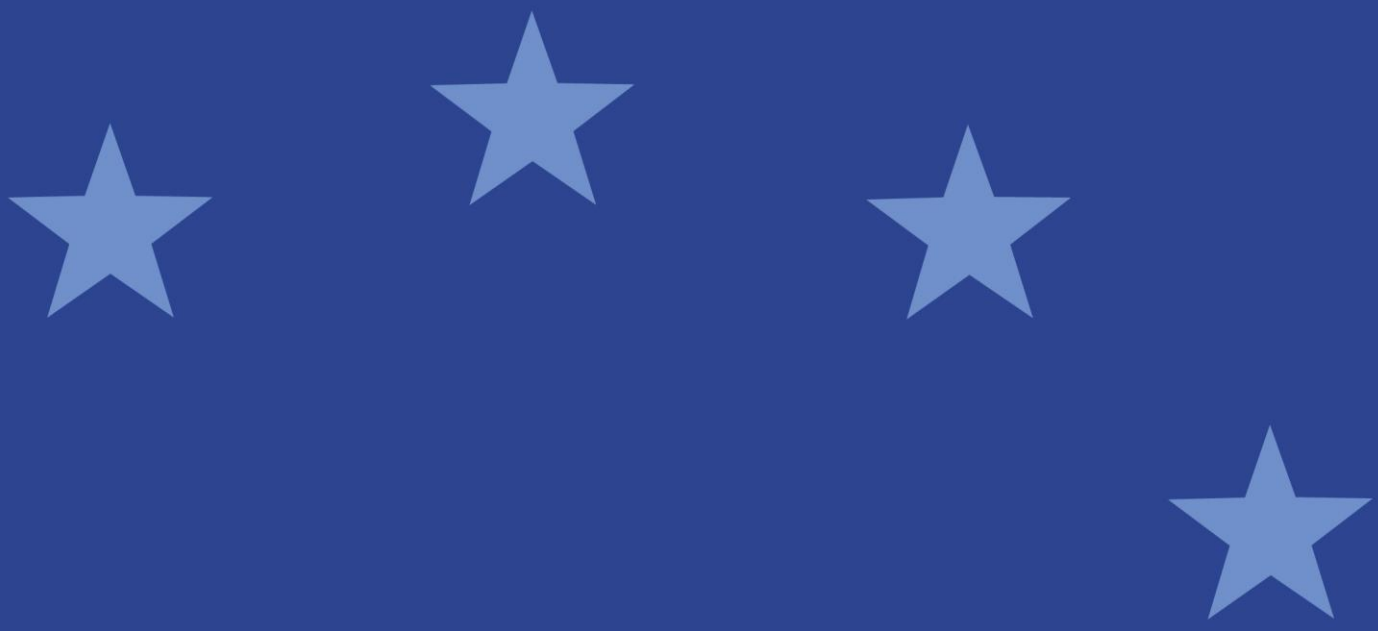
esma European Securities and Markets Authority

Questions and Answers

On the Benchmarks Regulation (BMR)



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1. Purpose and status

1. The purpose of this document is to promote common, uniform and consistent supervisory approaches and practices in the day-to-day application of Benchmarks Regulation ((EU) 2016/1011, "BMR"). It does this by providing responses to questions asked by the public, financial market participants, competent authorities and other stakeholders. The question and answer (Q&A) tool is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Further information on ESMA's Q&A process is available on our website.

2. ESMA intends to update this document on a regular basis and, for ease of reference, ESMA provides the date each question was first published as well as the date/s of amendment beside each question. A table of all questions in this document and dates is provided in Section I.

3. Additional questions on BMR may be submitted to ESMA through the Q&A tool on our website *(here)* Please see the guidance available on our website before submitting your question.

