



European Securities and
Markets Authority

Final Report

**Draft regulatory technical standards on cooperation arrangements with
third countries 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, or: BMR) in September 2013 in the wake of the manipulation of various benchmarks.

The Benchmarks Regulation² was published in the Official Journal of the European Union on the 29 June 2016, entered into force the following day, and will be fully applicable as of 1 January 2018.

The Benchmarks Regulation requests ESMA to develop a number of draft regulatory and implementing technical standards to be submitted to the Commission by 1 April 2017. ESMA published its Final Report on 11 draft technical standards under the BMR on 30 March 2017. As indicated in the Final Report published on 30 March, one set of draft technical standards was missing. This Final Report includes draft technical standards on the minimum content of cooperation arrangements with third country authorities, which was not included in the 30 March submission to the Commission. It, therefore, concludes ESMA's work with respect to ESMA's draft technical standards under the BMR.

Contents

The draft regulatory technical standards proposed in this Final Report set out minimum content for cooperation arrangements with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent according to Article 30(4) of the BMR.

Next Steps

ESMA has submitted the draft technical standards to the European Commission. The Commission has three months to decide whether to endorse the technical standards.

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 Benchmarks Regulation published in the EU Official Journal:

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

2 Minimum contents of cooperation arrangements with third country authorities

2.1 Mandate

Article 30

4. ESMA shall establish cooperation arrangements with the competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent in accordance with paragraph 2 or 3. Such arrangements shall specify at least:

(a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all relevant information regarding the administrator authorised in that third country that is requested by ESMA;

(b) the mechanism for prompt notification to ESMA where a third country competent authority deems that the administrator authorised in that third country that it is supervising is in breach of the conditions of its authorisation or other national legislation in the third country;

(c) the procedures concerning the coordination of supervisory activities, including on-site inspections.

5. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 4 so as to ensure that the competent authorities and ESMA are able to exercise all their supervisory powers under this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

2.2 Background

1. A benchmark from a third country whose legal framework and supervisory practices has been recognised as equivalent by the European Commission may be used in the Union if the relevant benchmark and its administrator are included in the register referred to in Article 36 BMR. One of the conditions to be included in the register is that cooperation arrangements between ESMA and the competent authority of the third country are operational.

2. Article 30(4) BMR already includes three areas that such cooperation arrangements should cover, i.e. the mechanism for the exchange of information between ESMA and the third country competent authority, the mechanism for prompt notification to ESMA where a third country competent authority deems that a benchmark administrator under its supervision is in breach of the condition of its authorisation or other national legislation in the third country, and procedures concerning the coordination of supervisory activities, including on-site-inspections.
3. The BMR mandates ESMA to develop draft regulatory technical standards (RTS) that determine minimum content of the cooperation arrangements that should allow the competent authority and ESMA to exercise their supervisory powers under the BMR.
4. Furthermore, according to point (a) of Article 32(5) BMR, where a third country administrator applies for recognition and is subject to supervision, the competent authority in the Member State of reference may only grant such recognition if an appropriate cooperation arrangement is in place between the competent authority of the Member State of reference and the competent authority of the third country where the administrator is located. Pursuant to Article 32(5) BMR, such cooperation arrangement has to comply with the RTS that the Commission will adopt after the draft RTS proposed in this Final Report have been submitted.
5. Before publishing this Final Report, ESMA asked the opinion of the Securities Markets Stakeholder Group (SMSG) on the draft standards. No opinion was provided by the SMSG. Also, it should be noted that ESMA did not conduct an open public consultation on these draft technical standards, nor did it analyse potential related costs and benefits, as this would have been disproportionate in relation to scope and impact of the draft standards. Indeed, the addressees of the draft technical standards would only be public authorities and not market participants.

2.3 Content of the draft RTS

6. The draft RTS require that the cooperation arrangements at least cover the cooperation on all issues relevant for the activities of benchmark administrators including the relevant laws and regulations and changes thereto. National competent authorities, and ESMA where applicable, will have the best knowledge about the applicable legislation and the general environment of benchmarks provision in their own jurisdictions and it is important that the signatories to the cooperation arrangements inform each other about relevant developments. Furthermore, the draft RTS propose that the signatories cooperate and inform each other about regulatory and supervisory actions in relation to benchmark administrators that provide benchmarks in the Union.
7. To set an adequately convergent standard for the exchange of information, the draft RTS require the cooperation arrangements to at least set forth procedures for the request for information and their minimum content, including a description of the subject matter and purpose of the request and the applicable laws and regulations that cover benchmarks activity.

