeal or otherwise immediately review the classification of a benchmark by the Commission or an NCA in the case where an administrator believes that the benchmark may have been inadvertently misclassified.
109. The CP included also a question dedicated to the concept of “significant share of”, used in several criteria, and whether it would be beneficial to further develop it in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data. In the CP ESMA stated that the main advantage of including (ranges of) percentages as reference for the criteria based on quantitative data, or for some of them, is to foster a common approach for the analysis of a potential critical benchmark that is more precise and therefore less subject to different applications, while the main disadvantages are linked to the difficulty in pre-setting meaningful (ranges of) percentages and to the partly loss of flexibility of the approach defined in the advice.
110. Out of some 20 respondents to this specific question, six of them explicitly favoured a more precise term replacing “significant share of”, seven explicitly favoured the expression “significant share of” to a pre-determined percentage. Of the six market participants expressing a preference for a definition of a percentage, one of them suggested to consider the range of “25-40% or greater”, citing European competition policy as guidance for ESMA, while another suggested the level of 10% as this is the typical substantial shareholder dimension.
111. Most of the remaining respondents did not reply to the question but expressed their worries about the availability of data needed to compute the criteria included in the draft technical advice. They argued that it is unclear how the value of financial instruments,

financial contracts and investment funds that reference a benchmark is to be measured; this alternative method of determining the categorisation of benchmarks is still reliant on the value of financial instruments that reference a benchmark but there is no clarity as to how this value is to be measured sourced.

4.3 Content of the technical advice

112. As already noted in the Discussion Paper (paragraph 218) and in the Consultation Paper (paragraph 97), in relation to the procedure for recognition of a benchmark as being critical in a single Member State by the NCA of that Member State (in accordance with Article 20(1)(b) and 20(3) of BMR, i.e. the “national” case), the BMR already includes the criteria that should be taken into account by that NCA in its assessment:

- the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State;
- the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and its relevance in terms of the gross national product of the Member State.
- any other figure to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on markets integrity, or consumers, or the real economy, or financial stability, or the financing of households and businesses of the Member State.

113. ESMA still believes that also the Commission and the NCAs should take into consideration these values and figures when assessing the criticality of a benchmark in accordance with Article 20(1)(c)(iii), and that the technical advice for Article 20(1)(c)(iii), should be developed consistently with the approach already embedded in the BMR.

114. Following the request for technical advice received from the Commission, ESMA’s technical advice should consider proposing numerical figures to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on the criteria included in Article 20(1)(c)(iii) BMR. For this purpose, ESMA proposed a “relative impact approach” in the CP, based on the aforementioned “significant share of”. As an illustrative example of how the relative impact approach would work, with respect to the real economy a certain percentage point decrease of GDP could be qualified as having significant impact. With respect to consumers a similar approach could be taken by looking at the percentage of consumer loans that would be affected if a benchmark is discontinued or is no longer considered reliable.

115. ESMA prefers to base the advice on a “relative impact approach” rather than absolute figures because the significant impact in absolute figures, for example on GDP, could differ to a great extent from one Member State to another, while a “relative impact approach” is

more flexible and can take into account the differences between Member States. This is also in line with the request for technical advice received from the Commission, which states: “When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size”.

116. In light of the responses to Question 9 of the CP (*Do you think that the concept of “significant share of” should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?*) ESMA has decided that it would retain the concept of “significant share of” without further specifying a particular value or ranges of value. ESMA considers that the use of a flexible approach better suit the diverse nature of the criteria included in the technical advice. Indeed, it is not only the economic realities and structures of the Member States that differ materially, but also the elements considered by the criteria that are very different. This would imply the translation of “significant share of” in a matrix of values that takes into account the two dimensions: (i) different natures of the criteria, and (ii) different economic context of the Member States (with particular focus on their financial sector).
117. Against this need of differentiation, ESMA believes that NCAs and the Commission are better placed to translate the concept of “significant share of” into a value that is appropriate for the analysis of a specific benchmark. It should also be noted that this advice will be used for the identification of critical benchmarks through the application of the sub-case (c) of Article 20(1) of the BMR. In other words, the Regulation that will stem from the advice will be used for these very specific cases of potential critical benchmarks.
118. It should be noted that one respondent raised the custodial role of some asset holders within some Member States and that these custodians hold a disproportionate volume of assets relative to the size of these Member States’ GDP. It is exactly for this type of idiosyncratic situation, and other special cases that surely can be identified, that ESMA believes that a flexible dimension in the criteria, through the use of the concept of “significant share of”, should be maintained.
119. The general approach of the advice is the same proposed in the CP, and therefore all criteria should be considered jointly and should be calibrated on a case-by-case basis by the Commission or the NCAs, taking into account the characteristics of the benchmark under scrutiny and the features of the economic and financial environment in which the benchmark is used. This set of criteria should be considered as the common approach to be used by the Commission and NCAs when developing their assessment.
120. As already stated in the CP, some of the criteria are quantitative in nature; these criteria essentially focus on the relative value of financial products referencing the benchmark across different fields of the financial system and of the economy in one or more Member States. After an in-depth analysis by ESMA and NCAs on the data needed to compute the criteria, ESMA decided to retain all the criteria in the technical advice with the exception of one (former criterion [e] in the draft advice included in the CP).

121. For the election of a benchmark as critical under Article 20(1)(c) there is always a need of enough data to establish the degree of usage of the benchmark (see subparagraph (i) of Article 20(1)(c), referring to “having a total value of at least EUR 400 billion”, and also the reference to this condition in the second part of subparagraph (iii) of the same Article), and most of the criteria included in the advice relies on the same set of data that NCAs and the Commission are requested to compute directly by the BMR. In this context, it should be noticed that the advice is not suggesting that an assessment should be based on all the criteria listed in the technical advice. In practical terms, it would be one or more NCAs (or the Commission) to pro-actively decide to take action under the provision of Article 20(1)(c) and prepare an assessment on the basis of only those criteria that are functional to “demonstrate” the critical nature of the benchmark under scrutiny in lights of the potential impact of the discontinuity or unreliability of such benchmark, and based on the data that would be available to that purpose. Against this background, ESMA prefers to include a relatively large number of criteria with the aim of providing the NCAs and the Commission with a flexible set of elements that could be of use in the analysis of benchmarks measuring different financial and economic contexts.
122. The final outcome of the assessment about the criticality of a particular benchmark is not an automatic outcome triggered by a single criterion, but rather an evaluation to be conducted on a case-by-case basis, according to a holistic approach that simultaneously considers different factors and is based on the relevant criteria listed in the advice.
123. In the area of market integrity, ESMA is proposing a set of criteria that focuses on the relative value of the financial contracts, financial instruments and investment funds referencing a specific benchmark vis-à-vis the total value of the financial contracts, financial instruments and investment funds in the Member States concerned. These criteria were developed based on the model of the criteria already included in the BMR in the case of election of “national” critical benchmarks (Article 20(3)). Besides, ESMA believes that in the context of market integrity, the Commission and NCAs, when assessing a benchmark, should also consider whether the benchmark has been indicated as a successor of another benchmark that has already been classified as critical.
124. In this section of the advice ESMA has decided to delete a criterion (ex-criterion [e] in the draft advice included in the CP) that was referencing to the diversity of financial instruments, financial contracts and investment funds. The reason is that ESMA valued the criticism of respondents to the consultation and recognised that there was no real added value in the proposed criterion, especially considering that the advice already includes criteria such as under (a), (b), and (c), which already focus, respectively, on financial contracts, financial instruments and investment funds.
125. One respondent suggested to introduce a new criterion referring to whether the benchmark has suitable substitutes. It should be noted that the BMR Article 20(1)(c), point (2), already makes reference to this: “the benchmark has no, or very few, appropriate market-led substitutes”, and therefore there is no need to include the suggestion in the technical advice.

126. The last criterion included in the section dedicated to market integrity focus on whether the benchmark is used as a reference for prudential regulation or in international accounting standards. In the CP this criterion was including a third sub-point with reference to tax purposes, that is now been deleted following the feedback to the CP by market participants.
127. In the domain of financial stability, the technical advice suggests to compare the value of financial instruments, financial contracts and investment funds that reference the benchmark with the total assets of the financial sector and of the banking sector in the considered Member States. The European Central Bank (ECB) defines financial stability as “a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation and in the general supply of financial services”²³. In the advice, ESMA proposes to link to this concept and focuses on how a potentially critical benchmark could impact and endanger the financial stability in the Member States in which it is used. The proposal put forward by ESMA in the advice additionally attempts to link the use of the benchmark to the “dimension”, in terms of total assets, of the financial sector and of the banking sector in the concerned Member States. These two values (total assets of financial sector and banking sector) are commonly used in the analysis of financial stability, macroprudential issues and financial system structure²⁴, where the banking sector is the most relevant element composing the broader financial sector (which includes also pension funds, insurance undertakings and other financial intermediaries).
128. The draft technical advice in the CP included a criterion dedicated to pension funds, which attracted the attention of some respondents. First of all, it has to be clarified that due to the definition of investment funds, in Article 3(1) point (19) of the BMR, as UCITS and AIF, when the BMR refers to investment funds it has to be inferred that pension funds are not included.
129. The BMR definition of “supervised entity”, in Article 3(1) point (17), includes “an institution for occupational retirement provision as defined in point (a) of Article 6 of Directive 2003/41/EC²⁵”. In this context, it should be noted that Article 29 of the BMR “*Use of a benchmark*” states that supervised entities can only use benchmarks provided by an administrator located in the EU and included in the register or benchmarks included directly in the register (i.e. third country benchmarks).
130. In addition, it has to be clarified that when specifying criteria for the sake of the identification of benchmarks that are critical, even if their reference value falls below the 400bn euro threshold, ESMA valued all possibilities of usage of a benchmark within one or more countries financial system and real economy (such as the use of a benchmarks for accounting purpose or prudential regulation purpose). The value of schemes for occupation

²³ See ECB webpage on financial stability: <https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html>

²⁴ See, for example, ECB report on financial structure: <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf>

²⁵ The text of the Directive 2003/41/EC is available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003L0041>

retirement referencing a benchmark is thus consistent with such logic. Against this background, ESMA is retaining the criterion but amending the wording so as no more refer to pension funds but to institutions for occupational retirement provision: a concept defined in the sectoral discipline, as explained above, and mentioned in Article 3(1) point (17) of the BMR.

