

**Memorandum of Understanding concerning the  
recognition of UK benchmark administrators in the EU**



**European Securities and Markets Authority**



**UK FCA**

## **Memorandum of Understanding between ESMA and the UK FCA establishing a cooperation arrangement under Article 32(5) of Regulation (EU) 2016/1011 of the European Parliament and of the Council**

In order for ESMA to grant recognition to UK benchmark administrators which are subject to supervision in the UK it is necessary that an appropriate cooperation arrangement be put in place between ESMA and the UK FCA and that the additional conditions for recognition set out in point (b) of the third subparagraph of Article 32(5) of Regulation (EU) 2016/1011 of the European Parliament and of the Council<sup>1</sup> ('BMR') are met. The minimum content of the cooperation arrangement is specified in Commission Delegated Regulation (EU) 2018/1644<sup>2</sup>.

To satisfy the above-mentioned requirements, ESMA and the UK FCA have therefore reached agreement on this Memorandum of Understanding ("MoU"), the purpose of which is two-fold, namely to:

- 1) establish a cooperation arrangement between ESMA and the UK FCA for an efficient exchange of information, thereby ensuring the fulfilment of the condition set out in point (a) of the third subparagraph in Article 32(5) of BMR; and
- 2) confirm that, as of the date upon which this MoU takes effect, (i) the effective exercise of ESMA's supervisory functions under the BMR is not prevented by the UK Laws and Regulations or UK administrative provisions; and (ii) there are no limitations with respect to the FCA's ability to exercise the supervisory or investigatory powers awarded to it under the UK BMR in respect of Covered Administrators, thereby ensuring the fulfilment of the condition set out in point (b) of the third subparagraph in Article 32(5) of BMR.

This MoU is an arrangement between ESMA and the UK FCA and not a collective arrangement with other European Union ('EU') authorities. As such, it will not affect any arrangements which may be agreed directly between other EU authorities and the UK FCA.

### **Article 1**

#### **Definitions**

For the purposes of this MoU:

- a) "Authority" means a signatory to this MoU or any successor thereto;

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<sup>1</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ, L 171, 29.6.2016, p. 1).

<sup>2</sup> Commission Delegated Regulation (EU) 2018/1644 of 13 July 2018 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 with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent (OJ L 274, 5.11.2018, p.33).

- b) “Covered Administrator” means a UK benchmark administrator applying for recognition in the EU under Article 32 of BMR or a UK benchmark administrator that has already been recognised by ESMA in the EU under the same Article of BMR.
- c) “Covered Benchmark” means any benchmark which a Covered Administrator provides or intends to provide in the EU;
- d) “Books and Records” means documents, electronic media, books and records within the possession, custody and control of, and other information about a Covered Administrator in respect of its provision of a Covered Benchmark;
- e) “Emergency Situation” means the occurrence of an event that could materially impair the financial or operational condition of a Covered Administrator, or an event of cessation of publication or material change of a Covered Benchmark;
- f) “Laws and Regulations” means, in relation to ESMA, applicable EU legislation within ESMA’s scope of action as set out in Article 1(2) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>3</sup> and, in relation to the UK FCA, any applicable laws and regulations in force in the UK, including the UK BMR.
- g) “UK BMR” means the UK version of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, which is part of UK law by virtue of the European Union (Withdrawal) Act 2018.
- h) “On-site Inspection” means any regulatory visit by ESMA to the premises of a Covered Administrator, including inspection of Books and Records in connection with the Covered Administrator’s provision of a Covered Benchmark;
- i) “Person” includes a natural person, unincorporated association, partnership, trust investment company or corporation and a Covered Administrator;
- j) “Requested Authority” means the Authority to whom a request is made under this MoU; and
- k) “Requesting Authority” means the Authority making a request under this MoU.

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<sup>3</sup> 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)

## Article 2

### General provisions

1. This MoU is a statement of intent to consult, cooperate and exchange information in connection with ESMA's prompt access on an on-going basis to all information requested by ESMA regarding a Covered Administrator. The cooperation and information sharing arrangements under this MoU should be interpreted and implemented in a manner that is permitted by, and consistent with, the Laws and Regulations.
2. This MoU does not create any legally binding obligations, confer any rights or supersede any domestic laws. This MoU does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this MoU.
3. This MoU is not intended to limit or condition the discretion of an Authority in any way in the discharge of its responsibilities or to prejudice or affect in any way the individual responsibilities, competencies or autonomy of any Authority. This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates. In particular, this MoU does not affect any right of any Authority to communicate with or obtain information or documents from any Person subject to its jurisdiction that is established in the territory of the other Authority.
4. The Authorities should, within the framework of this MoU, provide each other with the fullest cooperation permissible under their Laws and Regulations in relation to all relevant information and supervisory activities regarding a Covered Administrator in connection with the Covered Administrators' provision of a Covered Benchmark. Following a request for assistance, cooperation may be denied:
  - a) where the cooperation would require an Authority to act in a manner that would violate its Laws and Regulations;
  - b) where a request for assistance has not been made in accordance with the terms of this MoU; or
  - c) on the grounds of national public interest for the UK FCA and of EU public interest for ESMA.
5. In case of denial, the Requested Authority will provide the reasons for not granting the assistance. Where the Requested Authority presents objective grounds as reasons for which the request cannot be fulfilled in part or in whole, the Authorities will consult with a view to reaching an understanding on the assistance to be provided.
6. The Authorities represent that, as of the date upon which this MoU takes effect, their Laws and Regulations should not prevent them from providing assistance to one another as contemplated in this MoU. The UK FCA also represents that, as of

