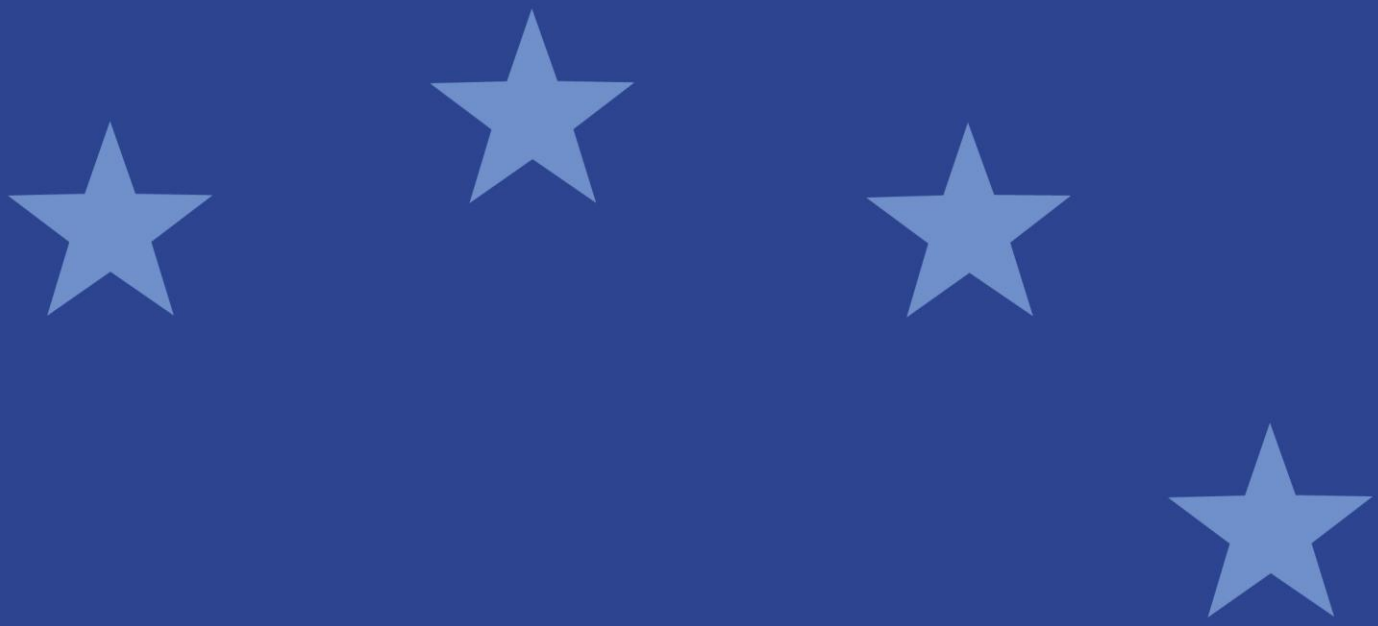
esma European Securities and Markets Authority

Consultation Paper

Draft technical advice under the Benchmarks Regulation



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Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **30 June 2016.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

This paper may be specifically of interest to administrators of benchmarks and to any investor dealing with financial instruments and financial contracts whose value is determined by a benchmark or with investment funds whose performances are measured by means of a benchmark.

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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 contracts[1] (Benchmarks Regulation) in September 2013 in the wake of the manipulation of various benchmarks.

On 24 November 2015, the European Parliament and the Council reached a preliminary political agreement[2] on a compromise text of the Benchmarks Regulation, an agreement that was confirmed on 9 December 2015 by the Permanent Representatives Committee of the Council of the European Union[3]. The European Parliament voted and approved the text of the Benchmarks Regulation in its plenary session on 28 April 2016. The Council adopted the same text on 17 May 2016. However, it should be noted that the Benchmarks Regulation has not yet been published in the Official Journal of the European Union.

On 11 February 2016 ESMA received a request from the European Commission for technical advice on possible delegated acts[4]. The technical advice should be delivered within four months after the entry into force of the Regulation, which is currently expected to take place in the month of June 2016.

ESMA published a Discussion Paper (DP) on the Benchmarks Regulation[5] on 15 February 2016. The DP included ESMA's policy orientations and initial proposals both for the technical advice to the Commission and the draft technical standards under the Benchmarks Regulation.

This Consultation Paper (CP) is the follow-up of the DP with respect to ESMA's technical advice to the Commission, and it is based on the Benchmarks Regulation text published by the European Parliament after the vote[6]. A separate CP on the draft technical standards only will be published by ESMA in due time.

Contents

This CP is organised in five chapters, each dedicated to one of the five areas for which the Commission requested a technical advice from ESMA, namely: (i) some elements of the definitions, (ii) measurement of the use of critical and significant benchmarks, (iii) criteria

[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] See Commission statement : http://europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm?locale=en
[3] See Council statement: http://www.consilium.europa.eu/press-releases-pdf/2015/12/40802206220_en_635852608200000000.pdf
[4] The mandate for the technical advice is publicly available: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf
[5] The Discussion Paper is available here: https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf
[6] The text of the Benchmarks Regulation as approved by the European Parliament is available here: http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2016/04-28/0146/P8_TA-PROV%282016%290146_EN.pdf

for the identification of critical benchmarks, (iv) endorsement of a benchmark / family of benchmarks provided in a third country, and (v) transitional provisions. Each chapter summarises the relevant provisions and their objectives, provides an explanation of the related policy issues and references to the relevant responses received to the DP. Each chapter includes also a draft technical advice text for which ESMA asks the public for comments.

Next Steps

ESMA will consider the responses to this CP, and will finalise the technical advice to the Commission within four months after the entry into force of the Benchmarks Regulation, as requested by the Commission to ESMA. The Benchmarks Regulation is currently expected to enter into force in June 2016, and therefore the final report containing the (final) technical advice is planned to be submitted to the Commission in October 2016.

A second CP dedicated to the draft technical standards under the Benchmarks Regulation is planned to be published by ESMA in the second half of 2016.

2 Technical Advice on some elements of the Definitions in Article 3

Extract from the Commission's request for technical advice (mandate)

Making available to the public

Article 3(1), point 1, defines an index as "any figure (a) that is published or made available to the public; (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys".

This definition is critical since it determines the scope of the Regulation. As stated in recital 8, the scope of the Regulation should be broad to provide a comprehensive preventative framework.

The concept of 'making available to the public' is a concept stemming from the EU acquis on copyright. Although of a different nature and not providing a legal definition of the concept, the discussion in that context may provide useful guidance for the preparation of the technical advice.

Administering the arrangements for determining a benchmark

Article 3(1), point 5, defines one of the elements of provision of a benchmark as "administering the arrangements for determining a benchmark". Given the variety of business models employed for the provision of benchmarks, it would be useful to further clarify what 'administering the arrangements' means in the context of benchmark determination.

Use of a benchmark

Article 3(1), point 7, lists five activities or situations which are considered to represent use of a benchmark under the Regulation. Some of the uses, such as point (a) "issuance of a financial instrument which references an index or a combination of indices", could benefit from further clarification in order to ensure a uniform application of the definition of 'use of a benchmark' across the Union.

ESMA is invited to provide technical advice on how to specify *what constitutes making available to the public for the purposes of the definition of an index",* taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying *what constitutes* administering *the arrangements for determining a benchmark taking into account different exsiting business practices.*

ESMA is invited to provide technical advice on specifying *what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark.*

2.1 Specification of what constitutes making available to the public

Framework

1. In the Benchmarks Regulation[7] (BMR) an 'index' is defined as any figure:

   a) that is published or made available to the public;

   b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and

   c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.

2. On such basis, a benchmark is then defined as any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument is determined or an index that is used to measure the performance of an investment fund with the purposes to track the return of such index or to define the asset allocation of a portfolio or to compute the performance fees (see also the definition of 'use of a benchmark' in Article 3(1), point (7).

3. It is worth to recall that in the IOSCO Principles for Financial Benchmarks[8] of July 2013 - which represent valuable additional information to consider when elaborating on the basic concepts within the BMR – a benchmark is defined as follows:

   "The Benchmarks in scope of this report are prices, estimates, rates, indices or values that are:

   a) Made available to users, whether free of charge or for payment;

   b) Calculated periodically, entirely or partially by the application of a formula or another method of calculation to, or an assessment of, the value of one or more underlying Interests;

   c) Used for reference for purposes that include one or more of the following:

   - determining the interest payable, or other sums due, under loan agreements or under other financial contracts or instruments;

   - determining the price at which a financial instrument may be bought or sold or traded or redeemed, or the value of a financial instrument; and/or

[7] This Consultation Paper refers to the text of the Benchmarks Regulation approved by the European Parliament: http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2016/04-28/0146/P8_TA-PROV%282016%290146_EN.pdf

[8] Link to the IOSCO Principles for Financial Benchmarks: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf

- measuring the performance of a financial instrument."

4. Consistently, in the ESMA-EBA Principles for Benchmark-Setting Processes in the EU[9] of June 2013, a benchmark is defined as: "A price, rate, index or other value which is made available to users, whether free of charge or for payment; and calculated through the application of a formula to the value of one or more underlying assets or prices, including estimated prices, interest rates or other values, or surveys; and by reference to which the amount payable under a financial instrument or the value of the financial instrument is determined; or the performance of a financial instrument is measured."

5. It should be noted that in both cases the definition of a benchmark in its element of publication makes reference to its availability to the group of 'users' and, additionally, in both cases it is recognised that such availability may be granted either "free of charge" or "for payment".

6. This last aspect is present also in the BMR, in Recital 11: "*Many investment indices involve significant conflicts of interest and are used to measure the performance of a fund such as a UCITS fund. Some of these benchmarks are published and others are made available, for free or on payment of a fee, to the public or a section of the public and their manipulation may adversely affect investors* […]".

Analysis and proposal

7. The respondents to the Discussion Paper (DP) on the initial considerations by ESMA were divided between those suggesting the definition of "made available to the public" to be strictly limited to those indices that are made available to the general public in an open manner and for free, and those sustaining that the provision to one or more entities, which use the index in the meaning of the Regulation, should be regarded as making the index available to the public.

8. Proponents of the first position highlight that bespoke or customised indices, constructed to accommodate the specific needs of any client, should not be considered as made available to the public, in order for these indices not to fall in the scope of the Regulation, as their use is also intended for professional clients or qualified investors and not to the general retail public.