131. For the criteria dedicated to consumers, ESMA proposes a first criterion focusing on the relative value of the financial contracts that are credit agreements for consumers (as defined in Directive 2008/48/EC on credit agreements for consumers²⁶) and that reference the benchmark, compared with the total value of all the credit agreements for consumers in the Member States considered. This criterion would measure the exposure of consumers to the particular benchmark via credit agreements that by definition do not include mortgages. The second criterion proposed in this area refers to the financial instruments and investment funds referencing the benchmark that are offered to retail investors, and in particular to the outstanding value of the instruments and funds sold to retail investors, their tenor and an estimate of the number of retail investors who bought them. This criterion would measure the exposure of consumers to the benchmark via financial instruments and investment funds.
132. In relation to the real economy, the advice proposes a criterion that compares the value of financial instruments, financial contracts and investment funds that reference the benchmark with the value of the gross national product of the Member States considered. This is based on the criterion already included in the BMR in the part dealing with the assessment to be conducted by a NCA when establishing a benchmark as critical at “national level” (Article 20(3)). One of the respondent to the CP suggested to delete this criterion, but it should be noted that this criterion is very similar to the one included in Article 20(3)(b) of BMR to be used in the “national” case (see paragraph at the beginning of this section). The only difference between the two is that in the technical advice the criterion includes the concept of “significant share of”, that is not included in the text of the BMR. ESMA therefore does not agree with the opinion expressed by a market participant and it is retaining the criterion (j) in the technical advice.
133. For the “financing of households and businesses” area ESMA has followed a similar logic to the one used in the other areas and proposes to consider the value of financial contracts referencing the benchmark that are loans to households or non-financial corporates in comparison to the total value of loans to households or non-financial corporates in the Member States considered.
134. Finally, in relation to the comments made by a market participant who believes that it is imperative that there is “an ability to appeal to the classification of a benchmark in the case where an administrator believes that the benchmark may have been inadvertently misclassified”, it should be noted that the process of classification of a benchmark as critical as envisaged in the text of the BMR does not provide for a possibility to appeal.

²⁶The text of the Directive is available here:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>



4.4 Technical advice on the criteria referred to in Article 20(1)(c) subparagraph (iii)

1. For the purpose of recognising a benchmark as critical pursuant to Article 20(1)(c), the following non-exhaustive list of criteria should be taken into account, in the assessment of whether the cessation of the provision of that benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, would have significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.
2. These criteria should be considered jointly, with the ultimate aim of developing an assessment that analyses the benchmark in a holistic manner, and they should be calibrated considering the idiosyncratic features of the benchmark and of the economic and financial environment in which the benchmark is used.
3. Not all the criteria will always be relevant for, or applicable to the benchmark under scrutiny. The criteria based on quantitative data should be included in the assessment only when the available data are considered by the Commission and national competent authorities to be reasonably accurate and up-to-date.
4. Where the assessment relates to the impact of the cessation of the provision of the benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data in more than one Member State, it should clearly state which Member States are considered, and all of the criteria included in the assessment should be considered with reference to each of these Member States. If an assessment relates to more than one Member State, the submitting authority can choose to present the impact separately for each Member State, or to present the impact on the group of Member States taken as a whole.

Criteria related to market integrity

- a. The value of financial contracts that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of financial contracts outstanding in the Member State(s) considered.
- b. The value of financial instruments that reference the benchmark, directly or indirectly within a combination of benchmarks, and are traded on trading venues in the Member State(s) considered and whether this is a significant share of the total value of financial instruments traded on trading venues in the Member State(s) considered.

- c. The value of investment funds referencing the benchmark for measuring their performance, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of investment funds authorised or notified for marketing in the Member State(s) considered.
- d. Whether the benchmark has been nominated, in accordance with Article 28(2) of Regulation 2016/1011, as a potential substitute for, or has been already used as a successor to, other benchmarks that are included in the list of critical benchmarks, as provided for by Article 20(1) of Regulation (EU) 2016/1011.
- e. With reference to standards for accounting purposes or other regulatory purposes:
 1. whether the benchmark is used as a reference for prudential regulation such as capital, liquidity or leverage requirements;
 2. whether the benchmark is used in international accounting standards;

Criterion related to financial stability

- f. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of:
 1. the total assets of the financial sector²⁷ in the Member State(s) considered;
 2. the total assets of the banking sector in the Member State(s) considered.

Criteria related to consumers

- g. With reference to financial instruments and investment funds offered to retail investors²⁸:
 1. The value of the financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, sold to retail investors in the Member State(s) considered and whether this is a significant share of the

²⁷ The European Central Bank's monthly "Report on Financial Structures" may provide helpful figures in this respect: <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf>

²⁸ "Retail investor" is defined in Article 4(6) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

total value of financial instruments and investment funds sold to retail investors in the Member State(s) considered;

2. An estimate of the number of retail investors who have bought financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

h. With reference to institutions for occupational retirement provision:

1. The value of the pension schemes referencing the benchmark which are operated by institutions for occupational retirement provision in the Member State(s) considered and whether this is a significant share of the total value of the pension schemes operated by institutions for occupational retirement provision in the Member State(s) considered.
2. An estimate of the number of consumers participating in institutions for occupational retirement provision operating pension schemes referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

i. With reference to credit agreements for consumers²⁹:

1. The value of credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total value of the credit agreements for consumers in the Member State(s) considered.
2. An estimate of the number of consumers that has subscribed credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

Criterion related to the real economy

- j. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) and whether this is a significant share of the gross national product of the Member State(s) considered.

²⁹ The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers) was adopted on 23 April 2008 and defines what credit agreements for consumers are.

Criteria related to the financing of households and businesses

k. With reference to loans:

1. The value of loans to households and non-financial corporates referencing the benchmark in the Member State(s) and whether this is a significant share of the total value of loans to households or non-financial corporates³⁰ in the Member State(s) considered.
2. An estimate of the number of households that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of households in the Member State(s) considered;
3. An estimate of the number of non-financial corporates that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of non-financial corporates in the Member State(s) considered.

³⁰ ECB maintains updated statistics on outstanding loans to households and non-financial corporations in its Statistical Data Warehouse : <https://sdw.ecb.europa.eu/home.do>

5 Technical advice on Article 33 (Endorsement)

Article 33 (7) Benchmarks Regulation (BMR)

“The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions under which the relevant competent authorities may assess whether there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark intends to measure, the need for proximity of the provision of the benchmark to such market or economic reality, the need for proximity of the provision of the benchmark to contributors, the material availability of input data due to different time zones, and specific skills required in the benchmark provision.”

Extract from the Commission’s request for technical advice:

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

5.1 Framework

135. The mandate to the Commission that is included in the text of Art. 33 (7) BMR, as well as the request for technical advice by the Commission to ESMA, ask for measures “to determine the conditions [under/on] which the relevant competent authority may assess whether there is an objective reason.” ESMA interprets the request by the Commission as asking to elaborate on aspects of exactly this material evaluation, i.e. issues to be taken into account by the relevant competent authority when it assesses the reasons for the provision of a benchmark in a third country or an endorsement in the Union that an administrator or other supervised entity has put forward.

136. The assessment by the relevant competent authorities will have to address two different sets of reasons, namely those that stem from the administrator’s sphere (“reason[s] for the provision of a benchmark or family of benchmarks in a third country”) and those that relate to the use of the respective third country benchmarks in the Union (“reason[s] for [...] their endorsement for their use in the Union”). ESMA has taken the view that reasons for both aspects should be required cumulatively.