the date upon which this MoU takes effect, (i) the effective exercise of ESMA's supervisory functions under the BMR is not prevented by the UK Laws and Regulations or UK administrative provisions; and (ii) there are no limitations with respect to the FCA's ability to exercise the supervisory or investigatory powers awarded to it under the UK BMR in respect of Covered Administrators, thereby ensuring the fulfilment of the condition set out in point (b) of the third subparagraph in Article 32(5) of BMR. The UK FCA will promptly notify ESMA of any material changes to the representation referred to in point (ii) of this paragraph. With regard to the representation referred to in point (i) and where the relevant notification is not already made under point (c) of Article 3(4), the UK FCA will endeavour to notify ESMA of any material changes to the UK BMR and any associated secondary legislation or UK guidance, which it becomes aware and which, in its reasonable judgement, may be relevant for the exercise of ESMA's supervisory functions under the BMR. For the avoidance of doubt, ESMA is solely responsible to assess if and how any notified changes may affect the effective exercise of its supervisory functions under the BMR.

7. To facilitate communication and cooperation under this MoU, the Authorities hereby designate contact points whose details are set out in the Appendix. Any amendments to the details of the contact points will be communicated without undue delay to the other Authority.

### **Article 3**

#### **Scope of cooperation**

1. This MoU does not affect any arrangements under any other agreement or Memorandum of Understanding between the two Authorities.
2. The Authorities recognise the importance of close communication concerning Covered Administrators in respect of their provision of Covered Benchmarks and intend to cooperate regarding:
  - a) general issues, including with respect to regulatory, supervisory or other developments concerning a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark or a Covered Benchmark;
  - b) issues relevant to the operations, activities or services of a Covered Administrator, in connection with the Covered Administrator's provision of a Covered Benchmark, including information on the applicable BMR or UK BMR requirements or any applicable IOSCO principles to which the Covered Administrator is subject. For the avoidance of doubt, there shall be no obligation on the UK FCA to actively monitor compliance by the Covered Administrator with the BMR or the applicable IOSCO principles;

- c) the coordination of supervisory activities relating to the Covered Administrator's provision of a Covered Benchmark including, where appropriate, On-site Inspections; and
  - d) any other areas of mutual interest.
3. Cooperation will be most useful in circumstances where issues of regulatory and supervisory concern may arise, including but not limited to:
- a) the initial application for recognition of a Covered Administrator, including the certification provided by the UK FCA to assess the compliance of a Covered Administrator applying for recognition, as referred to in the second subparagraph of Article 32(2) of BMR;
  - b) the on-going monitoring, the suspension or the withdrawal of the recognition of a Covered Administrator pursuant to Article 32(8) of BMR;
  - c) any change to a Covered Administrator's activity or internal rules, policies and procedures that could materially affect the way in which the Covered Administrator complies with the applicable BMR or UK BMR requirements or any applicable IOSCO principles. For the avoidance of doubt, there shall be no obligation on the UK FCA to actively monitor compliance by the Covered Administrator with the BMR or the applicable IOSCO principles;
  - d) any material change in the methodology or input data used for the calculation of a Covered Benchmark, or in the functioning of the oversight function related to the provision of a Covered Benchmark;
  - e) any relevant information or change concerning the legal representative appointed pursuant to Article 32(3) of BMR;
  - f) regulatory or supervisory actions taken, or approvals given by ESMA or the UK FCA in relation to a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark, including changes to the relevant obligations or requirements to which the Covered Administrator is subject, that may impact the Covered Administrator's continued compliance with the BMR, UK BMR or IOSCO principles as applicable, provided there shall be no obligation on the UK FCA to actively monitor the impact of such actions on the compliance by the Covered Administrator with the BMR or the applicable IOSCO principles. For the avoidance of doubt, references to regulatory or supervisory actions shall include: (i) any administrative sanctions and other administrative measures imposed by ESMA or the UK FCA in accordance with the BMR or UK BMR; and (ii) any actions taken by ESMA or the UK FCA in the exercise of their supervisory powers under the BMR or UK BMR where the Covered Administrators' provision of a Covered Benchmark may be materially impacted. This does not include supervisory dialogue and interaction nor resulting follow up actions thereto, which are likely to take place in the normal course of a supervisory relationship, unless such a supervisory

engagement or action materially impact the Covered Administrators' provision of a Covered Benchmark.