9. For those sustaining that the "availability to the public" should be instead linked to the availability of the index even to one single user, such an approach is justified by the overarching objective of the Regulation of ensuring the investor protection objective. In their view, a different definition of said availability to the public could provide incentives to indices providers to move an index out of scope of the Regulation by restricting the access to it to a limited number of users.

[9] Link to the the ESMA-EBA Principles for Benchmark-Setting Processes in the EU: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-659_esma-eba_principles_for_benchmark-setting_processes_in_the_eu.pdf

10. There are also respondents pointing to the need of ESMA to define clearly what 'available to the public means', in order to provide for legal certainty and, on the opposite, those that would rather prefer the element of the publication to be assessed on a case-by-case basis.

11. In close connection with the above opposite views, some respondents suggested to look at the existing modalities and channels of publication as a way to possibly distinguish between indices that may be deemed available and indices that may not be deemed to be available to the public. Some others suggested to rather work on the identification of the characteristics which can determine indices to be excluded from being "made available to the public".

12. In elaborating the draft technical advice ESMA took into due account the said arguments and further examined the use of the term "made available to the public" in other legislative contexts. In particular, following the explicit indication in the request of advice by the Commission, ESMA looked into Article 3(1) and (2) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[10], and its interpretation by the European Court of Justice (ECJ).

13. First and most important is the definition of the 'public', which has been consistently interpreted as encompassing both an indeterminate number of potential beneficiaries of the communication and a fairly large number of persons[11].

14. Based on such precedent, in ESMA's view a pre-condition for indices under Article 3(1)(1) BMR to be considered 'made available to the public' is that the index would have to be (at least potentially) accessible to an indeterminate and open group of recipients.

15. However, the ECJ not only gives consideration to persons that have access to the same work at the same time but it also considers necessary to know how many of them have access to it in succession[12]. This came to the attention in connection with the advent of new technologies which brought in new forms of exploitation and made relevant to analyse the consequences, on the holders of a right of communication to the public, of the re-transmission of an original communication. In this context the notions of 'user' and of 'new public' become relevant.

16. According to the ECJ, when making a communication to the public, the 'user' (i.e. the person using a means of communication) makes an act of communication when it intervenes, with full knowledge of the consequences of its action, to give its customers access to a broadcast containing the protected work[13].

17. With respect to the 'new public', the ECJ considers this as a public that was not envisaged by the authors of the protected works within the framework of an authorisation

[10] Link to the Directive 2001/29/EC: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF
[11] See the following cases: Lagardere, PPI, Rafael Hoteles, Case C-135/10 SCF v Del Corso, para. 85 and (SGAE v Rafael Hoteles SA [2006], SCF v Del Corso [2012], Phonographic Performance Ltd (Ireland) v Ireland [2012], ITV Broadcasting Ltd v TVCatchup Ltd [2013].
[12] CJEU 15 March 2012, Case C-162/10 (Phonographic Performance (Ireland)), para. 35.
[13] CJEU Case C-162/10 cit. para. 31.

given to another person (CJEU 13 October 2011, Cases C-431/09 and C-432-09 (Airfield/AGICOA), para. 72). In another relevant case (CJEU 7 December 2006, Case C-306/05, (SGAE v. Rafael Hoteles)), the ECJ affirmed that in the context of Directive 2001/29 'communication to the public' must be interpreted broadly (para. 36), and then that the clientele of a user forms new public (para. 42) and consequently, "*while the mere provision of physical facilities does not as such amount to a communication within the meaning of Directive 2001/29, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive*".

18. Adapted to the indices case, it is ESMA's view that a similar situation can occur when a supervised entity determines the amount payable under a financial instrument by referencing an index or when it determines the performance of an investment fund through an index. Making available of index values to the investors "*whatever technique is used"* should include the dissemination of such index values to (a wider) public through their incorporation into the coupons, strike prices, differentials, and values of financial instruments and investment funds referencing it, as the investor can isolate the index value therefrom.

19. In this respect, it is worth to recall that the dissemination of the information on the said prices and values for the financial instruments (including exchange traded funds) included in the list of Annex I, Section C, of Directive 2014/65/EU (MiFID II), which should reference an index, is ensured by the transparency regime imposed by Regulation (EU) No 600/2014 (MiFIR). The same may be said for the net asset values of funds other than ETFs, that are to be disclosed according to Directive 2009/65/EC (UCITS) and Directive 2011/61/EU (AIFMD)[14].

20. ESMA is aware that the stipulation of financial contracts of the type defined under Article 3(1)(18) is not under any specific transparency obligation and is therefore more questionable whether the availability of an index to one or a few supervised entities for the sake of its use in bilateral financial contracts might be regarded as sufficient to consider the index as being disclosed to a wider public. However, one can also infer that the large majority of the outstanding financial contracts of such type are normally referenced to the most widely diffused indices, for which the first condition under the below draft technical advice should apply.

21. Based on the above, ESMA considers that the availability of index determinations to one or more supervised entity users can imply its availability to an indeterminate number of recipients, rendering the index to be a benchmark fully in scope.

22. The approach proposed by ESMA is also intended to avoid that a paradoxical situation arises, in which an index is referenced in a financial instrument traded on a trading venue and potentially accessible to a huge number of retail investors, but because it is not made

[14] See the following Chapter 3 on the measurement of the reference value of a benchmark for a more thorough analysis of such aspects.

available otherwise but privately to a limited number of supervised entities, the index is considered out of the scope of the BMR.

23. On the other hand, whenever an index is produced to accommodate tailor made needs and thus used as a reference for a contractual relationship which does not take the form of a financial contract, as defined in Article 3(1)(18), or of a financial instrument, as defined in Article 3(1)(16) or of an investment fund, as defined in Article 3(1)(19), that index would not fall in scope (e.g. non-standardised derivative contracts that are not traded on TVs). Reference has also been made by some respondents to the DP to a 'customised basket of securities', designed to a single client. If such baskets are not synthesized in one single value and are merely used for asset allocation purposes, with a view to physically or synthetically replicating its composition, it is dubious whether such 'baskets' may fall in the definition of an index, not just in terms of their presumptive availability to the public, but because it does not seem that the other relevant characteristics for an index are present.

24. As concerns the various aspects of a process of making available, ESMA's view is that for a financial index it should not be required, in order to be considered as made available to the public, that the modality for its publication, and thus of access, is equal for all recipients/users (i.e. subscribers/licensees vs. general public, access upon payment of a fee vs. free access, different nature supervised entities, different channels for dissemination, …), as this may vary depending on the specific needs of each recipient/user or group thereof. A differentiated access may also imply a diverse width of the information supplied, depending on different uses of an index, or even justified in terms of the sectoral disciplines applicable to the different supervised entities that make use of an index.

25. The main advantages of such an open approach, as also sustained in reply to the DP, are linked to the opportunity of not preventing an index provider from differentiating the access regime to a given benchmark in order to support a business case based on distribution, as the same as of providing enough flexibility to adapt to future development driven by innovation in financial technologies.

26. The said approach is in line with the definitions in the IOSCO and ESMA-EBA Principles quoted above, and Recital 11 of the BMR, where reference is made to a diffusion that may be "free of charge or for payment", and also in line with what proposed by ESMA in the RTS 16[15], implementing Article 37 of Regulation (EU) No 600/2014 of 15 May 2014 (MiFIR), dealing with a right of access to benchmarks by central counterparties and trading venues. In the specification of the information to be made available (also through licensing), the RTS say that "it is not desirable to have an exhaustive list of the types of information that should be provided…" and that "The diversity of benchmarks and the different uses identified render a one size fits all approach inappropriate and a high degree of harmonisation on the content of license agreements unsuitable" (see Recitals 2 and 3).

[15] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

27. Lastly, in line with the views expressed by a few respondents, ESMA acknowledges that the element of the continuous availability of an index deserves some emphasis. The frequency of dissemination should ideally be consistent with the frequency according to which an index is calculated, even if the potential recipients do not actually avail themselves of the relevant information. But ESMA is aware that including this as a minimum requirement for a benchmark could create a major loophole, i.e. would allow administrators to avoid application of the BMR in its whole if they publish only a fraction of their determinations (e.g. 99 of 100).

2.2 Draft Technical Advice: “making available to the public”

1. An index shall be deemed to be made available to the public in the meaning of Article 3, paragraph 1, point 1(a), of the [BMR] if the following conditions are met:

(i) the index is accessible by a large or potentially indeterminate number of recipients; or

(ii) the index is provided or is accessible to one or more supervised entities to allow the use of the index in the meaning of Article 3(1)(5) of the [BMR] and through such use the index becomes accessible to an indeterminate number of people.

2. To be made available to the public as defined in paragraph 1, an index may be accessed through a variety of media and modalities, set out by the administrator or agreed between the administrator and the users, including, but not limited to, telephone, File Transfer Protocol, internet, open access, news, media, subscription or through financial instruments, financial contracts or investment funds referencing it.

Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?

2.3 Specification of what constitutes administering the arrangements for determining a benchmark

Framework

28. The definition provided under Article 3, paragraph 1, point (5), of the BMR states the following activities as provision of a benchmark: (a) the administration of the arrangements for determining a benchmark, (b) the collection and processing of the input data, (c) the calculation of the benchmark.

29. The following point (6) under the same Article 3, paragraph 1, defines an 'administrator' as "a natural or legal person that has control over the provision of a benchmark".

30. Other recitals and provisions within the Regulation explicitly introduce the possibility for the activities under points (a) and (b) to be carried out by third parties. In particular, Recital 16 mentions "[a]n administrator should be able to outsource to a third party one or more of those functions, including the calculation or publication of the benchmark, or other relevant services and activities in the provision of the benchmark", and Recital 24 says that "[t]he provision of benchmarks frequently involves the outsourcing of important functions such as calculating the benchmark, gathering the input data and disseminating the benchmark".

31. Accordingly, Article 5 of the BMR empowers an administrator oversight function to "overseeing any third party involved in the provision of the benchmark, including calculation or dissemination agents".

32. Under the IOSCO Principles for Financial benchmarks of July 2013, the Principle no. 1 defines a benchmark determination process as composed of the following activities: (i) the development of the methodology for the calculation of a benchmark; (ii) the determination and dissemination of the benchmark; (iii) the operation (i.e. the "[e]nsuring [of] appropriate transparency over significant decisions affecting the compilation of the benchmark and any related determination process, including contingency measures in the event of absence of or insufficient inputs, market stress or disruption, failure of critical infrastructure, or other relevant factors"); and (iv) the establishment of governance arrangements (i.e. "governance, oversight and accountability procedures for the benchmark determination process").

