

Submission Date

31/03/2023

ESMA_QA_753

Status: Answer Published

Additional Information

Level 1 Regulation

Benchmarks Regulation (BMR) - Regulation 2016/1011

Topic

Benchmarks Regulation

Subject Matter

The legal representative under Article 32(3) of BMR (ESMA70-145-114_Q&A 7.7)

Question

What should be the role and responsibilities of a legal representative under Article 32(3) of BMR and what entities may be suitable candidates to perform such role?

31-03-2023

Original language

Pursuant to Article 32(3) of the BMR, the legal representative shall be a natural or legal person located in the Union.

It is to be noticed that Article 32(3) of the BMR does not include any further indication regarding the organisational structure of such legal representative, noticeably when this is a legal person. In light of the duties to be performed by it (see below) but taking also into consideration the principle of proportionality, ESMA believes that the legal representative should have an organisational structure that is adequate in respect of (i) the functions it has to perform, (ii) the characteristics and the dimension of the administrator it represents and (iii) the number and significance of the benchmarks that the administrator provides and that are allowed for use in the Union.

Main functions and responsibilities of a legal representative

Article 32(3) of the BMR states that the legal representative should perform the oversight function relating to the provision of benchmarks performed by the administrator under the BMR together with the administrator. It is recalled that the oversight function must “[...] constitute a part of the organisational structure of the administrator, or of the parent company to which it belongs [...]” pursuant to Article 2(1) of Commission Delegated Regulation (EU) 2018/1637.

ESMA considers that in order to be able to perform the oversight function together with the administrator for the benchmarks used or allowed for use in the Union, the legal representative should at least be a member of the oversight function.

In addition, pursuant to Article 1(3) of Commission Delegated Regulation (EU) 2018/1637, the legal representative should, together with the other members of the oversight function, have appropriate knowledge of the underlying market or economic reality that the benchmark seeks to measure and have the skills and expertise appropriate to the oversight of the

provision of a particular benchmark. ESMA further considers that pursuant to Article 32(3) of the BMR and in order to be able to perform the oversight function together with the administrator, representatives of the legal representative and the administrator should have the power to determine jointly the decision making of the oversight function.

Accordingly, ESMA considers that the legal representative should ensure that the oversight function relating to the provision of benchmarks complies with the requirements in Article 5 of the BMR and Commission Delegated Regulation (EU) 2018/1637.

According to Article 2(2) of Commission Delegated Regulation (EU) 2018/1637, the oversight function shall assess, and where appropriate challenge, the decisions of the management body of the administrator with regard to the provision of benchmarks to ensure the fulfilment of the requirements of the BMR. Therefore, the legal representative should be able to ask and obtain from the administrator all the necessary information in this respect. ESMA considers that a possible way to achieve that is for the legal representative to have agreements in place with the administrator.

Further, according to Article 5(3)(i) of the BMR, the oversight function must report to the relevant competent authorities any misconduct by administrators, of which the oversight function becomes aware. The legal representative should hence be able to inform ESMA in the event that it finds that the third country administrator does not comply with the relevant legal requirements.

Main functions and responsibilities of a legal representative

ESMA acknowledges that the BMR does not include any specific requirement regarding the types of entities that may act as a legal representative when a legal person is appointed to perform this role. However, the above listed functions and responsibilities are the key elements the administrator should consider in the selection and appointment of its legal representative in the Union.

For the legal representative to effectively perform its functions and responsibilities, and notably to perform the oversight function together with the administrator, a suitable candidate to be considered would be an entity that is part of the administrator's group and, where available, that is either a benchmark administrator or another supervised entity located in the Union.