137. ESMA is requested to look at a non-exhaustive (“such as”) list of issues: geographical proximity, availability of input data and the availability of skills necessary for the provision of the benchmark - which were reflected in the draft technical advice. All these aspects relate to the first set of reasons, i.e. can be aspects of reasons for the provision of the relevant benchmark in a third country. In its empowerment to the Commission Article 33(8) of the BMR requires it to take into account a more detailed non-exhaustive set of “elements”: specificities of the underlying market or economic reality the benchmark seeks to measure, the need for proximity of the benchmark provision with such a market or economic reality, the need for proximity of the benchmark provision to contributors, the material availability of input data due to different time zones as well as specific skills required in the benchmark provision.
138. In addition, the administrator should in its application provide objective reasons for the endorsement or use of the benchmark or family of benchmarks in the Union. For there to be an objective reason for the endorsement of a third country benchmark for its use in the Union, its potential non-admittance for use would have to have some effect on users in the Union.
139. ESMA set out proposals for endorsement in its Discussion Paper (DP) issued in February 2016. The comments provided by respondents to the DP were taken into consideration by ESMA in its draft technical advice and the Consultation Paper published in May 2016 (CP) provided a description of how those comments shaped ESMA’s drafting. In particular, consistent with the majority of respondents, the approach ESMA followed is to take the criteria into account and to provide non-exhaustive examples for indicators of each criterion.
140. The Commission also asked ESMA to take into account existing definitions of “these concepts” in other pieces of European law or international fora and ESMA interpreted this as a request to consider other areas of regulation that contain the notion of “objective reason[s]” as a requirement for the non-application of certain provisions or other forms of relief from regulatory burden. ESMA found examples in the EU legislation on credit rating agencies (CRAs) and of alternative investment fund managers (AIFMs)³¹.
141. In summary, the mentioned references to “objective reason[s]” in the regulatory areas of CRAs and AIFMs are different in nature and capture different scenarios. In the case of credit rating endorsement, the respective regulation requires ratings to be conducted generally within the Union and provides for endorsement as an exception for which objective reasons would be mostly grounded in organisational or corporate specificities of the respective rating agency and would generally be of a provisional nature, i.e. none of these reasons should allow for a permanent endorsement of third country ratings for

³¹ Respectively dictated by Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (“CRAR 2009”) and the Directive 2011/611/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (“AIFMD”) and, specifying these, in the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (“AIFMD COM DR”).

economic reasons (cost savings) alone. In the other relevant area an AIFM can rely on a wider range of “objective reasons” for the delegations of its tasks, including cost savings and efficiency, while depositaries again can only discharge of their liability in exceptional cases, particularly if they have no other choice. So, references to “objective reason[s]” can take on their meaning from the context and circumstances in which they are used.

5.2 Feedback to the CP

142. The CP asked stakeholders about the suggested indicators for objective reasons for endorsement of third-country benchmarks. The responses of the stakeholders to ESMA’s draft technical advice on endorsement included in the CP were generally positive.
143. In particular, several stakeholders welcomed the way in which the draft technical advice provides a non-exhaustive list of criteria. The list would allow NCAs a level of flexibility in reaching its assessments; at the same time, it would provide a basis for a consistent approach. In support of the ability for NCAs to be able to rely on other factors, one respondent gave different examples of ways in which the circumstances in which benchmarks are provided can change over time. Similarly, another respondent considered that competent authorities should be able to take into account the specific characteristics of a benchmark.
144. Nevertheless, a majority of responses considered that the draft technical advice was too restrictive and made proposals about the ways it could be improved.
145. Some respondents expressed the view that the criteria should be viewed as non-cumulative. In other words, satisfaction of one of the listed objective reasons would be sufficient, even if the other reasons listed would not be met. ESMA was encouraged to take that view. One respondent explained that it did not believe it would be realistic to satisfy all of the criteria. Another respondent proposed that meeting one of the proposed criteria should be considered as an objective reason.
146. Many respondents to the CP proposed that an objective reason for endorsement should exist where there was use, whether existing or prospective, of the third country benchmark in the EU. In support, some respondents noted that indices are global and argued that a wide range of benchmarks should be available in the EU. A few respondents argued that, without them, EU market participants may be disadvantaged in terms of choice and competition. Further, a couple of respondents were of the view that non-EU administrators should be encouraged to seek endorsement or the lack of incentives for endorsement was of concern.
147. A number of respondents viewed endorsement, as a route towards providing for benchmark use in the EU, to be especially helpful in the case where the benchmark has a large amount of use outside the EU and its administrator is unlikely to relocate to the EU or to provide its intellectual property to an EU entity. They also noted that other routes for third country benchmarks may not be available.

148. Existing use was proposed as an objective reason by many respondents. It would indicate a demand in the benchmark's use from EU market participants. One participant argued that, without endorsement for a benchmark used in a financial instrument which is attractive to EU investors, those investors may seek to use the benchmark in ways which were not covered by the BMR, e.g., trading in the instrument in a way not covered by the definition of "financial instrument". In that scenario, a purpose of the BMR would not be met in that no protection would be provided to EU investors for those instruments – assuming the instruments would otherwise be available to investors.
149. Many respondents also considered that use of a benchmark in the EU on a prospective basis should be an objective reason. Without a consideration of prospective use, new benchmarks may not be able to be used in the Union. Amongst others, respondents proposed as objective reasons the existing use of a benchmark outside the EU in circumstances where EU market participants may in the future be interested in an instrument which references it, e.g. a globally traded instrument, and a new benchmark, even in circumstances where it does not have any or much existing EU use.
150. Further, some respondents considered the indication in support of an objective reason for the use of a benchmark to the effect that the applicant endorser can demonstrate "there are not substitutes available in the Union". They argued that the language should be deleted, although not necessarily for the same reasons. A couple of respondents suggested it would be overly protective of EU benchmarks. Another respondent argued that many benchmarks would have substitutes, in which case the availability of endorsement would be limited.
151. However, there were a couple of respondents which expressed some caution about the use of endorsement. One respondent considered that endorsement should not create a distortion of competition between EU and non-EU providers in light of potentially less stringent controls outside the EU. Another respondent, although supportive of an expansion of use as a basis of an objective reason, considered that endorsement should be the exception.
152. In addition to comments relating to use in the EU as an objective reason for endorsement, respondents had other proposals for the objective reasons and the indicators set out in the draft technical advice. A few respondents were concerned that the language in the draft technical advice did not deal sufficiently with global indices.
153. In connection with an indication for the objective reason for the provision of a benchmark in a third country, in relation to geographical proximity, one respondent was concerned that the language about "the benchmark may not be provided by an administrator in the Union including for technical reasons" was too restrictive.
154. Also relating to the same objective reason and geographical proximity, a number of respondents considered that a strong indication should include express confirmation that the avoidance of significantly increased costs (in effect, costs which would have been borne by users in circumstances where endorsement is not available and the operation of

the benchmark would need to be moved to an EU entity) should be viewed as analogous to how the draft technical advice already dealt with a cost reduction to users.

155. A couple of respondents were concerned that ESMA in its draft technical advice would be creating a hierarchy of third country options and prioritising recognition over endorsement. Where the draft of the objective reason for the *provision* of the benchmark in the third country relating to geographical proximity, in particular, contained reference to the notion that the indication would be strong if the applicant endorser could demonstrate that the provider of the third country benchmark is not likely to be available in the EU as a result of an application for recognition, one respondent argued that such a hierarchy does not appear to be justified by the Level 1 provisions and cited Recital 44 of the BMR in support of its view. Further, it noted that, in ESMA's discussion paper, paragraph 309, there is a concept of "parallel regimes". Differently, one respondent suggested that the indication in the draft technical advice should include the situation where the other routes to third country benchmark use are legally not possible to the third country administrator.
156. In relation to the discussion in the CP about a reference to the CRA (credit rating agencies) regime, a respondent expressed the view that the endorsement regime needs to consider a much larger and more diverse marketplace than the CRA regime.

5.3 Content of the technical advice

157. On the basis of the feedback received, ESMA is proposing draft technical advice focusing on the approach that competent authorities should follow when assessing whether they should allow endorsement of a third country benchmark.
158. ESMA considers, as set out in the CP and described in paragraph 133 above, that both of the following aspects are needed: reasons for the provision of a benchmark in a third country and reasons for their endorsement for their use in the Union. In addition, ESMA expressly describes the reasons which it has to set out in its draft technical advice as non-exhaustive. Respondents have now requested that ESMA considers them as non-cumulative as well. ESMA remains of the view that the satisfaction of a single factor may not be sufficient to provide an objective reason for endorsement. Nevertheless, it considers that the approach should be flexible, as indicated by CP and the draft technical advice itself. The competent authority should take the criteria, along with the supporting indicators, into account; but not each aspect needs necessarily to be satisfied in each case. The decision of the competent authority may depend on the strength and number of supporting indicating factors.
159. A number of different specific proposals were made by respondents about changes to the technical advice. ESMA notes the conditions for endorsement in the BMR (as described above) should provide protection to market participants in the Union. Further, ESMA would be concerned if protection did not exist in situations arising where market participants considered the technical advice to be overly restrictive. ESMA considers that a few changes should be made to the objective reason relating to EU use as a result of the views of respondents.

160. The main change to the reasons for use of a third country benchmark in the EU which ESMA has made is to encompass new or smaller benchmarks. Using wording in the CP version of the technical advice for existing benchmarks, another objective reason has been added to cover prospective use. Without adding the new objective reason, and relying only on existing use, it is difficult to see how a benchmark which is developed in the future could be used in the EU. The same position would apply to a benchmark, although existing now, becomes attractive to investors in the EU in the future, e.g. if a new instrument is developed which uses it. Further, the description of amount of use involved has, in the technical advice, now been expressed as “used to a material extent”. A level of use above that standard would be sufficient to meet the objective reason requirement for use in the Union.
161. Also, in relation to the objective reasons for use of a third country benchmark in the EU, the stipulation in the indicator of use that there are no substitutes in the Union has been challenged.
162. As regards consideration of the degree of use of a benchmark provided from a third country, it is important to recall some preliminary concepts the BMR introduces. According to Article 51 (Transitional provisions), provided that a third country benchmark is already referenced in financial contracts/instruments and/or investment funds in the EU, a grandfathering clause will cover its use for existing financial contracts/instruments and/or investment funds, with no limitation in time. Therefore, the endorsement mechanism should be viewed as a mechanism to allow the use of third country benchmarks not yet used in the EU territory or to allow the use of benchmarks already referenced in the EU also in new financial contracts/instrument and/or investment funds. The two circumstances are diverse as in the former case there is not any use to be accounted for at the level of the Union, whereas in the latter there is. A differentiation in terms of degree of use of the third-country benchmark seeking for endorsement is not appropriate in all circumstances. As a consequence, ESMA is proposing to distinguish the elements an NCA should take into consideration - when it comes to the evaluation of “reason[s] for [...] their endorsement for their use in the Union” - depending on whether the third country benchmark is already used in the Union or not, i.e. whether there are already existing users or whether there are potential users only.
163. It should be noted that in the evaluation of objective reason for endorsement of a third country benchmark that is not already referenced in financial contracts/instruments and/or investment funds in the Union, the presence of market-led substitutes for such benchmark is a relevant element. The possibility for potential users in the Union to make recourse to a different and available benchmark can be an argument against the endorsement of a third country benchmark. However, ESMA accepts the view that for a third country benchmark which is already referenced in financial contracts/instruments and/or investment funds in the Union the presence of market-led substitutes is not an appropriate element of evaluation of an objective reason for endorsement as this could imply a suggestion to change the reference from one benchmark to another.
164. The wording of one indication in support of geographical proximity has been broadened so that it, in addition to “technical” reasons, now refers expressly also to “legal” in response to a specific comment. ESMA recognises that there could be variety of reasons and

difficulties arising in the location of the third country administrator, e.g. corporate or intellectual property reasons, which may create an objective reason for the provision of benchmark in a third country.