33. Due to the administrator's primary responsibility for all aspects of the benchmark determination process, under IOSCO Principle no. 1, the following Principle no. 2 adds that "Where activities relating to the Benchmark determination process are undertaken by third parties - for example collection of inputs, publication or where a third party acts as Calculation Agent - the Administrator should maintain appropriate oversight of such third parties".

34. The same approach is reflected in the BMR, where Article 10 provides for the flexibility of an administrator to outsource the completion of any of the activities within a benchmark's determination process to third parties, as long as the administrator retains full responsibility "*for discharging all of its obligations under this Regulation*".

Analysis and proposal

35. ESMA's understanding is that '*administering the arrangements for determining a benchmark*' is first of all linked to the more practical aspects of the provision process, e.g. the actual management of the infrastructure, as well as of the employed personnel that practically contribute to the process of determination of one or more benchmarks provided.

36. In line with what was already sustained in the DP, ESMA also acknowledges the importance that the setting of the methodology for the calculation of a benchmark has in this context. Therefore, and also in consideration of the fact that no explicit mentioning of such a pivotal activity is done under the following points within the 'provision of a benchmark' definition, ESMA proposes that such an activity is encompassed by administering the arrangements for determining a benchmark and, by this way, is fully part of the overall activity of the provision of a benchmark. This would also align the definition of the provision of a benchmark in the BMR with the IOSCO Principle 1, which was prominently backed by respondents to the DP.

37. Nonetheless, based on the BMR provisions referred to in the previous section, and the established international standards, ESMA concludes that all aspects of the provision of a benchmark may be outsourced, provided the administrator remains in control of the performance of the outsourced activities and, in the light of the entry into application of the BMR, it is able to comply with all relevant requirements (see Article 10 BMR). Against this background, ESMA acknowledges the possible development of various business models, in which one or more elements of the overall provision process are outsourced. These aspects, however, even if the Commission refers in its request to "the variety of business models employed for the provision of benchmarks", do not appear to be strictly covered by the Commission's request for technical advice.

38. Finally, ESMA recognises the BMR introduces two distinct definitions for 'provision of a benchmark' and for 'administrator'. In light of this, ESMA reached the conclusion that establishing and operating governance and control arrangements are not, as initially envisaged in the DP, part of the provision of a benchmark (Article 3(1)(5) BMR) but instead are part of the administrator's control over the process (Article 3(1)(6) BMR).

2.4 Draft Technical Advice: "administering the arrangements for determining a benchmark"

The administration of the arrangements for the determination of a benchmark in Article 3, paragraph 1, point 5, letter (a), of the BMR means:

- the ongoing management of the infrastructure and of the personnel that are involved in the determination process of a benchmark, and

- the setting of a specific methodology for the determination of each benchmark or, with the necessary adaptations, each family of benchmarks provided, and its maintenance through periodic reviews.

Q2: Do you agree with the proposed specification of what constitutes *administering the arrangements for determining a benchmark?*

2.5 Specification of what constitutes the issuance of a financial instrument for the purposes of defining ‘use of a benchmark’

Framework

39. The definition for ‘use of a benchmark’ that is provided under Article 3(1) point (7) of the BMR is the following:

    a) issuance of a financial instrument which references an index or a combination of indices;

    b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;

    c) being party to a financial contract which references an index or a combination of indices;

    d) providing a borrowing rate as defined in point j in Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party,

    e) determination of the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees.

40. ESMA is required to further specify the width of the concept of issuance of a financial instrument, not in general terms but for the purposes of the BMR, i.e. for the specific case of the ‘issuance of a financial instrument which references an index or a combination of indices’.

41. As the BMR already specifies the definition of “financial instrument”, the Commission’s mandate to ESMA is focused on the term “issuance”, although with specific reference to the financial instruments in scope.

Analysis and proposal

42. A key issue with this ESMA task is whether derivatives included in paragraphs (4) to (10) of the list in Section C of Annex I of Directive 2014/65/EU (MiFID II) would fall within the concept of ‘issuance’, while this is not controversial for all other type of financial instruments within the referenced list.

43. ‘‘Issuance’ in this context relates to the offering of securities by parties seeking to raise funds or to finance their business (either equity or debt). In these cases, the ‘issuer’ has an economic or financial interest in the performance of the financial instrument.

44. ‘Derivative’ is a generic term, a category into which many types of financial instruments can fall. They generally tend to be bilateral contracts, deriving their value from an underlying asset, agreed between parties either over the counter or on a trading

venue/systematic internaliser. Depending on their type, derivatives can be said for example to be 'written' (as in options) or 'entered into' (as for swaps), but they are not generally described as being 'issued'. It could therefore be argued that it is outside the strict meaning of 'issuance' to apply it to the creation of derivatives.

45. A related issue is whether the activities performed by market operators in connection with the admission to trading and trading of derivatives, as well as the activities performed by central counterparties (CCPs), amount to 'issuance' of financial instruments.

46. A few respondents explained that regulated markets are responsible for creating their own contracts which are subject to and governed by their rule books, whilst multilateral trading facilities and organised trading facilities often make available for trading contracts which are based on industry-standard terms (e.g. ISDA) or are copies of contracts traded elsewhere. Other respondents outlined that administrators are used to define specific rights for market operators and CCPs in connection with the possible creation of financial instruments or financial contracts for trading. However, the role of CCPs is more debated, as several respondents highlight these entities do not themselves determine the indices used in the contracts they clear but, as they determine the amount payable under those instruments, they should fall in the category of users.

47. A significant portion of the respondents, although not backing the proposal to widen the concept of 'issuance', consider it important that ESMA clarifies that the decision to include the reference to a benchmark within the standardised terms of a financial instrument does amount to 'use of a benchmark', with only a few exceptions sustaining that the activities of Trading Venues and CCPs should instead be explicitly excluded by ESMA from the 'use of a benchmark'. However, the latter suggestion could hardly be pursued by ESMA, because, as also evidenced in reply to the DP, in the ordinary business practice market operators and CCPs pay license fees for the use of benchmarks and, following Article 37 of Regulation (EU) No. 600/2014 (MiFIR), they obtain a right to be licensed to access to benchmarks' data feed on a fair, reasonable and non-discriminatory basis.

48. After careful consideration of the arguments put forward by respondents, ESMA is cautious of widening the common concept of 'issuance of a financial instrument', as this could possibly affect concepts used in other regulatory areas and, although deploying its effects in the sole context of the BMR, it could be perceived by some as a precedent.

49. That said, ESMA believes that the activities normally performed by market operators and CCPs for the purposes of the trading or clearing of derivatives referencing to a benchmark are caught under the second point (b) of the definition for 'use of a benchmark': "*determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices*". When engineering the terms of a financial derivatives contract that makes reference to a benchmark, either for the purpose of its trading or of its clearing, that benchmark effectively determines the amount payable under the said instrument, not only at the time of its first creation or offering but whenever it is traded or cleared, including when the outstanding positions in such derivatives are margined.

50. This is also in line with what ESMA established in the draft RTS 16, implementing the mentioned Article 37 of MiFIR, where it is preliminarily recognised that the "*information relating to benchmarks* […] *are used to determine the value of some financial instruments for trading and clearing purposes*" (Recital 1).

51. In the end, considering some of the responses gathered, ESMA believes it opportune to clarify that the concept of 'use of a benchmark' does not coincide with being a party to a contract. Such a situation does not amount to 'use of a benchmark' as clarified in Recital 13 of the BMR. Coherently, it is not relevant that the supervised entity using a benchmark along the lines of what is specified in the definition of Article 3(1)(7) BMR holds a position in the issued financial instruments.

2.6 Draft Technical Advice: “issuance of a financial instrument”

The issuance of a financial instrument that references an index or a combination of indices is to be intended as the initial offering of the financial instrument types specified in paragraphs (1) to (3) within the list of Annex I, Section C, of Directive 2014/65/EU to third parties through negotiation on trading venues and/or systematic internalisers.

Q3: Do you agree that the ‘use of a benchmark’ in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, …)?

Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?

3 Technical Advice on the measurement of the reference value of a benchmark

Extract from the Commission's request for technical advice (mandate)

For critical benchmarks, recital 35 makes clear that the failure of a critical benchmark would have important implications for the Union or individual Member States. Therefore Article 20 and recital 36 indicate that several methods are available to designate such critical benchmarks. In particular, point (a) and point (c) of paragraph 1 of Article 20 refer to two thresholds of EUR 500 billion and EUR 400 billion, respectively, in order to ascertain whether a benchmark is critical.
Similarly, recital 40 explains the rationale for significant benchmarks, and paragraph 1 of Article 24 provides two methods for their designation, one of which relies on a threshold of EUR 50 billion.

The empowerment in paragraph 6 of Article 20 is limited to the specification of how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds can be determined. It does not mention other possible ways in which the total value of financial instruments, contracts and funds using a benchmark could be determined.
It does, however, address the question how indirect reference to a benchmark within a combination of benchmarks could be taken into account. The main issue to be discussed in the technical advice is whether the value of a financial instrument, contract or fund should be taken into account fully or only partially in the calculation of the total value of a benchmark if that financial instrument, contract or fund uses a combination of benchmarks.

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes of assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

3.1 Framework

52. For the purpose of the mandate to assess benchmarks under the thresholds in Article 20(1) and Article 24(1)(a) of the Benchmarks Regulation (BMR), ESMA was requested by the European Commission to provide technical advice on the appropriate measurement of:

    a) the nominal amount of financial instruments other than derivatives;

    b) the notional amount of derivatives; and

    c) the net asset value of investment funds.

53. For all these three elements, the measurement would include both the direct case and the case of the indirect reference to a benchmark within a combination of benchmarks.

54. The general approach presented in the Discussion Paper (DP) was to start by listing the financial instruments, as defined in the Directive 2014/65/EU[16] (MiFID II), Section C of Annex 1, to be considered for the calculation, and the existing obligation reports under the EU legislation, in order to identify the data for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds. The issue of determining these measures should be considered together with the availability of the data needed for the calculation. ESMA completed an overview of the current and upcoming European legislation that could be considered as input data for the measurement of the reference value of a benchmark.