4. *Notification.* The Authorities will seek to inform each other as soon as practicable of:
- a) any known material event that could adversely impact the financial or operational stability of a Covered Administrator, including where a Covered Administrator is deemed to (i) be in breach of the applicable BMR or UK BMR requirements or any applicable IOSCO principles to which it is subject (there shall be no obligation on the FCA to actively monitor such BMR or IOSCO compliance), (ii) act in a manner which is clearly prejudicial to the interests of users of its benchmarks or to the orderly functioning of markets, (iii) have made false statements or used any other irregular means to obtain recognition or any other license or authorisation it required directly in connection with the Covered Administrator's provision of a Covered Benchmark;
  - b) enforcement or regulatory actions or sanctions concerning or related to a Covered Administrator directly in connection with the Covered Administrator's provision of a Covered Benchmark, including the withdrawal, revocation, suspension or modification of the recognition or of any license or authorisation;
  - c) any change introduced in the legal or regulatory framework applicable to a Covered Administrator in respect of its provision of a Covered Benchmark or to a Covered Benchmark or any material change introduced in the supervisory arrangements affecting a Covered Administrator in connection with its provision of a Covered Benchmark or a Covered Benchmark;

The information should be provided in writing to the contact points set out in the Appendix hereto and using a secure transmission procedure or electronic means that ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.

The information to be provided by an Authority pursuant to this paragraph will refer to a Covered Administrator and/or a Covered Benchmark. The determination of what constitutes "material changes", "material event", "adversely impact" or "material effect" will be left to the reasonable discretion of the Authority providing the information.

5. *Exchange of Written Information.* Each Authority, upon written request and to the extent permissible under their Laws and Regulations, intends to provide the other Authority with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the applicable BMR or UK BMR requirements or any applicable IOSCO principles to which a Covered Administrator is subject, provided that the Requested Authority is authorised to collect such information on behalf of the Requesting Authority. Such

requests will be made pursuant to Article 4 of this MoU, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimising administrative burdens.

The information covered by this paragraph includes without limitation:

- a) information that would assist the Requesting Authority in assessing the recognition application and verifying that a Covered Administrator complies with the applicable BMR or UK BMR requirements or any applicable IOSCO principles;
- b) relevant regulatory and supervisory information and filings that a Covered Administrator is required to submit to the Requested Authority in connection with the Covered Administrator's provision of a Covered Benchmark; and
- c) regulatory and supervisory reports and assessments, or findings or information contained therein, prepared by an Authority in respect of a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark or a Covered Benchmark.

#### **Article 4**

##### **Execution of requests for information**

1. A request for written information pursuant to Article 3(5) should be made in writing and using a secure transmission procedure or electronic means that ensure that completeness, integrity and confidentiality of the information are maintained during the transmission. Such request for written information should be addressed to the relevant contact points identified in the Appendix. A request generally should specify at least the following:
  - a) the information sought by the Requesting Authority;
  - b) a concise description of the matter that is the subject of the request and the purpose for which the information is sought, including the Laws and Regulations applicable to the benchmark activity;
  - c) to whom, if anyone onward disclosure of information is likely to be necessary and the reason for such disclosure; and
  - d) the desired time period for reply and, where appropriate, the urgency thereof.
2. The Requested Authority shall acknowledge receipt of the request in writing within 10 working days of receipt.

3. In Emergency Situations, the Authorities will endeavour to notify each other of the Emergency Situation and communicate information between each other as deemed appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