8. The cooperation arrangements should also specify the means of notification to the other signatory, including for the cases in which a competent authority has concluded that an administrator in its jurisdiction is in breach of applicable laws. In ESMA's view, this type of notification will be particularly relevant when ESMA has to assess if a third country administrator has seriously infringed national legislation in the third country according to point (b) of Article 31(1) BMR.
9. ESMA also suggests that under the cooperation arrangement, it informs the competent authority in the third country about the notification it receives from benchmark administrators in the relevant third country of their consent that supervised entities in the Union may use one or more actual or prospective benchmarks they provide. ESMA will establish technical means for competent authorities in the EU to transmit data on benchmarks and administrators and the draft RTS provide that the cooperation arrangements should include that ESMA and the competent authority in the third country define technical means to use the same transmission mechanism.
10. ESMA, and in the case of recognition the competent authority in the Member State of reference, do not directly supervise benchmark administrators in the relevant third country, and therefore have to rely on cooperation with the local competent authority. According to ESMA's draft RTS, the cooperation arrangements should specify a framework for such coordination and that such framework should provide that joint supervisory activities should be based on a written request setting out the background and estimated timing. Furthermore, ESMA suggests minimum terms for the coordination of on-site inspections in the third country.
11. The draft RTS also establish that the cooperation arrangements should at least include a confidentiality regime that requires non-public information to be treated confidentially and that any information obtained under the cooperation arrangements should only be eligible for the purpose it was requested for, unless consented to otherwise by the other signatory.
12. The cooperation between ESMA, and where applicable the competent authority in the Member State of reference, and the competent authority in the third country may include personal data, e.g. on natural persons that act as benchmark administrators or the administrator's employees or members of its organisational bodies, and the draft RTS set forth that the cooperation arrangements should contain provisions that ensure the necessary and adequate level of data protection.

3 Annex: Draft Technical Standards

COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards determining the minimum content of cooperation arrangements between the European Securities and Markets Authority and competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014³, and in particular Article 30 (5) thereof,

Whereas:

- (1) The cooperation arrangements referred to in Article 30(4) of Regulation (EU) 2016/1011 (“the cooperation arrangements”) should allow the European Securities and Markets Authority (“ESMA”) and third country competent authorities from jurisdictions for which an equivalence decision has been adopted to exchange all information relevant to the fulfilment of their respective supervisory tasks. The European Commission may adopt multiple equivalence decisions and benchmarks from the relevant jurisdictions may be eligible for use by supervised entities in the Union if the conditions of Article 30(1) of Regulation (EU) 2016/1011 are met. It is important that the cooperation arrangements contain the same minimum requirements regarding the forms and procedures for the exchange of information, including confidentiality provisions and terms governing the permissible uses of information obtained under the cooperation arrangements.
- (2) Competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent will have the adequate knowledge of all events and changes of circumstances relevant for benchmark administrators in their jurisdiction. When supervised entities use benchmarks from these jurisdictions in the Union, it is appropriate that the competent authority in the third country informs ESMA about any such event or change and this Regulation therefore requires that the

³ OJ L 171, 29.06.2016, p. 1.

cooperation arrangements include provisions governing the relevant notifications to ESMA.

- (3) To ensure that a third country competent authority is informed about the activities of the benchmark administrators it is supervising it is appropriate that ESMA informs third country competent authorities of relevant notifications ESMA receives from third country administrators of their consent to their benchmarks being used by supervised entities in the Union. ESMA has established a mechanism for competent authorities to provide ESMA with the information necessary to establish and maintain the register according to Article 36 of Regulation (EU) 2016/1011. It would be useful for third country competent authorities to have access to this mechanism. This Regulation provides that ESMA and third country authorities define technical means that allow such access.
- (4) ESMA has, with the exception of its obligation to withdraw the registration of an administrator from its register according to Article 31 of the Regulation (EU) 2016/1011, no direct supervisory powers regarding third country benchmark administrators and relies on the supervision by, and cooperation with, third country competent authorities. The cooperation arrangements should therefore include provisions adequately addressing supervisory cooperation, including on-site inspections, and setting out the roles of the signatories.
- (5) According to Article 32(5)(a) of Regulation (EU) 2016/1011, the cooperation arrangements between competent authorities of third countries and competent authorities of Member States of reference shall have the same minimum content as the cooperation arrangements which are the subject matter of this Regulation. The minimum contents of cooperation arrangements established in this Regulation should therefore apply to such arrangements analogously.
- (6) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (7) ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor has it analysed potential related costs and benefits of introducing the minimum content of cooperation arrangements, as this would have been disproportionate in relation to their scope and impact, taking into account that the addressees of the regulatory technical standards would only be the third country competent authorities, competent authorities of Member States and ESMA, and not market participants.
- (8) ESMA has requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁴,