55. Article 3(1)(16) of the BMR defines a financial instrument as any of the instruments listed in Section C of Annex I to MiFID II for which a request for admission to trading on a trading venue has been made or which are traded on a trading venue or via a systematic internaliser. The instruments listed under points (4) to (10) of Section C, as well as point (c) under the "transferable securities" definition (see Article 2(1)(29) of Regulation (EU) No 600/2014 (MiFIR)[17]), are considered derivatives. The financial instruments that are not derivatives are therefore the following:

    a) Point (a) and (b) under the 'transferable securities' definition (Article 4(1)(44) of MiFID II):

        - shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

        - bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

    b) Money-market instruments (as defined in Article 4(1)(17) of MiFID II): instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;

    c) Units in collective investment undertakings; and

    d) Emission allowances, consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC30 (Emissions Trading Scheme)[18].

3.2 Nominal amount of financial instruments other than derivatives

Units in collective investment undertakings

[16] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=FR
[17] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0600&from=EN
[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0046:en:PDF

56. The above list of financial instruments other than derivatives includes “Units in collective investment undertakings”. The empowerment under Article 20(1) point (a) requires ESMA to specify how to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds. Article 3(1) point (19) of the BMR states that “investment fund” means AIFs as defined in point (a) of paragraph 1 of Article 4 of Directive 2011/61/EU (AIFMD)[19], or UCITS falling within the scope of Directive 2009/65/EU (UCITS Directive)[20].

57. The category of units in collective investment undertakings is thus fully included in the definition of investment fund in Article 3(1) point (19) of the BMR. The presence of units in collective investment undertakings within the set of financial instruments other than derivatives and, at the same time, the reference to net asset value of investment funds under the empowerment in Article 20(1) point (a) could lead to a double counting of units in collective investment undertakings in the calculation of the reference value of a benchmark. For this reason, ESMA is proposing to consider the value of units in collective investment undertakings under the assessment of the net asset value of investment fund only, so as to avoid double counting.

58. The responses to the DP were all in favour of avoiding double counting and taking into consideration the value of units in investment funds only under the assessment of the net asset value of investment funds.

Reference data

59. The new MiFID II / MiFIR regime introduces provisions regarding “reference data” of financial instruments. In particular, with regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs or systematic internalisers (see Article 27 of MiFIR), trading venues / systematic internalisers will have to provide competent authorities with identifying reference data that summarise the core characteristics of the financial instruments. Competent authorities will in turn provide the reference data to ESMA who will make it available on its website.

60. ESMA has developed regulatory technical standards[21] specifying the market data details that trading venues will have to report to competent authorities. The “reference data” table (see RTS 23 under Article 27 of MiFIR) to be used by the trading venues / systematic internalisers presents different sections according to the type of the financial instruments. A section is dedicated to “bonds or other forms of securitised debt related fields” that includes the field “total issued nominal amount”, for which the content to be reported is the “total issued nominal amount in monetary value”. The other sections are dedicated to different asset classes of derivatives. All remaining types of instruments fall within the general fields which do not include an item in relation to the nominal amount.

[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF
[20] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF
[21] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

61. The responses to the DP were generally in favour of the proposed approach to use MiFIR reference data for the assessment of the “nominal amount” under BMR Article 20(1) and Article 24(1)(a) for bonds, other forms of securitised debt and money market instruments. Respondents generally agreed with the use of the existing regulatory framework. However, several respondents pointed out the time gap between the entry into force of the Benchmarks Regulation and the delay in the implementation date of MiFIR. ESMA acknowledges this time lag issue and proposes in the meantime to use the approaches described in the below section in relation to the availability of data issue.

62. Two respondents highlighted that as regards structured finance products the notional amount and not the nominal amount should be considered. While a nominal amount might be issued usually only a smaller amount is being sold into the market, ESMA points out that structured finance products are not defined as derivatives under MiFID II / MiFIR and therefore would follow the measurement used for the nominal amount of financial instruments other than derivatives.

63. Concerning the category of shares in companies within the MiFID II transferable securities definition, under point (a) there may be some particular types of equity-like instruments linked to benchmarks, such as “preferente aandelen” in the Netherlands, which can refer to a floating interest rate linked to a benchmark. ESMA however believes that there are no cases in which “standard” shares reference a benchmark. Respondents to the DP shared ESMA’s view and were not aware of shares referencing a benchmark.

64. A separate category of financial instruments other than derivatives is emission allowances. As explained in the DP, within the EU emissions trading system (EU ETS), an emission allowance give the holder the right to emit one tonne of carbon dioxide (CO2), or the equivalent amount of two other greenhouse gases. The EU ETS works on the ‘cap and trade’ principle. The overall volume of greenhouse gases that can be emitted each year by the entities covered by the system is subject to a cap set at EU level. Within this Europe-wide cap, companies receive or buy emission allowances. Auctioning is the main method of allocating allowances. Considering the mechanics of the EU ETS, ESMA also tends to believe that emission allowances, in all cases, do not reference to benchmarks. Respondents to the DP shared ESMA’s view and were not aware of any emission allowance referencing a benchmark.

65. One respondent highlighted that the screening of reference data for potential instruments using a particular benchmark for reference will require significant additional IT and human resources. ESMA acknowledges the issue of potential increase in costs to be paid by market participants and, where possible, it is trying to reduce costs in its technical advice. For example, the proposed use of existing reporting obligations under MiFID II / MiFIR, instead of the creation of new reporting obligations for benchmarks-related purposes, was preferred by ESMA also because it limits the creation of additional costs on market participants.

3.3 Notional amount of derivatives

66. In relation to derivatives, the BMR Article 20(1) point (a) makes reference to the "notional amount", which is a concept common to other EU legislations, such as MiFIR and EMIR[22]. The category of derivatives is available as independent sections in the reference data: one section includes all derivatives and the other sections are split according to the different asset classes of the derivatives. This report does not include a field for notional amount except for the case of options where the notional amount can be measured as the strike price multiplied by the price multiplier.

67. The minimum details of the data to be reported to trade repositories (TRs) prescribed by Commission Delegated Regulation (EU) No 148/2013 includes the item "notional amount", described as "original value of the contract". In the context of the review of the reporting obligation under EMIR, ESMA has published a Final Report with new draft standards[23]. These new technical standards further specify the identification of the underlying asset (the process of identification would follow MiFID II / MiFIR data identification process described below in the section dedicated to the identification of the underlying benchmark). When measuring the notional amount of derivatives, ESMA proposes the use of the "Trade Repositories approach" based on EMIR reporting.

68. The responses to the DP were generally in favour of the proposed approach of using the notional amount, as used and defined in the EMIR reporting regime, for the assessment of notional amount of derivatives under BMR Article 20(1)(a). However, the main concern related to the non-availability of the data to benchmarks administrators. ESMA is considering the merit of broadening the regime for publicly available trade repositories data and is likely to include this matter in a Consultation Paper in relation to the review of EMIR second level measures.

69. In addition, one respondent suggested applying to the notional amount of index credit derivatives the index factor to adjust it to all the previous credit events in the index series.

70. In order to limit the number of times one financial contract is counted because it could be traded more than once a day, one respondent suggested to only take the net value of the major banks into the measurement or only look at the sell side in order to clean the data from a number of financial contracts which are sold and bought several times on one single day. In addition, the respondent suggested that the financial contracts to be considered could be limited to CCP cleared financial instruments. ESMA does not support to limit the calculation to CCP cleared financial instruments because they do not concern all asset classes or types of derivatives included in the scope of the BMR. In addition, ESMA points out that Trade Repositories are able to reconcile each single transaction in order to avoid double counting.

71. The Trade Repositories reporting includes a field to identify the venue of execution of the contract i.e. a unique code is associated for each venue. Where a contract is admitted to

[22] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN
[23] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf

trading on a trading venue but is traded OTC a specific code is reported to the Trade Repositories allowing them to identify these trades. As regards to derivatives traded via a systematic internaliser, ESMA points out that in accordance with EMIR and the related technical standards, systematic internalisers are not considered exchanges. These trades could not be identified in the trade repositories reporting and would be excluded from the measurement.

3.4 Net asset value of investment funds

72. The relevant European sectoral legislation applicable to investment funds (i.e. Directive 2009/65/EC (UCITS Directive) and Directive 2011/61/EU (AIFMD)) includes an obligation on investment managers to disclose the net asset value of investment funds. However, the current reporting system allows neither singling out the investment funds using any benchmark for the determination of their performance or to define the asset allocation of a portfolio or to compute the performance fees, nor computing the net asset value of such a subset of investment funds.

73. As explained in the DP, managers of UCITS funds have to publish annual and half-yearly reports for each UCITS they manage. According to Article 68(2) of the UCITS Directive, these reports shall be published within the following time limits, with effect from the end of the period to which they relate: four months in the case of the annual report; or two months in the case of the half-yearly report. In addition, the AIFMD provides that managers of AIFs "shall also ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation" (Article 19(3) of the AIFMD). AIFMs are responsible for the publication of the net asset value (Article 19(10) of the AIFMD). The latest net asset value of the AIF has also to be made available to AIF investors before they invest in the AIF (Article 23(1)(m) of the AIFMD).

74. There may be mismatches in terms of availability of data under the UCITS Directive and the AIFMD. In the DP two options were proposed: a possible first option to determine how the net asset value of funds should be assessed was to take as a proxy the information to be disclosed under the AIFMD and UCITS Directive, as described above. An alternative second option was that the net asset value of investment funds is assessed based on the latest available net asset value. Respondents to the DP were generally in favour of the second option.

75. Several respondents questioned the inclusion of performance benchmarks used for asset allocation or fee determination purposes in the scope of this measurement since the contribution to the risk of a benchmark would not be identical to when investment products actually track the benchmark. ESMA points out that according to the BMR definition of a benchmark: an index that is used "*to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees*", is in the scope of the BMR and could not be excluded from the measurement as long as it does not otherwise fall outside the scope set by Article 2 of the BMR.

3.5 Other issues

76. Several respondents proposed that ESMA would take a coordinated role to gather the data needed for these measurements. ESMA will gather reference data under MiFID II and will make them available on its website but any collection of further data lies with the NCAs.