165. ESMA also has made another addition to the wording relating to an indication of geographical proximity. Alongside the existing wording relating to a reduction of costs, it agrees with commenters that the notion of the avoidance of an increase in costs should be added.

166. ESMA has considered the wording of the BMR in connection with the operation of the endorsement framework and the other regimes relating to the use by supervised entities in the Union of benchmarks provided by an administrator located in a third country. As a result, it has deleted from the technical advice the references (express or by implication) to the other methods for the use of third country benchmarks and has not added any such references suggested by commenters.

5.4 Technical advice on Article 33 (Endorsement)

Measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union

When considering an application for endorsement of a third country benchmark or family of benchmarks, the competent authority of the administrator or other supervised entity should take into account the following non-exhaustive list of criteria:

1. Objective reasons for the provision of a benchmark or family of benchmarks in a third country

a. Geographical proximity:

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be the occurrence of one or more of the following circumstances:

(i) the market it is intended to measure is geographically limited to a certain region and the benchmark provider is closely linked to that market;

(ii) where the benchmark is based on contributions, the contributors are all, or in majority, located in the same non-EU region of the provider; or

(iii) the third country provider can access the infrastructure available in the non-EU region exclusively or can maintain systems necessary for administering the benchmark only locally.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark may not be provided by an administrator in the Union including for technical reasons or the third country legal framework or, in exceptional cases, a different time zone; or

(ii) providing the benchmark geographically near the market it is intended to measure leads to reduction of costs, or avoidance of a material increase in costs which would have likely resulted from a transition into the Union of the benchmark provision, and that this is directly and significantly advantageous to end-investors or consumers in the Union.

b. Specific skills required in the benchmark provision

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be that the benchmark relies partly on expertise of individuals/firms located in a third country and this expertise is based on individual experience and/or personal

skills that are associated with employees of the third-country benchmark provider or third country contributors.

The indication is strong if the applicant endorser can demonstrate that:

(i) the relevant personnel within the third-country provider or, more generally, the third-country provider itself is prevented from providing its expertise to an entity in the Union, as a result of the third country legal framework; or

(ii) relying on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to reduction of costs, or avoidance of a material increase in costs which would have likely resulted from a transition into the Union of the benchmark provision, and that this is directly and significantly advantageous to end-investors or consumers in the Union.

c. Legal or other restraints to obtain input data

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be that the benchmark is based on third country input data and the necessary data cannot be submitted to an administrator in the Union to be processed for provision in the EU because of constraints as a result of the third country legal framework.

2. Objective reasons for the use of a third country benchmark or family of third country benchmarks in the Union

a. Effects on benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-endorsement of such benchmark would have adverse consequences in the Union.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark is used to a material extent in the Union; and

(ii) the discontinuation of the use of the third-country benchmark would adversely and materially affect users of the benchmarks in the EU or adversely affect the financial stability or market integrity of the European area in which it is already used, or the consumers, the real economy or the financing of households and businesses in that area.

b. Effects on potential benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-endorsement of such benchmark could in the future adversely and materially affect the financial stability or market integrity of the European area, or the

consumers, the real economy or the financing of households and businesses in that area.

The indication is strong if the applicant endorser can demonstrate that:

- (i) the benchmark is likely to be used to a material extent in the Union; or
- (ii) there are no market-led substitutes available in the Union, for the third country benchmark.

6 Technical advice on Article 51 “Transitional provisions”

Extract from the Commission’s request for technical advice

Article 51(4) provides a safeguard which allows relevant competent authorities to permit the continued use of a benchmark which does not meet the requirements of the Regulation in financial instruments or financial contracts that already reference that benchmark at the date of the entry into application of the Regulation if "ceasing or changing that benchmark to conform with the requirements of [the] Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark".

It is necessary to develop a consistent approach for competent authorities on how to assess when these conditions arise. In the preparation of its technical advice, ESMA should consider, in particular, whether the methodology, the data gathering process or other elements of the benchmark provision could be changed without resulting in a break in the benchmark time series which would make it impossible or inappropriate to continue using that benchmark in the respective financial products, and whether appropriate substitutes exist or are already envisaged in the respective contracts or documentation accompanying financial products linked to the benchmark in question. The technical advice should outline conditions under which such outcome could be ensured.

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

6.1 Framework

167. Article 51(1) of the Benchmark Regulation (BMR) provides for a 42 month period after the date of entry into force of the BMR for existing benchmark providers to apply for authorisation or registration under Article 34: “*Authorisation and registration of an administrator*”, applicable only to administrators located in the EU. European administrators should therefore apply for authorisation or registration before 1 January 2020. It is ESMA understanding that Article 51 of the BMR does not prohibit during this 42 month period (i.e. before 1 January 2020) the use of existing benchmarks produced by such providers.

168. Article 51(4) applies where an existing benchmark does not meet the requirements of the BMR, in which case the use of such benchmark should be permitted by the competent authority of the benchmark administrator only if ceasing or changing that benchmark to conform with the requirements of the BMR “*would result in a force majeure event, frustrate or otherwise breach the terms of any existing financial contract or financial instrument or*

the rules of any investment fund which references that benchmark". It should be noted that in accordance with Article 51(4) no financial instruments or financial contracts, or measurements of the performance of an investment fund shall add a reference to such an existing benchmark after 1 January 2020.

169. It should be noted that benchmarks provided in third countries are covered by Article 51(5) of the BMR. This paragraph states that where the Commission has not adopted equivalence decision and where no recognition nor endorsement has taken place, the use in the EU by supervised entities of an already used benchmark provided by an administrator located in a third country should be permitted only for the financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the Union on 1 January 2020, or which add a reference to such benchmark prior to that date.

6.2 Feedback to the CP

170. The overall feedback of the stakeholders to ESMA's draft technical advice included in the Consultation Paper (CP) was very positive. In particular, the conditions on which the National Competent Authority (NCA) should assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the BMR could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark were deemed as appropriate by the vast majority of respondents.

171. Several stakeholders welcomed that the draft technical advice provides for a non-exhaustive list of conditions. In this way, the draft technical advice leaves NCAs a margin of flexibility so that assessment can be performed with the appropriate level of discretion and an appropriate solution can be found on a case by case basis. At the same time the draft technical advice provides for a base to be used by all NCAs, so that the consistency of application of Article 51(4) of the BMR is ensured.

172. The following is a summary of the comments received by ESMA. ESMA's reactions to these comments are included in the next section of this chapter.

173. Two respondents to the CP proposed an additional criterion dealing with the situation where an administrator of non-EU benchmarks decides not to apply for authorisation and its benchmark becomes non-compliant with the BMR. They argued that in this case the financial instrument referencing the non-compliant benchmark is left with a limited number of alternatives, bearing the risk that none of them will be as representative of the market as the non-compliant benchmark was. For example, a single emerging market fund may not be able to replace a national index provided by the Asian, African or American local stock exchange.

174. Four respondents to the CP were seeking for more legal certainty regarding the criterion on the transitioning of a benchmark to another administrator which results in a substantial change in the benchmark (paragraph 2, 5th bullet point of draft technical advice in the CP:

“whether the transitioning of the benchmark to another administrator would lead to a substantial change in the benchmark”). The respondents argued that the formulation of the criterion might be misleading and can be interpreted in a way that the non-compliant benchmark administrator has to submit its intellectual property rights to another administrator which would de facto result in a “misappropriation”. The respondents proposed to make the wording more explicit by referring to the transitioning of assets referencing the benchmark in question to an adequate substitute provided by another benchmark provider.