⁴ 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 L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Scope and general provision

The cooperation arrangements shall clearly set out their scope of application, including at least the cooperation of the signatories on:

- (a) the exchange of information and notifications pursuant to Regulation (EU) 2016/1011;
- (b) issues relevant to the operations, activities and services of benchmark administrators in the signatories' jurisdictions, information on the laws and regulations to which benchmark administrators are subject and any material changes thereto;
- (c) regulatory or supervisory actions or approvals taken by the competent authority of the third country in relation to a benchmark administrator that provides benchmarks in the Union, including changes to the relevant obligations and requirements to which the benchmark administrator is subject that may have an impact on the benchmark administrator's continued compliance with the applicable laws and regulations;

and shall contain at least provisions in accordance with Articles 2 to 4.

Article 2

Exchange of information and notifications

1. The cooperation arrangements shall provide that the exchange of information pursuant to Regulation (EU) 2016/1011 shall occur in writing using requests for information that specify at least the information sought by the authority requesting it, a concise description of the subject matter of the request, the purpose for which the information is sought and the relevant laws and regulations applicable to benchmarks activity.
2. The cooperation arrangements shall specify the means of any notification pursuant to Regulation (EU) 2016/1011 of one signatory to the other. Where a third country competent authority deems that an administrator authorised in its country is in breach of the conditions of its authorisation or other national legislation, the co-operation arrangements shall specify that a notification of its assessment shall occur within a reasonable time frame.
3. Where ESMA receives notifications according to point (c) of Article 30(1) of Regulation (EU) 2016/1011, the cooperation arrangements shall specify that ESMA provide a third country competent authority with any notification it receives from an administrator supervised in the third country that its actual or prospective benchmarks may be used by supervised entities in the Union, together with the list of benchmarks for which it has given consent. The co-operation arrangements shall provide that the signatories define technical means for a third country competent authority to transmit to ESMA a consolidated list of all benchmark administrators in the third country that have given consent for some or all of their benchmarks to be used in the Union and of those benchmarks to the use of which they have given consent.

4. The cooperation arrangements shall specify the secure method by which the exchange of information according to paragraph 1, the notifications according to paragraph 2, and the transmission of information according to paragraph 3 are to be undertaken.

Article 3

Supervisory cooperation

1. The cooperation arrangements shall specify a framework for the coordination of supervisory activities of the signatories in the area of benchmarks supervision, including at least a requirement that a signatory makes an initial written request in relation to undertaking such an activity, which sets out the factual and legal background and an estimated timeframe for the activity, and a requirement that the other signatory acknowledges receipt of the request in writing within ten working days.
2. For the coordination of on-site inspections in the third country competent authority's jurisdiction, the cooperation arrangements shall set out a procedure for the signatories to reach an understanding on the terms governing such on-site inspections, including at least terms stating their respective roles and responsibilities, the right of the third country competent authority to accompany any on-site inspection and any duty to assist in reviewing, interpreting and analysing the contents of public and non-public books and records and in obtaining information from directors and senior management of a benchmark administrator in the respective third country jurisdiction.

Article 4

Confidentiality, permissible uses of information and data protection

1. The cooperation arrangements shall require that the signatories keep non-public information exchanged under the cooperation arrangements confidential, except where a legally enforceable demand requires its disclosure.
2. The cooperation arrangements shall specify that non-public information obtained thereunder shall be securely stored and used solely for the purpose set out by the authority that requested it, unless that authority has obtained prior written consent from the authority that provided the information to another use.
3. Where the cooperation arrangements allow for personal data to be exchanged, they shall contain provisions to ensure adequate means for the protection of such data that is in compliance with all applicable data protection legislation in the respective jurisdictions.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[...]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[...]
[Position]