77. The assessment of the reference value of a benchmark and its comparison with the quantitative thresholds are intended under the BMR to be carried out by the competent authorities (in the case of the identification of benchmarks that are critical in a particular Member State and for the distinction between the significant and the non-significant benchmarks), by the European Commission (in the case of the identification of benchmarks that are critical at European level), and by the administrators (for the distinction between the significant and the non-significant benchmarks they provide). Several respondents argued that an asymmetry of available information exists between regulators and administrators. ESMA acknowledges this issue and tried to base its technical advice on public data - where available - giving however priority to regulatory reporting in order to establish a lasting methodology.

78. Where a financial instrument is not traded in EUR, the nominal amount of the financial instrument, or the notional amount of the financial instrument or the Net Asset Value of the investment fund shall be converted into EUR, for which ESMA considers appropriate to use the daily euro foreign exchange reference rates published by the European Central Bank on its website.

Length of time to be used for the measurement of the reference value to be compared with the quantitative threshold

79. A measurement of the reference value to be compared with the relevant quantitative threshold in a specific point in time is sufficient for a large number of benchmarks that are available on a daily basis such as Libor or Euribor and for which the degree of use tend to be more stable over the time. However, several respondents highlighted that for highly seasonal commodities, like energy or agriculture, the measurement at a point in time can lead to an overvalued benchmark if the valuation takes place on a day where prices are high (or undervalued otherwise). In addition, respondents argued that since the notional amount of derivatives and the net asset value of investment funds are volatile the measurement should be smoothed out for example as an average daily notional value per month.

80. However, ESMA considers that commodity benchmarks, for which the above described problems are reportedly more relevant, are not under the scope of Article 24 and may fall in the scope of Article 20. Moreover, potential candidates for the critical category of benchmarks are supposed to be so widely used as to be less subject to swift fluctuations in the underpinning degree of use; furthermore the BMR already provides for a review of these to be conducted every two years. That considered, and also in order to simplify the measurement against the thresholds and reduce costs, ESMA proposes to apply a measurement at a specific point in time for all financial instruments and types of

benchmarks in the case of the calculation required under Article 20 and a measurement over a period of six months for all financial instruments and types of benchmarks in the case of the calculation required under Article 24, in line with what was already provided for under the said Article 24.

Identification of the underlying benchmark

81. Irrespective of the type of instrument, the identification of the underlying benchmark could be overly burdensome. The MiFID II / MiFIR database (reference data) identifies the underlying index or benchmark through a waterfall approach starting with an ISIN code when available, than through an index list defining 26 rate indices. The remaining benchmarks would fall within an alphanumerical field of up to 25 characters which is a free text field without any rules governing its definition.

82. In order to identify benchmarks in the context of MiFID II / MiFIR reporting framework and to enable automatic calculation, an ISIN code for the underlying of the financial instrument should be registered. ESMA highlights also that within the current international work stream on unique product identifiers, IOSCO and CPMI are also working on an “underlier ID”. However, this work is still at an early stage.

83. Another alternative approach is the use of the licensing agreements in order for users of benchmarks to provide the necessary information, in particular in relation to financial instruments referencing a benchmark. Several respondents proposed that competent authorities would request to all benchmark administrators a list of the firms for which a license has been granted. The relevant authority would then send a mandatory survey including the relevant assets which will be reported back to the benchmark administrator. A limit of this approach is that usually the use of licensing agreements does not cover the overall use of a benchmark. In addition, the data to be exchanged could be subject to confidentiality, not allowing the competent authorities to report back these data to the benchmark administrator.

Availability of data issue

84. ESMA provides in its technical advice a long term solution to be applied as soon as EMIR TR data and on MiFID II / MiFIR reporting requirements will be available.

85. In the meantime, the following alternative approach can be used based on the hypothesis that when a benchmark is widely referenced by financial instruments, a significant market of futures and options traded on trading venues develops. Data from trading venues could be used to measure the threshold for each benchmark using the open interest data. If the open interest is above the thresholds defined in the Article 20(1) and article 24(1)(a) the benchmark will be categorised accordingly.

86. The current AIFMD reporting system does not allow determining whether the reporting AIF uses any benchmark for the determination of its performance. Moreover, there are no databases for UCITS funds. This approach based on the information to be disclosed under AIFMD and UCITS could be very burdensome in the sense that the benchmark could not be identified unless going through the marketing material of all individual

investment funds. Several respondents suggested, as an alternative, using private info-providers in order to identify the benchmarks used as reference in investment funds and be able to aggregate net asset value per referenced benchmark.

3.6 Indirect reference to a benchmark within a combination of benchmarks

87. The nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds need to be assessed for the purpose of determining whether a benchmark is critical or significant and this has to be done also "*in case of the indirect reference to a benchmark within a combination of benchmarks*". Therefore, in case of a financial instrument, a derivative or an investment fund referencing to a composite benchmark, two different approaches may be considered. Firstly, only the portion of the nominal amount of the financial instrument / notional amount of the derivative / net asset value of the investment fund which refers to the single benchmark (within a combination of benchmarks) which is being assessed as critical or significant could be taken into account. Secondly, whenever a financial instrument, a derivative or an investment fund makes reference to a benchmark (within a combination of benchmarks), the "full" nominal amount / notional amount / net asset value could be seen as relevant for the purpose of the assessment whether the relevant benchmark is critical or significant.

88. The responses to the DP were all in favour of the proposed approach which states that in relation to assets referencing a combination of benchmarks only the portion of the value which refers to a single benchmark should be taken into account. However, several responses to the DP highlighted that the "portion approach" can be difficult to implement when, for example, the formula is not composed of a mere weighted sum of the different benchmarks and weightings are subject to discretional and potentially continuous changes.

89. ESMA proposes to apply the first "portion approach" option when the weightings are available. In the case where the combination of benchmarks is different from a weighted sum, for example when 'best of' or 'worst of' pay-out profile is used, then ESMA proposes to consider that all benchmarks are equally weighted.

3.7 Draft Technical Advice on the measurement of the reference value of a benchmark

The following measures, expressed in EUR (contracts in other currencies shall be converted into EUR using the daily euro foreign exchange rate published by the European Central Bank on its website), should be taken into account when assessing benchmarks under the thresholds in Article 20(1) (at a specified point in time) and under the thresholds in Article 24(1)(a) (over a period of six months):

a) Nominal amount of financial instruments other than derivatives[24]

For bonds, money market instruments and other forms of securitised debt including structured finance products, the total issued nominal amount in monetary value, as reported under Article 27 of Regulation (EU) No 600/2014 and in accordance with RTS 23 "Draft regulatory technical standards on supply of financial instruments reference data under Article 27 of MiFIR", Table 3, field 14.

b) Notional amount of derivatives

The Notional amount as reported under Article 9 of Regulation (EU) No 148/2013 of the European Parliament and of the Council and in accordance with Commission Delegated Regulation (EU) No .../.., Table 2, field 20, with the following additional specifications:

- If the notional amount is negative, the absolute value should be taken into account;
- For credit derivative index transactions the notional amount should be applied to the index factor, as derived from Commission Delegated Regulation (EU) No .../.., Table 2, field 89.

The following additional measurement methods should be applied to the non-exhaustive list of derivatives below:

- In the case of swaps and forwards traded in monetary units, the reference amount from which contractual payments are determined in derivatives markets;
- In the case of options, Number of contracts * number of units of options * strike price;
- In the case of futures, Number of contracts * number of units of futures * settlement price;
- In the case of financial contracts for difference and derivative contracts relating to commodities designated in units such as barrels or tons, the resulting amount of

[24] In line with ESMA TS under MiFID II / MiFIR https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

the quantity at the relevant price set in the contract.

c) Net asset value of investment funds

For investment funds subject to Directive 2009/65/EC, the latest available net asset value per unit, as reported in the most recent annual or half-yearly report in accordance with Article 68(2) and Annex I, Schedule B of the same Directive, times the number of units.

For investment funds subject to Directive 2011/61/EU, the latest available net asset value per unit published in accordance with Article 19(10) of the same Directive, times the number of units.

d) Transitional regime

Whenever data as set out above in paragraphs a), b) and c) is not available or not sufficient, when assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a), the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds, or proxies for these values, such as open interest data, as reported by alternative private providers of information available to administrators and competent authorities may be taken into account. In such cases, the competent authority or the administrator shall provide written justification of this use, in particular in relation to the non-availability of the regulatory data.

e) The indirect reference to a benchmark within a combination of benchmarks

For the purpose of assessing a benchmark under the thresholds in Article 20(1) and Article 24(1)(a), where an investment fund, a derivative or a financial instrument other than a derivative makes indirect reference to that benchmark within a combination of benchmarks the following measures, expressed in EUR, should be taken into account:

- When the weighting of the benchmark, within the combination of benchmarks, is available, the portion of the nominal amount of the financial instrument other than derivatives, notional amount of the derivative and net asset value of the investment fund indirectly referencing such benchmark;

- When the weighting of the benchmark, within the combination of benchmarks, is not available, the portions of the total nominal amount of the financial instruments other than derivatives, of the total notional amount of the derivatives and of the total net asset value of the investment funds indirectly referencing such benchmark, assuming an equally weighted combination of benchmarks.

Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of

derivatives and the net asset value of investment funds when regulatory data is not available or sufficient?

Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?

Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?

4 Technical Advice on the criteria referred to in Article 20(1)(c) subparagraph (iii)

Extract from the Commission's request for technical advice (mandate)

ESMA is tasked to specify what would be significant and adverse impacts on a number of different economic factors: market integrity, financial stability, consumers, the real economy, and the financing of households and corporations in one or more Member States.

In particular, ESMA should consider whether numerical measures, in absolute or relative terms, could be developed to ensure objective consideration of these criteria. If so, ESMA should provide advice on such numerical measures and how they should be interpreted in the respective economic and financial context. The technical advice should allow competent authorities to base their assessment on objective grounds instead of subjective reasoning which is hard to assess.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

4.1 Framework

90. According to Article 20(1) of the Benchmark Regulation (BMR), the Commission shall adopt implementing acts to establish and review at least every two years a list of benchmarks provided by administrators located in the Union which are critical benchmarks.