175. Several respondents welcomed that the draft technical advice does not provide for a quantitative threshold when assessing whether a non-compliant benchmark may be further used, as it was originally proposed by ESMA in the Discussion Paper (Chapter 14, para. 348), but are of the opinion that also the proposed time limit regarding the use of non-compliant benchmarks should be removed from the technical advice. It has been argued that an indefinite use of non-compliant benchmarks should be allowed until the maturity date of any financial instrument in order to minimize the risk of contract frustration. The main argument is that the BMR does not foresee any time limits for the use of the non-compliant benchmark and time limitations have been rejected during the trilogue (i.e. the preparatory work of the BMR by European Parliament, the Council and the Commission).
176. With respect to the wording used in Recital 63 of the BMR (“*It is therefore necessary to make provision to allow for the continued provision of such benchmarks for a transitional period.*”) out of which ESMA derived its preliminary opinion that a certain time limit has to be respected when exempting non-compliant benchmarks, one stakeholder is of the opinion, that Recital 63 BMR “[...] does not impose a certain time limit; it only states that it is necessary to allow the continued provision of certain benchmarks for a transitional time. Such transitional time must not be necessarily interpreted as a close period of time, as it could refer, for instance, to the time until no financial contract or financial instrument is linked to such benchmark. The stakeholder is of the opinion that this would comply with the BMR while providing legal certainty to such contracts.
177. Finally, one respondent states that the inclusion of a time limit in the technical advice would go beyond the Commission’s request for advice, as it only targets the determination of the conditions for the NCA’s assessment.
178. A broad concern was raised by respondents in relation to ESMA’s interpretation of the term “existing benchmark” used in Article 51(3), (4) and (6) BMR in the draft technical advice. In accordance with paragraph 1 of the draft technical advice, in the CP ESMA considers only such benchmarks in scope of the abovementioned paragraphs which are in existence on the date of entry into force of the BMR. In this context several respondents see a necessity to further clarify the situation where a benchmark is set-up during the period between the entry into force of the BMR (30 June 2016) and the date of application of the BMR (1 January 2018).
179. Stakeholders argue that if none of the transitional provisions of Article 51 BMR is applicable to this category of benchmark, then the administrator of such a benchmark would require being authorised or registered under Article 34 BMR on the very day of

application of the BMR. As long as no authorisation or registration is granted, it appears that the benchmark could no longer be used. Therefore, ESMA was encouraged to reflect further as to whether some or all of the transitional provisions of Article 51 BMR can, consistent with the BMR, be clarified as applicable to a benchmark that is newly created during the period between entry into force and the date of application of BMR. It was noted that the concept of “existing benchmark” used in Articles 51(3) and 51(4) BMR does not coincide with the language of Article 51(1) BMR which relates to an “index provider providing a benchmark on 30 June 2016”. It was further noted that the term “existing benchmark” used in Article 51(3) and 51(4) BMR may be interpreted in a way as laid down in Article 51(5) BMR where reference is made to benchmarks which are already used in the Union.

180. Furthermore, it was stated that ESMA’s interpretation of the term “existing benchmark” as existing on the date of entry into force of the BMR might lead to a competitive disadvantage for EU-based benchmark administrators compared to their non-EU peers as Article 51 (5) BMR refers to benchmarks being “[...] *already used in the Union* [...]” and does not refer to an “existing benchmark”, and therefore ESMA’s interpretation is not applicable in this case.
181. In this context, it was proposed by one stakeholder that the technical advice should clarify, that once an index provider has applied for authorisation or registration, all benchmarks published by such index provider are “existing benchmarks” in the meaning of Article 51(3) and (4) BMR. Otherwise, it risks disrupting financial markets to limit “existing benchmarks” to those already published on 1 January 2018, as no new benchmarks could be created by any index provider until authorisation or registration is granted.
182. Three respondents seek for clarification in the technical advice that Article 51 (3) and (4) BMR applies equally to all benchmarks which are in scope of the BMR, including those provided by third country administrators in order to ensure consistent supervisory treatment of benchmarks produced in the Union or in third countries.
183. Several respondents highlighted the importance of identifying non-compliant benchmarks in order to allow identifying the related financial instruments. Therefore, it was proposed that ESMA should publish a list of non-compliant benchmarks (in accordance with a list of compliant benchmarks), in order to allow identifying non-compliant benchmarks more easily.
184. The problem of how to receive the data, which is crucial for the NCA in order to perform an informed assessment whether a non-compliant benchmark may be further used, in particular with a view to internal contractual information (i.e. term to maturity, existence of fall-back provisions etc.), was also recognised by respondents. As already announced in the CP (Chapter 6.3, paragraph 160), ESMA believes that some guidance could be needed in relation to the practical implementation of the BMR transitional provisions and expressed its intention to use its powers under Regulation (UE) No. 1095/2010 to inform market participants in due time. In this respect one stakeholder states that any guidance that may be provided by ESMA regarding the data gathering process should be subject to prior

consultation, so that market participants and stakeholders may express their opinion on the data gathering process.

6.3 Content of the technical advice

185. On the basis of the feedback received, ESMA is proposing draft technical advice focusing on the approach that NCAs should follow when assessing whether they should allow the use of a non-compliant benchmark pursuant to the transitional provisions, in line with the proposed draft technical advice in the CP.
186. ESMA has deleted paragraph 1 of the draft technical advice of the CP, as it was merely repeating the content of the BMR without adding any material provision and hence the reference to benchmarks “existing on the date into force of the BMR” is no more included in the final version of the technical advice.
187. Market participants should notice that the interpretation of the text of the BMR is ultimately an issue for the European Court of Justice. It is also true that, as rightly commented by some market participants, ESMA would like to clarify its understanding of the term “existing benchmark” in Article 51(4).
188. After the comments received by stakeholder and a second analysis of the BMR text, it is ESMA understanding that, in the context of Article 51(4), “existing benchmark” means financial indices that are referenced in financial contracts/instruments or used to measure the performance of investment funds on 1 January 2018, i.e. the date of the BMR’s application (rather than its earlier entry into force). This view can be supported by the fact that Art 51(4) refers to ‘existing benchmarks’ that ‘do not meet the requirements’ of the BMR. With the exception of the paragraphs specified in Article 59 of the BMR (the majority of which relate to ESMA’s and the Commission’s obligations) the requirements of the BMR will only be effective (i.e. in the sense of being ‘enforceable’) on 1 January 2018. Therefore, as a benchmark will only be able not to meet the BMR’s requirements once those requirements are effective, or apply, it would seem that ‘existing benchmarks’ can only relate to benchmarks that exist at this point in time (on or after 1 January 2018). It could be added, on a slightly simpler basis, that Article 51(4) itself does not apply until 1 January 2018. Therefore, if its provisions can only be effective on or after that date, the words ‘existing benchmark’ must also be understood in this context.
189. Additionally, it appears to be appropriate to interpret the wording “existing benchmark” used in Articles 51(3) and 51(4) BMR in a way that results consistent with the provision of Article 51(5), in order to prevent unequal treatment of benchmarks provided within the Union vis-a-vis benchmarks provided from third-countries. In other words, benchmarks which are newly created after the entry into force of the BMR but before its entry into application should be treated the same, irrespective of whether the provider entity is based in or outside the Union.
190. ESMA reiterates that it is for the European Court of Justice to interpret the meaning of EU legislation and the above is merely the understanding of ESMA.

191. Having clarified that, the content of the draft technical advice is composed by a non-exhaustive list of criteria based on the wording of the request for advice received by the Commission.
192. The first criterion included in the draft technical advice focuses on whether the changes to input data or methodology would materially change the value of the benchmark. If the compliant input data/methodology would lead to a substantially different value of the benchmark, there is a higher risk of breach or frustration of the terms financial contracts or financial instruments referencing to the benchmark. This criterion, in practice, could be applied by comparing the value of the non-compliant benchmark calculated over a specific period of time with the value of the benchmark, with reference to the same period of time, calculated with input data and methodology subject to the changes that make the benchmark compliant with the BMR.
193. Similarly, a second criterion focuses on whether changes of input data or methodology would undermine the index representativeness of the underlying market or economic reality. Changes to the way the benchmark is computed could bring, in some “extreme” cases, to the situation where the benchmark measures a reality that does not fully coincide with the one originally measured by the benchmark. In these hypothesized circumstances, there is a clear risk of impacting all the financial instruments, contracts and investment funds referencing the benchmark.
194. Another important element to be considered by the NCAs is whether there exists a substitute benchmark. This could be done by checking whether the benchmark administrators already included in the ESMA register provide a benchmark that measure the same market or economic reality of the non-compliant benchmark. Also the situation in which the financial contracts, financial instruments and investment funds referencing the non-compliant benchmark already include a reference to a possible substitute benchmark should be taken into account. In cases where a substitute benchmark can be identified, the need for the use of transitional provisions will naturally be lower and would need to be reflected in the determination of a potential transitional period.
195. For the application of these criteria it is possible that NCAs would request the collaboration of the non-compliant benchmark provider for accessing some limited and specific information, that is not available and cannot be accessed otherwise, and that is needed for the finalisation of the NCA’s assessment justifying the use of a non-compliant benchmark under the transitional provisions.
196. With regards to the additional criterion covering the case where a benchmark of a non-EU administrator becomes non-compliant with the BMR due to the decision of the administrator not to apply for recognition, lacking either an equivalence decision by the Commission or the endorsement by a EU-based entity, ESMA rejects the proposal of the market participants as non-EU benchmarks providers are covered by paragraph 5 of Article 51 of the BMR.
197. In relation to the comments received on the last bullet point of paragraph (1) of the technical advice, ESMA would like to clarify that under no circumstances the criterion

proposed should be read as an obligation to pass intellectual property rights from a non-compliant provider of a benchmark to another provider of benchmarks. Therefore, after this clarification, ESMA decided to maintain the wording of the criterion as it was presented in the CP.

