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Additional Information

Level 1 Regulation

Benchmarks Regulation (BMR) - Regulation 2016/1011

Topic

Benchmarks Regulation

Subject Matter

Use of benchmarks in certificates (ESMA70-145-114 Q&A_5.9)

Question

When are banks issuing certificates “users of benchmarks”?

ESMA Answer

26-09-2018

Original language

Many banks issue certificates where the underlying is a portfolio composed of different components. The value of the portfolio is regularly determined and may also be regularly published pursuant to the Prospectus Regulation (See item 4.2.2 of Annex XII of Commission Regulation (EC) No 809/2004 states: “*A statement setting out the type of the underlying and div of where information on the underlying can be obtained: (...) an indication where information about the past and the further performance of the underlying and its volatility can be obtained*”). The terms index, basket, reference portfolio, reference index, benchmark and variations of these terms are used by market participants in a manner that does not reflect the BMR terminology.

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

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