91. In order for a benchmark to be included in the list of critical benchmarks pursuant to Article 20(1)(c) of the BMR, all the conditions mentioned in that paragraph should be fulfilled. Therefore, for this paragraph to apply, a benchmark will have to be used as a reference for financial instruments or contracts, or for measuring the performance of investment funds, having a total value between EUR 400 billion and EUR 500 billion (although an exemption to this criterion is included in the BMR, see below). In addition, the benchmark should have no or very few appropriate market-led substitutes. Finally, ceasing to provide such a benchmark, or the benchmark's provision where its input data was unreliable or no longer fully representative of the intended market or economic reality, should have a significant and adverse impact in one or more Member State on:

    a) Markets integrity;

    b) Financial stability;

c) Consumers;

d) The real economy; or

e) The financing of households and businesses.

92. ESMA was requested by the Commission to provide technical advice on how the criteria specified in Article 20(1)(c)(iii) of the BMR should be applied, taking into consideration any numerical figure to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on the elements listed in subparagraph (iii). ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

93. It is important to note that the criteria defined in the ESMA advice would apply to a benchmark with no or very few appropriate market-led substitutes, and that is used as a reference for financial instruments, contracts or investment funds having a total value between EUR 400 billion and EUR 500 billion. The criteria included in the advice would refer to this total value, and under this first case it would be a responsibility of the European Commission to make the assessment, also based on the criteria suggested in the advice, and take the decision.

94. Article 20(1)(c) also states that National Competent Authorities (NCAs) may identify a benchmark as critical even if the benchmark is used as a reference for financial instruments and contracts having a total value lower than EUR 400 billion, if such benchmark has no or very few appropriate market-led substitutes and if the criteria to be specified in the technical advice apply. Under this second case, it would be a responsibility of the NCAs involved to make the assessment, also based on the criteria included in the advice (the assessment will be then transmitted to the Commission which will adopt an implementing act including the benchmark in the list of critical benchmarks).

95. ESMA therefore needs to develop criteria considering that these criteria will be used in both cases described above and therefore by different entities (the Commission in the first case, NCAs in the second one).

96. Finally, a separate provision (Article 20(1)(b)) empowers an NCA to identify a benchmark as critical if this is based on submission by contributors which are in majority located in the Member State of the NCA (no minimum “total value” is contemplated under this provision). Under this third “national” case, the criteria of technical advice would not apply: the text of the BMR already includes which conditions should be taken into account by the competent authority (Article 20(3)).

4.2 Feedback and proposed criteria

97. As already noted in the Discussion Paper (see paragraph 218 of the Discussion Paper), in relation to the procedure for recognition of a benchmark as being critical in a single Member State by the NCA of that Member State (in accordance with Article 20(1)(b) and 20(3) of BMR, i.e. the “national” case), the BMR already includes the criteria that should be taken into account by that NCA in its assessment:

a) the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State;

b) the value of financial instruments and financial contracts that reference the benchmark and the value of investment funds referencing the benchmark for measuring their performance within the Member State and its relevance in terms of the gross national product of the Member State.

c) any other figure to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on markets integrity, or consumers, or the real economy, or financial stability, or the financing of households and businesses of the Member State.

98. ESMA believes that also the Commission (under the first case described above) and the NCAs (under the second case) should take into consideration these values and figures when establishing the list of critical benchmarks in accordance with Article 20(1)(c)(iii), and that the technical advice for Article 20(1)(c)(iii), should be developed with a consistent approach with that already embedded in the BMR.

99. ESMA's technical advice should propose figures to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on the criteria included in Article 20(1)(c)(iii) BMR. For this purpose, ESMA proposed a "relative impact approach" in the Discussion Paper. As an illustrative example of how the relative impact approach would work, with respect to the real economy a certain percentage point decrease of GDP could be qualified as having significant impact. With respect to consumers a similar approach could be taken by looking at the percentage of consumer loans that would be affected if a benchmark is discontinued or is no longer considered reliable.

100. In the Discussion Paper (DP), ESMA preferred to propose a "relative impact approach" rather than absolute figures because the significant impact in absolute figures, for example on GDP, could differ to a great extent from one Member State to another, while a "relative impact approach" is more flexible and can take into account the differences between Member States. This is also in line with the mandate received from the European Commission, which states: "When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size".

101. The responses to the DP were all in favour of the "relative impact approach" described in the DP. The respondents highlighted that, given the implications of being classified as a critical benchmark, it is of vital importance that the relevant assessment be sufficiently defined and robust so that it does not yield different results following each biennial reassessment. They also added that the relevant elements of the "qualitative test" are intended to measure the impact of a potential, unquantifiable and unknown event and this means that the assessment must ensure with a high level of certainty that

the risks associated with a particular benchmark are so undeniable as to be able to predict the expected results, i.e. a significant and adverse impact in one or more Member State on markets integrity, financial stability, consumers, the real economy, or the financing of households and businesses.

102. One respondent also argued that the potential impact of the discontinuity and unreliability of a benchmark will also depend on the number of financial instruments, derivative contracts, and investment funds that reference that benchmark, because each of these would be impacted if the relevant benchmark were discontinued or found to be unreliable. The higher the number of financial instruments, derivative contracts, and investment funds that reference the benchmark, the higher the level of costs incurred and effort associated with switching these products to an alternative benchmark. A criterion based on this comment has been added to the draft advice (see below).

103. In light of the feedback received from stakeholders, ESMA has decided to maintain the "relative impact" approach proposed in the DP while adding some additional qualitative criteria to be considered during the assessment, which refer to the impact of a specific benchmark and not the "relative impact". It should be noted that the size and structure of the financial sector, and the use of benchmarks within it, vary considerably across Member States. Therefore, while retaining the "relative impact approach", ESMA prefers, at this stage, to propose criteria without a pre-defined percentage, leaving the Commission (under the first case) and the NCAs (under the second case) to decide on a case-by-case basis which level should be considered "critical" when developing the assessment for each specific benchmark (at the end of this chapter there are two paragraphs and a question focusing on whether a pre-determined percentage should be used instead).

104. As a general remark, it should be noted that all criteria should be considered jointly and should be calibrated on a case-by-case basis by the Commission or the NCAs, taking into account the characteristics of the benchmark under scrutiny and the features of the economic and financial environment in which the benchmark is used. This set of criteria should be considered as the common approach to be used by the Commission and NCAs when developing their assessment.

105. In the area of market integrity, ESMA is proposing a set of criteria that focuses on the relative value of the financial contracts, financial instruments and investment funds referencing a specific benchmark vis-à-vis the total value of the financial contracts, financial instruments and investment funds in the Member States concerned. These criteria were developed based on the model of the criteria already included in the BMR in the case of election of "national" critical benchmarks (Article 20(3)). Besides, ESMA believes that in the context of market integrity, the Commission and NCAs, when assessing a benchmark, should also consider:

- whether the benchmark has been indicated as a successor of another benchmark that has already been classified as critical; and

- the number, nature and tenors of financial instruments and contracts referencing the benchmark, so as to identify all the different financial markets in which the benchmark

is employed and thus be able to ascertain the degree and modality of use of the benchmark throughout the financial system.

106. In the domain of financial stability, the draft technical advice suggests to compare the value of financial instruments, financial contracts and investment funds that reference the benchmark with the total assets of the financial sector and of the banking sector in the considered Member States. The European Central Bank (ECB) defines financial stability as "a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation and in the general supply of financial services"[25]. In the draft advice, ESMA proposes to link this concept to the use of benchmarks. The approach focuses on how a potentially critical benchmark could impact and endanger the financial stability in the Member States in which it is used. The proposal put forward by ESMA in the draft advice is an attempt to link the use of the benchmark to the "dimension", in terms of total assets, of the financial sector and of the banking sector in the concerned Member States. These two values (total assets of financial sector and banking sector) are commonly used in the analysis of financial stability, macroprudential issues and financial system structure[26], where the banking sector is the most relevant element composing the broader financial sector (which includes also pension funds, insurance undertakings and other financial intermediaries).

107. For the criteria dedicated to consumers, ESMA proposes a first criterion focusing on the relative value of the financial contracts that are credit agreements for consumers (as defined in Directive 2008/48/EC on credit agreements for consumers[27]) and that reference the benchmark, compared with the total value of all the credit agreements for consumers in the Member States considered. This criterion would measure the exposure of consumers to the particular benchmark via credit agreements that by definition do not include mortgages. The second criterion proposed in this area refers to the financial instruments and investment funds referencing the benchmark that are offered to retail investors, and in particular to the outstanding value of the instruments and funds sold to retail investor, their tenor and an estimate of the number of retail investors who bought them. This criterion would measure the exposure of consumers to the benchmark via financial instruments and investment funds that could be bought by consumers.

108. In relation to the real economy, the draft advice proposes a criterion that compares the value of financial instruments, financial contracts and investment funds that reference the benchmark with the value of the gross national product of the Member States considered. This criterion is based on the criterion included in the BMR and that a NCA has to consider when assessing whether a benchmark is critical at "national level" (Article 20(3)).

[25] See ECB webpage on financial stability: https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html
[26] See, for example, ECB report on financial structure: https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf
[27] The text of the Directive is available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF

109. Finally, for the “financing of households and businesses” area ESMA has followed a similar logic to the one used in the other areas and proposes to consider the value of financial contracts referencing the benchmark that are loans to households or non-financial corporates compared to the total value of loans to households or non-financial corporates in the Member States considered.

110. Some of the criteria proposed by ESMA in the draft advice are quantitative in nature; these criteria essentially focus on the relative use of the benchmark across different fields of the financial system. The use of such criteria may be limited by the availability of the relevant data at the disposal of the Commission and the NCAs. When precise and up-to-date data cannot be accessed by the Commission and the NCAs, the criteria based on quantitative data, if relevant for the assessment of the benchmark under scrutiny, should be either computed by the Commission and the NCAs on a best-effort basis or not applied. An assessment should therefore be considered complete even if it does not take into consideration all the criteria proposed in the advice, if one of these two conditions is met: either the criterion excluded from the assessment is not relevant for the benchmark under scrutiny (e.g. this could be the situation when the benchmark is not used for credit agreements for consumers, and therefore the criterion referring to these financial agreements is not applicable); or the data necessary to compute the criterion cannot be retrieved.

111. While it is clear that for the election of a benchmark as critical under Article 20(1)(c) there is always the need to have enough data to establish the degree of use of the benchmark (see subparagraph (i) of Article 20(1)(c), referring to a “having a total value of at least EUR 400 billion”, and also the reference to this condition in the second part of subparagraph (iii) of the same Article), it could be the case that an assessment is finalised without the use of one or more criteria based on quantitative data because of the lack of reliable data. In these cases, the relevant NCAs and the Commission would conduct the assessment based on the other criteria, consistently with the principle that the final decision about the criticality of a particular benchmark is not an automatic outcome triggered by a single criterion, but rather an evaluation to be conducted on a case-by-case basis, according to a holistic approach considering simultaneously different factors.