198. ESMA believes that NCAs, when applying the conditions included in the technical advice to a non-compliant benchmark, could rely, where necessary and appropriate, on the expertise and arrangements of the benchmark provider. This support by the providers of benchmarks can, under the right circumstances, bring to a more precise application of the criteria and a clearer understanding of the situation of the benchmark by the NCA.
199. Concerning the proposal to specify in the technical advice that all benchmarks of an administrator who applied for authorisation or registration can be considered as “existing benchmarks”, ESMA considers the BMR clear in this respect and prefers to deliver an advice focusing only on the criteria to be used by NCAs when deciding whether a non-compliant benchmark may be further used. The same applies for the suggested clarification that Article 51 (3) and (4) BMR covers the case of benchmarks provided by third country administrators. The BMR seems to be sufficiently clear and comprehensive in this respect, as it sets an unlimited transitional regime allowing the continued use of a third-country benchmark already referenced in the Union on 1 January 2020.
200. The final version of the technical advice does no longer include a reference to the duration of the transitional provisions. This decision follows the comments provided by market participants on the possibility of including a reference to the duration of the transitional provisions in the advice (see previous section of this chapter). After having considered the comments received, ESMA has analysed again the issue and it has finally decided not to include in the final technical advice any reference to the duration of the transitional provisions because the BMR text does not seem to foresee a time-limit to the application of Article 51(4).
201. Finally, ESMA believes that it would be important to provide for the disclosure of the decisions by NCAs to permit the use of non-compliant benchmarks according to the transitional provisions. This would contribute to the legal certainty for supervised entities, which are bound by Article 29 of BMR to choose, when starting to reference a benchmark, only within those provided by administrators authorised or registered or recognised according to the Regulation or those that are endorsed. For this reason, the draft technical advice proposes that the decision adopted by a NCA is published on its website so that supervised entities can rely on the websites of NCAs for this key information when selecting a benchmark for its use in compliance to Article 29 BMR. It is worth noticing that the draft technical advice in the CP was asking NCAs to publish the full assessment, including an indication of the criteria applied. In its final version, the technical advice requests NCAs to publish only their decision (i.e. the outcome of the assessment), and not the full assessment.

6.4 Identification of non-compliant benchmarks and data for the assessment

202. The processes of identification of non-compliant benchmarks and of data-gathering for the development of the assessment by NCAs are not part of the draft advice. However, respondents to the DP asked ESMA for clarification on how in practice the public would be informed of each of the steps electing a non-compliant benchmark for the application of the transitional provisions. In light of these comments, ESMA believes that some guidance could be needed in relation to the practical implementation of the BMR transitional provisions and therefore ESMA stands ready to use its powers under Regulation (EU) No. 1095/2010 to inform market participants in due time.

203. In this context it is worth noting that even if the publication of a list of non-compliant benchmarks (in accordance with the list of compliant benchmarks) would be very helpful for users of the benchmarks to identify non-compliant benchmarks, it remains questionable how the NCA will be able to identify benchmarks being not compliant with the BMR as there might be several benchmarks of which the NCA is even not aware of. Such a list bears the risk of being not complete and might contravene the targeted legal certainty.

6.5 Technical advice on transitional provisions

Conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the Benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark

1. For the purpose of applying Article 51(4) of Regulation (EU) 2016/1011 (Benchmarks Regulation), a competent authority shall base its assessment of whether ceasing or changing a non-compliant benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark on the following non-exhaustive list of conditions, applied on a case-by-case basis:

- In cases where changing a benchmark to conform with obligations of the Benchmarks Regulation would lead to a material change to the input data, to the methodology, to the data gathering process or to other elements of the benchmark provision, the competent authority should consider whether this change would lead to a significantly different value of the benchmark.
- Whether any change in the input data or to the methodology due to the obligations of the Benchmarks Regulation would undermine the benchmark's representativeness of the market or economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark.
- Whether there exists a substitute benchmark for the non-compliant benchmark that measures the same market or economic reality of the non-compliant benchmark and is compliant with the Benchmarks Regulation (i.e. it is included under the Register of administrators and benchmarks envisaged in Article 36 of the Benchmarks Regulation or is provided by an administrator listed therein).
- Whether the existing financial contracts, financial instruments and investment funds (or their accompanying documents) referencing the non-compliant benchmark already include reference to a possible substitute benchmark and, if yes, how such substitute benchmark has to be determined.
- Whether the transitioning of the benchmark to another administrator would lead to a substantial change in the benchmark.

2. The decision of a competent authority of permitting the use of a non-compliant benchmark under the transitional provisions should be published on the website of the competent authority.

7 Annexes

7.1 Annex I – Commission's request for technical advice

Link to the request for technical advice by the Commission:

http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf

08/02/2016

REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON INDICES USED AS BENCHMARKS IN FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS

With this mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts concerning the Regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts (the "**Regulation**")³². These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),³³ the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),³⁴ and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").³⁵

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

The mandate focuses on technical issues which follow from the **Regulation**. The following delegated acts provided for by this Regulation should be adopted so that they enter into

³² The text referred to here is the text of the political agreement reached between the European Parliament and the Council as adopted by COREPER (doc. 14985/15 EF 224 ECOFIN 956 CODEC 1664). It might still be subject to change until finalised by the co-legislators. Should the final text differ in parts relevant to this request the Commission might update its request. <http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf>

³³ Communication of 9.12.2009. COM(2009) 673 final.

³⁴ 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. OJ L331/84, 15.12.2010, p.84.

³⁵ The Framework Agreement on relations between the European Parliament and the European Commission, OJ L304/47, 20.11.2010, p.47.

application by 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3 months):

a) The measures to "*specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index*" (Article 3, paragraph 2, of the Regulation);

b) The measures 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 assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in article 14b(1)(a)*"; (Article 13, paragraph 3, point i, of the Regulation);

c) The measures to "*specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States*" (Article 13, paragraph 3, point iii, of the Regulation);

d) The measures to "*to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union.*" (Article 21b, paragraph 8, of the Regulation);

e) The measures "*to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.*" (Article 39, paragraph 6, of the Regulation).

This request does not cover delegated acts on issues, such as reviews, which do not have to be in place at the date of application of the Regulation. The Commission might request technical advice on these delegated acts at a later stage.

The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

On 20 October 2011, Commission published its proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts. On 25 November 2015 the European Parliament and the Council reached political agreement on a compromise text of the regulation in the trilogue. This compromise text was endorsed by COREPER on 09 December 2015.

The Regulation has as main objectives to:

- improve the governance and controls over the benchmark process;
- improve the quality of the input data and methodologies used by benchmark administrators;
- ensure that contributors to benchmarks provide adequate data and are subject to adequate controls;
- ensure adequate protection for consumers and investors using benchmarks;
- ensure the supervision and viability of critical benchmarks.

Certain elements of the Regulation need to be further specified in delegated acts to be adopted by the Commission: These delegated acts should enter into application by 18 months after the entry into force of the Regulation.

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- **Proportionality:** the technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation. In particular, ESMA should distinguish between the different types and categories of benchmarks and sectors as set out in this Regulation and take into account the vulnerability of the benchmarks to manipulation and any impact of such manipulation, as well as developments in benchmarks and financial markets, including international convergence of supervisory practices in relation to benchmarks.

- **Comprehensive:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.
- **Coherent:** While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.
- **Proactive:** In accordance with the ESMA Regulation, ESMA should not feel confined in its advice to elements that are addressed by the delegated acts but, if appropriate, it may include advice, guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. In addition it may indicate how the delegated act should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.
- **Autonomy in working methods:** ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.
- **Consultation:** In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- **Evidenced and justified:**
 - ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its impact assessment. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.
 - ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.
 - ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the Directive and Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- **Clarity:** The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.

- **Advice, not legislation:** The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.
- **Responsive:** ESMA should address to the Commission any question they might have concerning the clarification on the text of the Regulation, which they should consider of relevance to the preparation of its technical advice.

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act and in particular answers to the questions in section 3 of this mandate.

This mandate is made in accordance with the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Regulation.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission has informed the European Parliament and the Council about this mandate. As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

Definitions: measures to "specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index" (Article 3, paragraph 2, of the Regulation)

Making available to the public

Article 3(1), point 1, defines an index as "any figure (a) that is published or made available to the public; (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys".

This definition is critical since it determines the scope of the Regulation. As stated in recital 8, the scope of the Regulation should be broad to provide a comprehensive preventative framework.

The concept of 'making available to the public' is a concept stemming from the EU acquis on copyright. Although of a different nature and not providing a legal definition of the concept, the discussion in that context may provide useful guidance for the preparation of the technical advice.

Administering the arrangements for determining a benchmark

Article 3(1), point 3, defines one of the elements of provision of a benchmark as "administering the arrangements for determining a benchmark". Given the variety of business models employed for the provision of benchmarks, it would be useful to further clarify what 'administering the arrangements' means in the context of benchmark determination.

Use of a benchmark

Article 3(1), point 5, lists five activities or situations which are considered to represent use of a benchmark under the Regulation. Some of the uses, such as point (a) "issuance of a financial instrument which references an index or a combination of indices", could benefit from further clarification in order to ensure a uniform application of the definition of 'use of a benchmark' across the Union.

ESMA is invited to provide technical advice on how to specify *what constitutes making available to the public for the purposes of the definition of an index*", taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying *what constitutes administering the arrangements for determining a benchmark taking into account different existing business practices*.

ESMA is invited to provide technical advice on specifying *what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark*.

Critical and significant benchmarks: measures 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 assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in Article 14b(1)(a); (Article 13, paragraph 3, point i, of the Regulation)

The concepts of critical and significant benchmarks are defined in Article 3 and further expanded upon in Chapters 3 and 5 respectively.

For critical benchmarks, recital 30 makes clear that the failure of a critical benchmark would have important implications for the Union or individual Member States. Therefore Article 13 and recital 31 indicate that several methods are available to designate such critical benchmarks. In particular, point (a) and point (c) of paragraph 1 of Article 13 refer to two thresholds of EUR 500 billion and EUR 400 billion, respectively, in order to ascertain whether a benchmark is critical.

Similarly, recital 31b explains the rationale for significant benchmarks, and paragraph 1 of Article 14b provides two methods for their designation, one of which relies on a threshold of EUR 50 billion.