2. Legislative references and abbreviations

Legislative references

ESMA Regulation	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[1]
BMR	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 (Text with EEA relevance)[2]

Abbreviations

EU	European Union
ESMA	European Securities and Markets Authority

[1] OJ L 331, 15.12.2010, p. 84
[2] OJ L 171, 29.6.2016, p. 1–65

3. Summary table

Subject	Q	Topic of the question	Level 1 / Level 2 provision	Last updated
Scope of BMR				
	4.1	Central banks	Article 2(2)(a) BMR	29/09/2017
	4.2	Single reference price	Article 2(2)(d) BMR	29/09/2017
	4.3	BMR outside the EU	Article 2(1) BMR	08/11/2017
Definitions				
	5.1	Family of benchmarks	Article 3(1)(4) BMR	29/09/2017
	5.2	Use of a benchmark	Article 3(1)(7) BMR	29/09/2017
Authorisation and registration				
	6.1	Requirements for administrators	Article 34(4) BMR	14/12/2017
Requirements for users				
	7.1	Written plans	Article 28(2) BMR	14/12/2017
Transitional provisions				
	8.1	EU index providers providing benchmarks as of 30/06/16	Article 51(1) BMR	05/07/2017
	8.2	EU index providers providing benchmarks after 30/06/16	Article 51(3) BMR	05/07/2017
	8.3	Third country benchmarks	Article 51(5) BMR	08/11/2017

4. Questions and Answers on the scope of the Regulation

Application of the Regulation to EU and third country central banks

Updated: 29/09/2017

Q4.1 **Does the BMR apply to EU and third country central banks and the benchmarks they provide?**

A4.1 Point (a) of Article 2(2) of the BMR states that the BMR does not apply to "a central bank". ESMA considers that the term "a central bank" encompasses both EU central banks (i.e. members of the European System of Central Banks) and non-EU central banks, and therefore that the BMR does not apply to EU nor to third country central banks.

Benchmarks provided by EU and third country central banks are not to be included in the register referred in Article 36 of the BMR, but ESMA considers that supervised entities in the Union are nevertheless allowed to use such benchmarks.

Where a supervised entity in the Union uses a benchmark provided by a central bank, ESMA considers that the supervised entity should, in relation to such benchmark, produce and maintain the written plans referred to in Article 28(2) of the BMR.

Finally, ESMA considers that Article 16 of the BMR is to be applied to EU supervised contributors contributing input data (according to Article 3(1)(8)) to a central bank.

Exemption on single reference price

Updated: 29/09/2017

Q4.2 **Article 2(2)(d) BMR exempts the application of the BMR for "the provision of a single reference price for any financial instrument listed in Section C of Annex I to Directive 2014/65/EU". What does "single reference price" mean?**

A4.2 Article 2(2)(d) BMR excludes prices from the scope of the Benchmarks Regulation that are only reflecting the value of "any financial instrument." With its singular use of the term, the exclusion would not cover e.g. a basket of securities or an index based on the price of more than one financial instrument.

Similarly, Recital 18 of the BMR states that single prices or single value reference prices should not be considered benchmarks under the BMR and it includes the example of a price of a single security the provision of which does not include any calculation, input data or discretion.

Following Recital 13 of the BMR on the types of use of a benchmark, the setting and reviewing weights within a combination of benchmarks, which is generally also only based on a simple average or similar figure if any, should not amount to the provision

of a benchmark as such an activity does not involve discretion. This discrimination further supports the exemption of single reference prices, based on little or no calculation and with no discretion involved, by way of analogy.

Other EU legislation refers to a price of a financial instrument published by one trading venue and referred to by another trading venue as a "reference price" (Article 4(1)(a) of Regulation (EU) 600/2014 (MiFIR)). Such "reference prices" as published by trading venues may also include a simple calculation, e.g. a re-calculation as a "per unit" price or an averaging, but no complex methodology is applied, nor is additional data being processed. ESMA considers that the term "single reference price" should be interpreted similarly.

Application of the Regulation outside the EU

Updated: 08/11/2017

Q4.3 **Does the provision of and contribution to benchmarks that are used outside the European Union only fall within the scope of the BMR?**

A4.3 The scope of the Benchmarks Regulation is defined in Article 2(1) of the BMR. As a general rule Article 2(1) of the BMR provides that the BMR "*applies to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the Union*". The term "*provision of a benchmark*" is defined in point (5) Article 3(1) of the BMR.

The BMR's objective is to ensure the proper functioning of the European market and a high degree of consumer and investor protection vis-à-vis benchmarks *at Union level*, as underlined in Recital 6 of the BMR. In contrast, it is not the ambition of the BMR to protect users of benchmarks worldwide, possibly conflicting with any applicable third country regimes. Accordingly, Article 29 of the BMR refers to the use of a benchmark *in the Union*.