112. As explained in the previous paragraphs, the criteria included in the current draft advice do not include any pre-defined percentage. However, the criteria based on quantitative data introduces the concept of “significant share of” that should be understood, for example in relation to the criterion l)(2), as an analysis for determining if the portion of households that have subscribed loans referring to the benchmark is significant compared to the total number of households.

113. ESMA would like to receive comments on whether the concept of “significant share” in relation to this set of criteria based on quantitative data (criteria a), b), c), g), h), i), j), k), and l) of the draft advice) should be further specified and translated into predefined percentages of reference, or ranges of values expressed in percentages, defined in relation to the specific metrics considered in the different criteria. It could be proposed, as illustrative examples, to redraft criterion l)(2) as “an estimate of the number of households

that has subscribed loans referencing the benchmark in one or more Member States and whether this represents 10% or more of the total number of households in the Member State(s) considered", or to redraft criterion h)(2) as "an estimate of the number of retail investors who have bought financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this represents 1% or more of the total population in the Member State(s) considered".

114. The main advantage of including (ranges of) percentages as reference for the criteria based on quantitative data, or for some of them, is to foster a common approach for the analysis of a potential critical benchmark that is more precise and therefore less subject to different applications. The main disadvantages are linked to the difficulty in pre-setting meaningful (ranges of) percentages and to the partly loss of flexibility of the approach defined in the advice.

4.3 Draft Technical Advice on the criteria referred to in Article 20(1)(c) subpara. (iii)

1. For the purpose of recognising a benchmark as critical pursuant to Article 20(1)(c), the following non-exhaustive list of criteria should be taken into account, in the assessment of whether the cessation of the provision of that benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, would have significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

2. These criteria should be considered jointly, with the ultimate aim of developing an assessment that analyses the benchmark in a holistic manner, and they should be calibrated considering the idiosyncratic features of the benchmark and of the economic and financial environment in which the benchmark is used.

3. Not all the criteria will always be relevant for, or applicable to the benchmark under scrutiny. The criteria based on quantitative data should be included in the assessment only when the available data are considered by the Commission and national competent authorities to be reasonably precise and up-to-date. The assessment has to clearly indicate which of the criteria below have not been considered and include a brief explanation of the reasons for doing so.

4. Where the assessment analyses the benchmark in more than one Member State, it should clearly state which Member States are considered, and all of the criteria included in the assessment should be considered in each of these Member States. For the purpose of computing the criteria based on quantitative data, the quantitative data of the same type referring to different Member States should be added together in order to apply the criteria simultaneously to all the Member States involved.

Criteria related to market integrity

   a. The value of financial contracts that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of financial contracts outstanding in the Member State(s) considered.

   b. The value of financial instruments that reference the benchmark, directly or indirectly within a combination of benchmarks, and are traded on trading venues in the Member State(s) considered and whether this is a significant share of the total value of financial instruments traded on trading venues in the Member State(s) considered.

   c. The value of investment funds referencing the benchmark for measuring their performance, directly or indirectly within a combination of benchmarks, in the

Member State(s) considered and whether this is a significant share of the total value of investment funds present in the Member State(s) considered.

d. Whether the benchmark is considered or used as a potential successor for other benchmarks that are included in the list of critical benchmarks, envisaged in Article 20(1) of the [Regulation …/…].

e. The diversity of financial instruments and financial contracts referencing the benchmark, and in particular:

    1. the number of different types of derivative contracts that reference the benchmark, in the Member State(s) considered and its relevance in terms of an estimate of the total number of types of derivative contracts traded in the financial system of the Member State(s) considered;

    2. the reference of the benchmark simultaneously in derivatives, securities, investment funds and financial contracts;

    3. The average and maximum tenors of the existing financial instruments and financial contracts referencing the benchmark.

f. The use of the benchmark as a standard for accounting purposes or as a reference for other regulatory purposes:

    1. whether the benchmark is used as a reference for prudential regulation such as capital, liquidity or leverage requirements;

    2. whether the benchmark is used in international accounting standards;

    3. whether the benchmark is used for tax purposes.

Criteria related to financial stability

g. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of:

    1. the total assets of the financial sector[28] in the Member State(s) considered;

    2. the total assets of the banking sector in the Member State(s) considered.

[28] The European Central Bank's monthly "Report on Financial Structures" may provide helpful figures in this respect: https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf

Criteria related to consumers

h. The use of the benchmark in financial instruments and investment funds offered to retail investors[29], and in particular:

    1. The value of the financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, sold to retail investors in the Member State(s) considered and whether this is a significant share of the total value of financial instruments and investment funds sold to retail investors in the Member State(s) considered;

    2. An estimate of the number of retail investors who have bought financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

i. The use of the benchmark by pension funds, and in particular:

    1. The value of pension funds referencing the benchmark for measuring their performance in the Member State(s) considered and whether this is a significant share of the total value of the pension funds in the Member State(s) considered.

    2. An estimate of the number of consumers participating in pension funds referencing the benchmark for measuring their performance, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

j. The use of the benchmark in credit agreements for consumers[30], and in particular:

    1. The value of credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total value of the credit agreements for consumers in the Member State(s) considered.

    2. An estimate of the number of consumers that has subscribed credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

[29] "Retail investor" is defined in Article 4(6) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

[30] The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers) was adopted on 23 April 2008 and defines what credit agreements for consumers are.

Criteria related to the real economy

k. The value of financial instruments, financial contracts and investment fund that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) and whether this is a significant share the gross national product of the Member State(s) considered.

Criteria related to the financing of households and businesses

l. The use of the benchmark in loans, and in particular:

1. The value of loans to households and non-financial corporates referencing the benchmark in the Member State(s) and whether this is a significant share of the total value of loans to households or non-financial corporates[31] in the Member State(s) considered.

2. An estimate of the number of households that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of households in the Member State(s) considered;

3. An estimate of the number of non-financial corporates that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of non-financial corporates in the Member State(s) considered.

Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?

Q9: Do you think that the concept of "*significant share of*" should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?

5 Technical Advice on Article 33 BMR (Endorsement)

Article 33 (7) Benchmarks Regulation (BMR):

[31] ECB maintains updated statistics on outstanding loans to households and non-financial corporations in its Statistical Data Warehouse : https://sdw.ecb.europa.eu/home.do

"The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions under which the relevant competent authorities may assess whether there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark intends to measure, the need for proximity of the provision of the benchmark to such market or economic reality, the need for proximity of the provision of the benchmark to contributors, the material availability of input data due to different time zones, and specific skills required in the benchmark provision."

Extract from the Commission's request for technical advice (mandate)

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

5.1 Framework

115. The mandate to the Commission that is included in the text of Art. 33 (7) BMR as well as the request for technical advice by the Commission to ESMA ask for measures "to determine the conditions [under/on] which the relevant competent authority may assess whether there is objective reason." This could be read as a request to define conditions that would have to be met before an authority may (even) begin its assessment and that would rather have to be perceived as preceding the material decision whether there are objective reasons (for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union) or not. Given that both the Level 1 mandate to the Commission as well as the request for technical advice to ESMA require to take into account aspects ("issues") that clearly relate to the material evaluation of reasons an administrator or other supervised entity may have and put forward, ESMA instead interprets the request by the Commission as asking to elaborate on aspects of exactly this material evaluation, i.e. issues to be taken into account by the relevant competent authority when it assesses the reasons for an endorsement put forward by an administrator or other supervised entity to the competent authority regarding their objectivity.

116. The assessment by the relevant competent authorities will have to address two different sets of reasons, namely those that stem from the administrator's sphere ("reason[s] for the provision of a benchmark or family of benchmarks in a third country") and those that relate to the use of the respective third country benchmarks in the Union

("reason[s] for […] their endorsement for their use in the Union"). In ESMA's view reasons for both aspects should be required cumulatively, i.e. an administrator should represent that not only it is at least overly burdensome to produce the existing benchmark within the Union but, additionally, that although the benchmark is so specific and so closely related to a third country region it is nonetheless appropriate to consider it being provided by an administrator or other supervised entity in the Union as prescribed by Article 33(4) BMR.

117. Relevant competent authorities will be required to make their assessment in the context set out in Article 33. The endorsing administrator or other supervised entity located in the Union, with a clear and well defined role within the control or accountability framework of the third country administrator, which allows such person to effectively monitor the provision of the benchmark, is required:

a) to have verified and to be able to demonstrate that the provision of the benchmark to be endorsed fulfils requirements which are at least as stringent as the requirements set out in the BMR;

b) to have the necessary expertise to monitor the provision of activities performed in a third country effectively and to manage the associated risks.

118. As a result, the protection of users of the endorsed benchmarks in the Union would be ensured through the terms of the BMR and consideration of the reasons for endorsement should be made separately. Further, in Article 21b(4), the use of the endorsement procedure for avoidance purposes is prohibited.

119. ESMA is requested to look at a non-exhaustive ("such as") list of issues: geographical proximity, availability of input data and the availability of skills necessary for the provision of the benchmark. All these aspects relate to the first set of reasons, i.e. can be aspects of reasons for the provision of the relevant benchmark in a third country. In its empowerment to the Commission Article 33(8) of the BMR requires it to take into account a more detailed non-exhaustive set of "elements": specificities of the underlying market or economic reality the benchmark seeks to measure, the need for proximity of the benchmark provision with such a market or economic reality, the need for proximity of the benchmark provision to contributors, the material availability of input data due to different time zones as well as specific skills required in the benchmark provision.

5.2 Existing use of "objective reason[s]"

120. The Commission also asked ESMA to take into account existing definitions of "these concepts" in other pieces of European law or international fora and ESMA interprets this as a request to consider other areas of regulation that contain the notion of "objective reason[s]" as a requirement for the non-application of certain provisions or other forms of relief from regulatory burden. ESMA has found examples in the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ("CRAR 2009"), the Directive 2011/611/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No

1060/2009 and (EU) No 1095/2010 ("AIFMD") and, specifying these, in the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision ("AIFMD COM DR").