In all of these cases, the thresholds refer to the total value of direct use of a benchmark and its indirect use within a combination of benchmarks in financial instruments or financial contracts or in the determination of the performance of investment funds on the basis of all the range of maturities or tenors of the benchmark, where applicable.

Given the large scope of different instruments which can use benchmarks and are therefore to be taken into account in the determination of a benchmark as critical or significant, it is necessary to have a standardised way of determining the value of these financial instruments, financial contracts and investment funds.

The empowerment in paragraph 3 of Article 13 is limited to the specification of how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds can be determined. It does not mention other possible ways in which the total value of financial instruments, contracts and funds using a benchmark could be determined.

It does, however, address the question how indirect reference to a benchmark within a combination of benchmarks could be taken into account. The main issue to be discussed in the technical advice is whether the value of a financial instrument, contract or fund should be taken into account fully or only partially in the calculation of the total value of a benchmark if that financial instrument, contract or fund uses a combination of benchmarks.

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes of assessing benchmarks under the thresholds in Article 13(1) and Article 14b(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

Critical Benchmarks: measures to "specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, or financial stability, or consumers, or the real economy, or the

financing of households and corporations in one or more Member States" (Article 13, paragraph 3, point iii, of the Regulation)

One of the conditions for a benchmark to be deemed a critical benchmark under Article 13, paragraph 1, point (c), is noted in subparagraph (iii): namely that "In case the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or unreliable input data, there would be significant and adverse impacts on market integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member State."

In order to ensure that these criteria can be applied by competent authorities across the Union in a consistent and harmonised manner it is necessary to provide some further specification of how these criteria are to be applied. ESMA is tasked to specify what would be significant and adverse impacts on a number of different economic factors: market integrity, financial stability, consumers, the real economy, and the financing of households and corporations in one or more Member States.

In particular, ESMA should consider whether numerical measures, in absolute or relative terms, could be developed to ensure objective consideration of these criteria. If so, ESMA should provide advice on such numerical measures and how they should be interpreted in the respective economic and financial context. The technical advice should allow competent authorities to base their assessment on objective grounds instead of subjective reasoning which is hard to assess.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

Endorsement of an administrator in a third country: measures to "to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union." (Article 21b, paragraph 8, of the Regulation)

Article 21b provides for a regime of endorsement of third country benchmarks by EU entities. In order to be endorsed, three conditions listed in Article 21b, paragraph 1, have to be met by a third country benchmark. The third condition provides that "there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union". This condition should ensure that the location of the provision of the benchmark to be endorsed is not dictated by factors such as legislation or non-business related factors, i.e. it should ensure that the endorsement regime is not misused to circumvent the direct application of the Regulation in the Union.

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

Transitional provisions: measures "to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark." (Article 39, paragraph 6, of the Regulation)

Article 39(3) provides a safeguard which allows relevant competent authorities to permit the continued use of a benchmark which does not meet the requirements of the Regulation in financial instruments or financial contracts that already reference that benchmark at the date of the entry into application of the Regulation if "*ceasing or changing that benchmark to conform with the requirements of [the] Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark*".

It is necessary to develop a consistent approach for competent authorities on how to assess when these conditions arise. In the preparation of its technical advice, ESMA should consider, in particular, whether the methodology, the data gathering process or other elements of the benchmark provision could be changed without resulting in a break in the benchmark time series which would make it impossible or inappropriate to continue using that benchmark in the respective financial products, and whether appropriate substitutes exist or are already envisaged in the respective contracts or documentation accompanying financial products linked to the benchmark in question. The technical advice should outline conditions under which such outcome could be ensured.

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

This mandate takes into consideration the expected date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation.

The delegated acts provided for by the Regulation and addressed in this mandate should be adopted so that they enter into application 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and the Council to object to a delegated act within 3 months (which can be extended by 3 months). Therefore it is of the utmost importance to start preparatory work on these measures as soon as possible.

The deadline set to ESMA to deliver the technical advice is four (4) months after the entry into force of the Regulation.

The establishment of the deadlines for the work set out in this mandate is based on the following timetable which is based on the assumption that the Regulation will enter into force in May or June 2016.

Deadline	Action
Entry into force of Benchmark Regulation [June 2016, (expected)]	Date of entry into force of the Regulation (day following that of its publication in the Official Journal of the European Union)
4 months after entry into force	ESMA provides its technical advice.
4 th to 7 th month after entry into force	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA
8 th to 12 th month after entry into force	Adoption and translation process of draft delegated acts [The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) on the draft delegated acts. The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.]
13 th to 18 th month after entry into force	Objection period for the European Parliament and the Council (three months which can be extended by another three months)
18 months after entry into force 2017	Date of application of the Benchmark Regulation and delegated acts

7.2 Annex II - Technical advice

Technical advice on some elements of the Definitions in Article 3

Making available to the public

1. A figure shall be deemed to be made available to the public in the meaning of Article 3, paragraph 1, point 1(a), of Regulation (EU) 2016/1011 if the figure is made accessible to a potentially indeterminate number of (legal or natural) persons outside of the provider's legal entity.
2. To be made available to the public as defined in paragraph 1, a figure may be accessed either directly or indirectly (as a result, *inter alia*, of its use by one or more supervised entities as a reference for a financial instrument it issues or to determine the amount payable under a financial instrument or a financial contract, or to measure the performance of an investment fund, or to provide a borrowing rate calculated as a spread or mark-up over such figure), and through a variety of media and modalities, set out by the provider or agreed between the provider and the receiving persons, free or upon payment of a fee, (including, but not limited to, telephone, File Transfer Protocol, internet, open access, news, media, through financial instruments, financial contracts or investment funds referencing the figure or by way of request to the users).

Administering the arrangements for determining a benchmark

The administration of the arrangements for the determination of a benchmark in Article 3, paragraph 1, point 5, letter (a), of Regulation (EU) 2016/1011 means:

- the ongoing management of the provider's structures and of its personnel that are involved in the determination process of a benchmark, and
- the setting, adaptation and ongoing maintenance of a specific methodology for the determination of a benchmark.

Issuance of a financial instrument

The issuance of a financial instrument referred to in Article 3, paragraph 1, point 7, letter (a), of Regulation (EU) 2016/1011 means the creation of transferable securities, money market instruments or units in collective investment undertakings, to be sold to potential investors by way of a public offer or placement or by way of their admission to trading on a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU or multilateral trading facility as defined in point (22) of Article 4(1) of Directive 2014/65/EU and / or of their trading on an organised trading facility as defined in point (23) of Article 4(1) of Directive 2014/65/EU or systematic internaliser as defined in point (20) of Article 4(1) of that Directive.

Technical advice on the measurement of the reference value of a benchmark

1) In order to measure appropriately the reference value of a benchmark (for comparison against the thresholds in Art 20(1) and 24(1)(a) of Regulation (EU) No. 2016/1011 (BMR)), the amounts and values described below should be used:

The amount or value should be expressed in EUR, the official daily spot foreign exchange rate i.e. where available, the daily euro foreign exchange rate published by the European Central Bank on its website should be used for the conversion of any amount or value where necessary.

a) Nominal amount of financial instruments other than derivatives³⁶

For bonds, money market instruments and other forms of securitised debt including structured finance products other than derivatives, the total issued nominal amount in monetary value, as reported under Article 27 of Regulation (EU) No 600/2014 and in accordance with RTS 23 “Draft regulatory technical standards on supply of financial instruments reference data under Article 27 of MiFIR”, Table 3, field 14.

b) Notional amount of derivatives

The Notional amount as reported under Article 9 of Regulation (EU) No 648/2012 of the European Parliament and of the Council and in accordance with Commission Delegated Regulation (EU) No .../.., Table 2, field 20, with the following additional specifications:

- If the notional amount is negative, the absolute value should be taken into account;
- For credit derivative index transactions the notional amount should be applied to the index factor, as derived from Commission Delegated Regulation (EU) No .../.., Table 2, field 89.

The following additional measurement methods should be applied:

- In the case of swaps and forwards traded in monetary units, the reference amount from which contractual payments are determined in derivatives markets;
- In the case of options, Quantity * Price Multiplier * strike price; where Quantity is the number of contracts traded and Price Multiplier is the number of units of the financial instruments which are contained in a trading lot; for example, the number of derivatives represented by the contract. The quantity should be counted single sided.
- In the case of futures, Quantity * Price Multiplier * settlement price; where Quantity is the number of contracts traded and Price Multiplier is the number of units of the financial

³⁶ In line with ESMA TS under MiFID II / MiFIR https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

instruments which are contained in a trading lot; for example, the number of derivatives represented by the contract. The quantity should be counted single sided.

- In the case of financial contracts for difference and derivative contracts relating to commodities designated in units such as barrels or tons, the resulting amount of the quantity at the relevant price set in the contract.
- In the case of derivative contracts where the notional is calculated using the price of the underlying asset and such price is only available at the time of settlement, the end of day price of the underlying asset at the effective date of the contract.

c) Net asset value of investment funds

For investment funds subject to Directive 2009/65/EC, the latest available net asset value per unit, as reported in the most recent annual or half-yearly report in accordance with Article 68(2) and Annex I, Schedule B of the same Directive, times the number of units.

For investment funds subject to Directive 2011/61/EU, the latest available net asset value published in accordance with Article 104(1)(c) of Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

2) Fall-back regime

Whenever any of the data as set out above in paragraphs a), b) and c) is not available to an administrator or a competent authority according to the relevant case or is not sufficient, when assessing the reference value of benchmarks under the thresholds in Article 20(1) and Article 24(1)(a), an administrator or a competent authority may use the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds, or proxies for these values, such as those reported by alternative private providers of information or the open interest data calculated and published by market operators, unless there exists an indication of non-reputability or non-reliability of the provider or operator. An administrator shall perform the measurement to the best of its ability, based on the available data, and shall provide a written specification of the data sources used to its relevant competent authority.