ESMA therefore considers that the BMR does not apply to the provision of benchmarks that are exclusively used outside the Union. The same reasoning would apply to the contribution of input data with respect to a benchmark that is exclusively used outside the Union. An administrator providing a benchmark exclusively to users outside the Union would have to comply with any applicable third country regimes with respect to benchmarks.

5. Questions and Answers on definitions

Family of benchmarks
Updated: 29/09/2017

Q5.1 **How can benchmarks be grouped into a family? Can critical, significant and non-significant benchmarks be part of the same family of benchmarks?**

A5.1 The BMR allows administrators to group benchmarks into families when they publish the benchmark statement (as per Article 27(1) BMR) and, provided that the benchmarks are based on a similar methodology, when they publish the key elements of the benchmarks' methodology (as per Article 13(1) BMR). Furthermore, administrators may also develop a single code of conduct for a family of benchmarks (as per Article 15(3) BMR), and third country benchmarks may be grouped into families when an administrator or any other supervised entity located in the Union applies to the relevant competent authority for their endorsement (as per Article 33(1) BMR).

Art. 3(1)(4) BMR states that benchmarks by the same administrator may be grouped into a family:

(i) if they are determined from input data of the same nature, and

(ii) if this input data provides specific measures of the same or similar market or economic reality.

In ESMA's view, examples of input data of the same nature can be:

- input data of identical type (e.g. reported transactions, quoted prices, committed quotes or expert judgement). Consequently, the proportionality concept of grouping benchmarks into families would not apply to an administrator's benchmarks if one of them is based on expert judgement and another on raw transaction data;

- input data qualifying the benchmark as a particular type of benchmark as defined by the BMR (interest rate or commodity benchmark).

Examples of input data providing specific measures of the same or similar market or economic reality can be:

- input data relating to markets trading comparable assets (e.g. precious metals or other specific types of commodities, equity shares of the same sector or the same geographical region, sovereign bonds, cash deposits);

- input data measuring different aspects of the same economic reality (e.g. household income, GDP, or rent).

Finally, ESMA considers that benchmarks of all levels of reference values (i.e. critical, significant and non-significant) can be grouped into the same family because a benchmark's degree of use is not part of any of the elements of Article 3(1)(4) of the BMR defining a family of benchmarks.

Use of a benchmark

Updated: 29/09/2017

Q5.2 **In Article 3(1)(7), "use of a benchmark", is defined, in paragraph (b), as meaning "determination of the amount payable under a financial instrument . . . by referencing an index or a combination of indices". In which circumstances would one or more supervised entities be viewed as using a benchmark under paragraph (b) in relation to a derivative, i.e. a financial instrument in Section C of Annex I to Directive 2014/65/EU, paragraphs (4) – (10)?**

A5.2 The following supervised entities would be viewed as using a benchmark under paragraph (b) in relation to the determination of an amount which is payable by reference to an index or a combination of indices under a derivative in the scope of the BMR (see definition for relevant financial instruments in Article 3(1)(16)):

a) a trading venue, where the derivative is the subject of a request for admission to trading on such trading venue or is traded on such trading venue (each as defined in point (24) of Article 4(1) of Directive 2014/65/EU), to the extent the applicable trading venue has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced;

b) the investment firm acting in the capacity of a systematic internaliser, where the derivative is traded via a systematic internaliser (as defined in point (20) of Article 4(1) of Directive 2014/65/EU), to the extent such systematic internaliser has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced;

c) a CCP, where the derivative is cleared by such CCP, to the extent that the CCP has set the relevant terms of the derivative and thus chosen the specific benchmark to be referenced; or

d) each party to a transaction of a derivative, where none of points (a) to (c) applies, particularly if the parties trade on an OTF that has not set the terms of the contract.

6. Questions and Answers on authorisation and registration

Authorisation and registration vis-à-vis the applicability of the requirements of the BMR
Updated: 14/12/2017

Q6.1 **Are EU index providers required to comply with the obligations laid down in the BMR before they are authorised or registered?**

A6.1 Article 34(2) of the BMR "Authorisation and registration of an administrators" states that "*an authorised or registered administrator shall comply 'at all times' with the conditions laid down in the Regulation"*. This wording suggests that only an authorised or registered administrator is required to comply with the BMR's conditions. "Conditions", in this context, should be understood as encompassing the requirements imposed by the BMR on administrators.