## **Article 5**

### **On-site Inspections**

1. As part of its ongoing supervisory activity, ESMA intends to rely mainly on the EU legal representative of a Covered Administrator in order to obtain information on the Covered Administrator in respect of its provision of a Covered Benchmark. However, in cases where information needs to be obtained through an On-site Inspection, the Authorities will act in accordance with the following procedure:
  - a) ESMA will submit to the UK FCA an initial written request with respect to the On-site Inspection. The request will include the factual and legal background to, the objective of, and an estimated time frame for, the On-site Inspection;
  - b) The UK FCA will acknowledge receipt of the initial written request in writing within 10 working days of receipt;
  - c) When establishing the scope of any proposed On-site Inspection by ESMA officers, ESMA will consider the supervisory activities of the UK FCA and will consider any information that was made available or is capable of being made available by the UK FCA;
  - d) Following the initial written request and the related acknowledgement of receipt referred to in points (a) and (b), the Authorities will, as soon as reasonably practicable having regard to the estimated timeframe for the On-site Inspection set out in the request, consult each other with a view to reaching an understanding on the terms governing such On-site Inspection. In particular, the Authorities will clearly determine their respective roles, responsibilities, and degree of assistance which will be provided (if any) in conducting the On-site Inspection, taking into account *inter alia* each other's sovereignty and applicable Laws and Regulations. The Authorities will also consult each other with a view to reaching an agreement in relation to what (if any) assistance the UK FCA will provide to ESMA in reviewing, interpreting and analysing the contents of public and non-public Books and Records and obtaining information from directors and senior management of the Covered Administrator in respect of its provision of a Covered Benchmark. The UK FCA will separately determine whether the ESMA

officers will be accompanied by its own officers during the On-site Inspection;

- e) Where the On-site Inspection is conducted jointly by the Authorities, they will give each other an opportunity to consult and discuss the findings arising from the On-site Inspection;
- f) Where the On-site Inspection is conducted by one Authority, that Authority will share its findings and / or report on the On-site Inspection with the other Authority.

## **Article 6**

### **Data Protection**

The Authorities acknowledge that the transfer of personal data will take place in accordance with the applicable data protection legislation in the jurisdictions of the Authorities.

## **Article 7**

### **Permissible uses and storage of information**

1. The Requesting Authority may use information obtained under this MoU for the purpose set out by that Authority in its request for the information or, if the information was provided other than by means of a request, solely for the purpose of enabling that Authority to exercise its regulatory, enforcement and supervisory functions.
2. Before using information obtained under this MoU for any purpose other than that stated in Article 7(1), the Requesting Authority will obtain the prior written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult to discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
3. If an Authority ("Receiving Authority") receives, via a party that is not a signatory to this MoU, information originally provided by the other Authority ("Disclosing Authority") that is related to the Disclosing Authority's supervision and oversight of a Covered Benchmark or a Covered Administrator and that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information in accordance with the terms of this MoU.
4. The Receiving Authority will store the information obtained under this MoU securely on a medium that ensure that completeness, integrity and confidentiality of the

information and that allows the storage of information to be accessible for future reference.

5. The restrictions in this Article do not apply to an Authority's use of information it obtains directly from a Covered Administrator.

## **Article 8**

### **Confidentiality and onward sharing of information**

1. Except as provided in paragraph 3, each Authority will keep confidential information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU. The terms of this MoU are not confidential.
2. Each Authority acknowledges that measures are in place in its jurisdiction to ensure that professional secrecy is ensured, and confidential information is protected.
3. Except where disclosure is necessary for legal proceedings, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing information received under this MoU to any non-signatory to this MoU. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided such communication is confirmed in writing as promptly as possible. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
4. In the event that disclosure of information obtained under this MoU is necessary for legal proceedings, the Requesting Authority should, to the extent legally permissible, notify the Requested Authority prior to disclosing such information (or as soon as reasonably practicable after disclosing such information if prior notification is not practicable) and will assert all appropriate legal exemptions or privileges with respect to such information as may be available.
5. The Authorities intend that the sharing or disclosure of information, including deliberative and consultative materials, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.
6. The Authorities acknowledge that nothing in this Article 8 prevents an Authority from disclosing information it receives directly from a Covered Administrator.

## **Article 9**

### **Successor authorities**

Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of this MoU will apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities will become a signatory or signatories to this MoU without the need for any further amendment to this MoU, and notice will be provided to the other Authority. This will not affect the right of any Authority to give written notice as provided in Article 12(2) that it no longer wishes to be a signatory to this MoU if it wishes to do so.

## **Article 10**

### **Amendments**

The Authorities intend to periodically review the functioning and effectiveness of cooperation arrangements between them. This MoU may be amended with the written consent of all signatories.

## **Article 11**

### **Taking effect of the MoU**

This MoU will enter into force on the date that it is signed by the Authorities.

## **Article 12**

### **Termination**

1. This MoU will remain operative until terminated by either of the Authorities in accordance with Article 12(2).
2. If an Authority wishes to no longer be a signatory to this MoU, it will provide thirty (30) calendar days prior written notice to the other Authority.
3. If an Authority gives such notice, the Authorities will consult concerning the disposition of any pending requests. If an agreement cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MoU before the expiration of the 30-day period until all

requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance.

4. Termination of this MoU does not affect obligations under any other agreement or Memorandum of Understanding between the two Authorities.
5. In the event of termination of this MoU, information obtained under this MoU will continue to be treated in the manner described under Articles 6, 7 and 8.