3) The indirect reference to a benchmark within a combination of benchmarks

For the purpose of assessing the reference value of a benchmark under the thresholds in Article 20(1) and Article 24(1)(a), where an investment fund, a derivative or a financial instrument other than a derivative makes indirect reference to that benchmark within a combination of benchmarks the following measures, expressed in EUR, should be taken into account:

- When the weighting of the benchmark, within the combination of benchmarks, is available or can be approximated on the basis of other available information, the portion

of the nominal amount of the financial instrument other than derivatives, notional amount of the derivative and net asset value of the investment fund indirectly referencing such benchmark;

- When the weighting of the benchmark, within the combination of benchmarks, is not available or cannot be approximated, the portions of the total nominal amount of the financial instruments other than derivatives, of the total notional amount of the derivatives and of the total net asset value of the investment funds indirectly referencing such benchmark, assuming an equally weighted combination of benchmarks.

Technical advice on the criteria referred to in Article 20(1)(c) subparagraph (iii)

1. For the purpose of recognising a benchmark as critical pursuant to Article 20(1)(c), the following non-exhaustive list of criteria should be taken into account, in the assessment of whether the cessation of the provision of that benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, would have significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.
2. These criteria should be considered jointly, with the ultimate aim of developing an assessment that analyses the benchmark in a holistic manner, and they should be calibrated considering the idiosyncratic features of the benchmark and of the economic and financial environment in which the benchmark is used.
3. Not all the criteria will always be relevant for, or applicable to the benchmark under scrutiny. The criteria based on quantitative data should be included in the assessment only when the available data are considered by the Commission and national competent authorities to be reasonably accurate and up-to-date.
4. Where the assessment relates to the impact of the cessation of the provision of the benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data in more than one Member State, it should clearly state which Member States are considered, and all of the criteria included in the assessment should be considered with reference to each of these Member States. If an assessment relates to more than one Member State, the submitting authority can choose to present the impact separately for each Member State, or to present the impact on the group of Member States taken as a whole.

Criteria related to market integrity

- a. The value of financial contracts that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of financial contracts outstanding in the Member State(s) considered.
- b. The value of financial instruments that reference the benchmark, directly or indirectly within a combination of benchmarks, and are traded on trading venues in the Member State(s) considered and whether this is a significant share of the total value of financial instruments traded on trading venues in the Member State(s) considered.
- c. The value of investment funds referencing the benchmark for measuring their performance, directly or indirectly within a combination of benchmarks, in the

Member State(s) considered and whether this is a significant share of the total value of investment funds authorised or notified for marketing in the Member State(s) considered.

- d. Whether the benchmark has been nominated, in accordance with Article 28(2) of Regulation 2016/1011, as a potential substitute for, or has been already used as a successor to, other benchmarks that are included in the list of critical benchmarks, as provided for by Article 20(1) of Regulation (EU) 2016/1011.
- e. With reference to standards for accounting purposes or other regulatory purposes:
 1. whether the benchmark is used as a reference for prudential regulation such as capital, liquidity or leverage requirements;
 2. whether the benchmark is used in international accounting standards;

Criterion related to financial stability

- f. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of:
 1. the total assets of the financial sector³⁷ in the Member State(s) considered;
 2. the total assets of the banking sector in the Member State(s) considered.

Criteria related to consumers

- g. With reference to financial instruments and investment funds offered to retail investors³⁸:
 1. The value of the financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, sold to retail investors in the Member State(s) considered and whether this is a significant share of the

³⁷ The European Central Bank's monthly "Report on Financial Structures" may provide helpful figures in this respect: <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf>

³⁸ "Retail investor" is defined in Article 4(6) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

total value of financial instruments and investment funds sold to retail investors in the Member State(s) considered;

2. An estimate of the number of retail investors who have bought financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

h. With reference to institutions for occupational retirement provision:

1. The value of the pension schemes referencing the benchmark which are operated by institutions for occupational retirement provision in the Member State(s) considered and whether this is a significant share of the total value of the pension schemes operated by institutions for occupational retirement provision in the Member State(s) considered.
2. An estimate of the number of consumers participating in institutions for occupational retirement provision operating pension schemes referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

i. With reference to credit agreements for consumers³⁹:

1. The value of credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total value of the credit agreements for consumers in the Member State(s) considered.
2. An estimate of the number of consumers that has subscribed credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

Criterion related to the real economy

- j. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) and whether this is a significant share of the gross national product of the Member State(s) considered.

³⁹ The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers) was adopted on 23 April 2008 and defines what credit agreements for consumers are.

Criteria related to the financing of households and businesses

k. With reference to loans:

1. The value of loans to households and non-financial corporates referencing the benchmark in the Member State(s) and whether this is a significant share of the total value of loans to households or non-financial corporates⁴⁰ in the Member State(s) considered.
2. An estimate of the number of households that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of households in the Member State(s) considered;
3. An estimate of the number of non-financial corporates that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of non-financial corporates in the Member State(s) considered.

⁴⁰ ECB maintains updated statistics on outstanding loans to households and non-financial corporations in its Statistical Data Warehouse : <https://sdw.ecb.europa.eu/home.do>

Technical advice on Article 33 (Endorsement)

Measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union

When considering an application for endorsement of a third country benchmark or family of benchmarks, the competent authority of the administrator or other supervised entity should take into account the following non-exhaustive list of criteria:

1. Objective reasons for the provision of a benchmark or family of benchmarks in a third country

a. Geographical proximity:

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be the occurrence of one or more of the following circumstances:

(i) the market it is intended to measure is geographically limited to a certain region and the benchmark provider is closely linked to that market;

(ii) where the benchmark is based on contributions, the contributors are all, or in majority, located in the same non-EU region of the provider; or

(iii) the third country provider can access the infrastructure available in the non-EU region exclusively or can maintain systems necessary for administering the benchmark only locally.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark may not be provided by an administrator in the Union including for technical reasons or the third country legal framework or, in exceptional cases, a different time zone; or

(ii) providing the benchmark geographically near the market it is intended to measure leads to reduction of costs, or avoidance of a material increase in costs which would have likely resulted from a transition into the Union of the benchmark provision, and that this is directly and significantly advantageous to end-investors or consumers in the Union.

b. Specific skills required in the benchmark provision

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be that the benchmark relies partly on expertise of individuals/firms located in a third country and this expertise is based on individual experience and/or personal skills that are associated with employees of the third-country benchmark provider or third country contributors.

The indication is strong if the applicant endorser can demonstrate that:

(i) the relevant personnel within the third-country provider or, more generally, the third-country provider itself is prevented from providing its expertise to an entity in the Union, as a result of the third country legal framework; or

(ii) relying on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to reduction of costs, or avoidance of a material increase in costs which would have likely resulted from a transition into the Union of the benchmark provision, and that this is directly and significantly advantageous to end-investors or consumers in the Union.

c. Legal or other restraints to obtain input data

An indicator for an objective reason for the provision of the benchmark in a non-EU region can be that the benchmark is based on third country input data and the necessary data cannot be submitted to an administrator in the Union to be processed for provision in the EU because of constraints as a result of the third country legal framework.

2. Objective reasons for the use of a third country benchmark or family of third country benchmarks in the Union

a. Effects on benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-endorsement of such benchmark would have adverse consequences in the Union.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark is used to a material extent in the Union; and

(ii) the discontinuation of the use of the third-country benchmark would adversely and materially affect users of the benchmarks in the EU or adversely affect the financial stability or market integrity of the European area in which it is already used, or the consumers, the real economy or the financing of households and businesses in that area.

b. Effects on potential benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-endorsement of such benchmark could in the future adversely and materially affect the financial stability or market integrity of the European area, or the consumers, the real economy or the financing of households and businesses in that area.

The indication is strong if the applicant endorser can demonstrate that:

- (i) the benchmark is likely to be used to a material extent in the Union; or
- (ii) there are no market-led substitutes available in the Union, for the third country benchmark.

Technical advice on transitional provisions

Conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the Benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark

1. For the purpose of applying Article 51(4) of Regulation (EU) 2016/1011 (Benchmarks Regulation), a competent authority shall base its assessment of whether ceasing or changing a non-compliant benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark on the following non-exhaustive list of conditions, applied on a case-by-case basis:

- In cases where changing a benchmark to conform with obligations of the Benchmarks Regulation would lead to a material change to the input data, to the methodology, to the data gathering process or to other elements of the benchmark provision, the competent authority should consider whether this change would lead to a significantly different value of the benchmark.
- Whether any change in the input data or to the methodology due to the obligations of the Benchmarks Regulation would undermine the benchmark's representativeness of the market or economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark.
- Whether there exists a substitute benchmark for the non-compliant benchmark that measures the same market or economic reality of the non-compliant benchmark and is compliant with the Benchmarks Regulation (i.e. it is included under the Register of administrators and benchmarks envisaged in Article 36 of the Benchmarks Regulation or is provided by an administrator listed therein).
- Whether the existing financial contracts, financial instruments and investment funds (or their accompanying documents) referencing the non-compliant benchmark already include reference to a possible substitute benchmark and, if yes, how such substitute benchmark has to be determined.
- Whether the transitioning of the benchmark to another administrator would lead to a substantial change in the benchmark.

2. The decision of a competent authority of permitting the use of a non-compliant benchmark under the transitional provisions should be published on the website of the competent authority.