Paragraph (4) of the same Article states that "*the applicant* [index provider] *shall provide all information necessary to satisfy the competent authority that the applicant has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation".* Also this paragraph clearly indicates that index providers, in order to be authorised or registered as administrators, must be in a position to meet the requirements of the BMR at the time of authorisation or registration, i.e. not before that date. Therefore EU index providers are required to comply with the obligations laid down in the BMR only at the time of authorisation or registration.

7. Questions and Answers on requirements for users of benchmarks

Written plans for cessation or material changes of a benchmark
Updated: 14/12/2017

Q7.1 **Are supervised entities, other than administrators, required to have robust written plans for cessation or material changes of a benchmark and to reflect them in the contractual relationship with clients as of 1 January 2018?**

A7.1 Yes, Article 28(2) of the BMR applies as of 1 January 2018. Therefore, as of this date, supervised entities, other than administrators, are required to produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark they are using materially changes or ceases to be provided.

ESMA considers that supervised entities, other than administrators, are required to reflect such plans in the contractual relationship with clients in contracts entered into after 1 January 2018. In relation to contracts entered into prior to 1 January 2018 and still existing at that date, ESMA expects supervised entities, other than administrators, to amend them where practicable and on a best-effort basis.

8. Questions and Answers on transitional provisions

Transitional provisions applicable to EU index providers already providing a benchmark on 30 June 2016

Updated: 05/07/2017

Q8.1 **Where an EU index provider, that already provided a benchmark on 30 June 2016 and that has not yet been authorised or registered, provides a new benchmark after 1 January 2018, could such a benchmark be used by supervised entities in the Union under the transitional provisions of the Benchmarks Regulation?**

A8.1 Article 51(1) allows an EU index provider, already providing a benchmark on 30 June 2016, to apply for authorisation or registration until 1 January 2020. This transitional provision applies at the entity level.

ESMA considers that during such period, the EU index provider is allowed to continue its activity of provision of benchmarks in full and supervised entities in the Union are able to use all the benchmarks provided by EU index providers that qualify for the transitional provisions in Article 51(1).

This includes benchmarks already provided before 1 January 2018, updates and modifications of benchmarks already provided before 1 January 2018, as well as the provision of new benchmarks for the first time after 1 January 2018. The transitional provisions of Article 51(1) are to be applied unless and until the authorisation or registration of the EU index provider is refused.

Transitional provisions applicable to EU index providers starting to provide a benchmark between 1 July 2016 and 31 December 2017

Updated: 05/07/2017

Q8.2 **Where an EU index provider that was not providing a benchmark on 30 June 2016 starts to provide benchmarks between 1 July 2016 and 31 December 2017, can these benchmarks be used by supervised entities in the Union? Can the same index provider provide new benchmarks after 1 January 2018 and before it is authorised or registered?**

A8.2 Article 51(3) allows an EU index provider to continue to provide an existing benchmark which may be used by supervised entities until 1 January 2020 or unless and until authorisation or registration is refused.

ESMA considers that the term "*existing benchmark*" used in Article 51(3) should be understood as "*existing on or before 1 January 2018*", in light of the fact that Article 51(3) will be applicable as of 1 January 2018.

On this ground, ESMA's understanding of the transitional provisions in Article 51(3) is the following: all benchmarks provided for the first time on or before 1 January 2018 by an EU index provider can be used by a supervised entity until 1 January 2020 or until and unless the authorisation or registration of the EU index provider is refused.

Therefore, if an EU index provider starts to provide benchmarks between 30 June 2016 and 1 January 2018, such benchmarks, including their updates and modifications, can be used by supervised entities on and after 1 January 2018 (even if the authorisation or registration is not yet granted) and until 1 January 2020 or until and unless the authorisation or registration of the EU index provider is refused.

However, in the case that an EU index provider starts to provide benchmarks after 30 June 2016 and provides a new benchmark after 1 January 2018, supervised entities will not be allowed to use such newly provided benchmark, unless the EU index provider obtains first authorisation or registration.

Transitional provisions applicable to third country benchmarks

Updated: 08/11/2017

Q8.3 **In Article 51(5) of the BMR, what does "*where the benchmark is already used in the Union*" mean?**

A8.3 ESMA considers that the meaning of the term "*where the benchmark is already used in the Union"* in Article 51(5) of the BMR is "*where the benchmark is already used in the Union on or before 1 January 2020*".