121. According to Article 4 (3) CRAR 2009 a credit rating agency established in the Community and properly registered may endorse a credit rating issued in a third country if the rating is based on credit rating activities that comply with various conditions, one of which is that "there is an objective reason for the credit rating to be elaborated in a third country." While ESMA has published Guidelines on the application of the endorsement regime under Article 4 (3) of the Credit Rating Agencies Regulation No 1060/2009 in May 2011 (ESMA/2011/139), ESMA has so far not further interpreted the concept of "objective reason" under Article 4 (3) CRAR 2009. Recital 55 of CRAR 2009 states that credit rating agencies whose headquarters are located outside the Community should be required to set up a subsidiary in the Community in order to maintain a high level of investor and consumer confidence and enable the ongoing supervision. Therefore, endorsement under the CRAR 2009 should be an exceptional case and the argument of additional cost otherwise occurred will – if not excessive in relation to the entity's size – generally not be an objective reason for endorsement.

122. Article 20 (1) AIFMD allows alternative investment fund managers ("AIFM") to delegate the task of carrying out their function to third parties if a number of conditions are met, the first of which is that "the AIFM must be able to justify its entire delegation structure on objective reasons" (letter (a)). Additionally, according to Article 21 (13) AIFMD, a depositary may contractually discharge itself of its liability under the condition – inter alia – that a written agreement with the depositary "expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge" (letter (c)).

123. The AIFMD mandates the Commission to adopt delegated acts to specify both the conditions for fulfilling the "objective reason" requirement for delegation in Article 20 (1) and the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to Article 21 (13). In Article 76 of the AIFMD COM DR, the Commission establishes criteria to be considered when assessing if a delegation structure is based on "objective reason":

a) Optimising of business functions and processes;

b) Cost saving; Expertise of the delegate in administration or in specific markets or investments;

c) Access of the delegate to global trading capabilities.

124. More generally, a delegation shall be subject to strict requirements and limitations (Recital 82 AIFMD COM DR).

125. In Article 102 AIFMD COM DR the Commission prescribes a more formal framework for objective reasons for a contractual discharge of liabilities of depositaries and states that they should be:

a) Limited to precise and concrete circumstances characterising a given activity; and

b) Consistent with the depositary's policies and decisions;

126. In any case, objective reasons in this context are deemed to exist if the depositary "had no other option but to delegate its custody duties to a third party" and Article 102 (3) AIFMD COM DR names particular cases when this is the case. According to Recital 122 of AIFMD COM DR the depositary "should demonstrate that it was forced by the specific circumstances to delegate custody to a third party."

127. In sum, the mentioned references to "objective reason[s]" in the regulatory areas of CRAs and AIFMs are different in nature and capture different scenarios. In the case of credit rating endorsement, the CRAR 2009 requires ratings to be conducted generally within the Union and provides for endorsement as an exception for which objective reasons would be mostly grounded in organisational or corporate specificities of the respective rating agency and would generally be of a provisional nature, i.e. none of these reasons should allow for a permanent endorsement of third country ratings for economic reasons (cost savings) alone. In the area of AIFMD the AIFM can rely on a wider range of "objective reasons" for the delegations of its tasks, including cost savings and efficiency, while depositaries again can only discharge of their liability in exceptional cases, particularly if they have no other choice.

128. The assessment of objective reasons for endorsement under Article 33(1)(c) BMR should reflect that for third country benchmarks the BMR primarily prescribes equivalence in accordance with Article 30 BMR and – in the absence of a decision by the Commission – recognition of a third country administrator according to Article 32 BMR, which is preceded by an in-depth assessment of the administrator and which requires a permanent legal representative in the Union.

5.3 Two sets of reasons

129. In any case, in ESMA's view the administrator should provide reasons for both the provision of the benchmark or family of benchmarks in a third country and for its/their endorsement in the Union.

130. ESMA notes that the elements in both the empowerment of the Commission and in the request for technical advice to ESMA are relating to the first set of reasons, i.e. to the provision of the third country benchmark itself. ESMA is specifically asked to take into account proximity, availability of input data and relevant skills.

131. Given the permanent availability of communication technology with no considerable delay in data transmission, the cases for the need of geographical proximity of the provision of a benchmark to the market the benchmark is designed to measure are few. For example, where input data is sourced from a third party trading venue that may itself

be open to investors that reside in another continent, geographical proximity can hardly be an objective reason for a benchmark to be provided in the third country jurisdiction.

132. The same will generally hold for a difference in time zones between the region where the benchmark is provided and the European Union. If the third country benchmark is relevant to European investors although it may be provided outside core trading hours, the input data could most likely be transferred to an administrator in the EU for a provision of the benchmark outside business hours in the Union as well (although this would need to be a voluntary move by the entity in question and cannot be forced by the NCA). ESMA acknowledges however that there may be exceptional cases where an applicant can demonstrate that the time difference leads to severe technical hurdles that can indicate an objective reason for endorsement.

133. The case may be different particularly for commodity benchmarks where the measured market, e.g. commodity market is geographically limited to a certain region and the benchmark provider is closely linked to that market. This could be the case when the provider operates in the same market the index is intended to measure or when the provider has close relationships with the operator of or the participants in that market (which are actual or potential contributors to the third country benchmark). In these cases, the benchmark may not be provided by another European entity and the administrator may see little incentive to apply for recognition in the Union, particularly if the benchmark provision is not its core business, the use of the benchmark in the EU is ancillary to the overall use of the benchmark or the provider derives little revenue from the use of the benchmark in the EU, unless the degree of use of the benchmarks provided is increasingly high.

134. Equally, there may be cases where expertise in the benchmark provision is based on individual experience and skills that lie exclusively with personnel in the providing entity. ESMA is convinced however that these cases are likely to be rare since the BMR strives for a solid and transparent methodology and aims at reducing irreproducible expert judgement. Yet, full transparency and ex post high reproducibility will not necessarily always exclude ex ante individual judgement.

135. Also, a benchmark may rely on third country input data where it may not be possible to transfer the detailed input data to an administrator within the Union for legal reasons, e.g. when national or regional third country law prohibits to send the relevant data to a Member State or to process it or to have it kept in the Member State in order to comply with the record keeping requirements under the BMR. Closely related, there may be cases where third country contributors may not be willing or legally able to transmit input data to an administrator in the Union, e.g. due to contractual or corporate restraints. Such restraints would have to go beyond an individual case in order to support an objective reason for third country benchmark provision.

136. On the other hand, the administrator should in its application provide objective reasons for the endorsement of the benchmark or family of benchmarks in the Union. ESMA notes that criteria such as efficiency and cost saving on the part of the administrator are neither mentioned in the empowerment to the Commission nor in the request for technical advice. ESMA believes that, as in other areas of regulation, these

aspects may nonetheless serve as criteria for objective reasons and may support the application for an endorsement of a benchmark in the Union (i.e. if moving the business to the Union would undermine the cost savings associated with the provision of the benchmark in the third country in connection with the geographical proximity or the benefiting of specific skills at local level). In addition, the cost reducing effects would have to be significantly advantageous to the benchmark users. In any case, competent authorities should in their assessment ensure that endorsement of a third country benchmark is not used to avoid the requirements of this Regulation, as set forth in Article 33 (4), and thereby avoid potential compliance costs. Budgetary aspects will therefore generally not amount to objective reasons if an existing benchmark is moved to a third country after the entry into force of the BMR before an administrator or other supervised entity applies for its endorsement.

137. Additionally, for there being an objective reason for the endorsement of a third country benchmark for its use in the Union its potential non-admittance for use would have to have some effect on users in the Union. This may be the case e.g. where the benchmark has been produced in a third country for a considerable period of time and EU users rely on it to some degree. ESMA however acknowledges that Level 1 does not require a minimum in terms of significance of the benchmark to be endorsed.

5.4 Responses to the Discussion Paper

138. Respondents to the Discussion Paper were divided on the question whether the value of financial instruments, financial contracts and investment funds referencing a third country benchmark should be an indicator for an objective reason for its endorsement. While one respondent argued a qualitative test similar to that applied to critical benchmarks could even indicate that a benchmark not only could but should be endorsed in the Union and while another favoured a proportionate approach for third country benchmarks that would not meet the threshold for significant benchmarks, others explicitly objected to any arithmetic evaluation or the introduction of thresholds for third country benchmarks and, with the diversity of benchmarks, favoured a more flexible approach of the criteria for “objective reason” – an element widely supported by the respondents. ESMA follows the latter and suggests that NCAs take into account if the benchmark is frequently used in the Union without further quantitative specification.

139. Stakeholders also advocated for ESMA to only provide a non-exhaustive list of possible factors – with one arguing that the three elements should be considered in the round. The approach ESMA has taken is in line with the majority of propositions as ESMA only suggests to take the criteria into account and provides non-exhaustive examples for indicators of each criterion.

140. Respondents also shared ESMA’s above elaboration on the generally low impact of a difference in time zones between the EU and the third country state of origin of the benchmark. One stakeholder argued that timing of the fixing was important, particularly if a third country benchmark was set at a time when EU markets are open for trading as bigger movements in the benchmark could influence the markets more intensively than those of benchmarks that are set in a different time zone when markets in the Union are

closed. ESMA thinks that this argument does not hold as the administrator is not bound by any rules as to when to publish its benchmark – be it an EU benchmark or an endorsed one – and that either one can be provided inside or outside market hours.

141. In terms of proximity, several respondents proposed that the NCA should also take into account the location of subscribers outside the EU, so that a provider with a large subscriber basis elsewhere could continue to provide its benchmark from outside the Union via endorsement. ESMA agrees that such an existing larger group of subscribers can be an important factor when reasons for endorsement are assessed. Some respondents also pointed to the potentially higher importance geographical proximity could have for commodity benchmarks and confirmed ESMA's view that markets in this field tend to be stronger localized and that often benchmarks are produced as ancillary activity and with no equivalents. Users would therefore be deprived of relevant useable information were the third country benchmark not endorsed.

142. Respondents also saw commercial reasons such as cost savings and corporate structures (e.g. joint ventures) as important factors to be considered. ESMA agrees that these elements should be taken into account, but merely as a supporting indicator when evaluating other criteria, as this element *per se* may otherwise allow for circumvention of the provisions of the BMR, as argued in the previous section.

5.5 Draft Technical Advice on Article 33 (Endorsement)

Measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union

When considering an application for endorsement of a third country benchmark or family of benchmarks, the competent authority of the administrator or other supervised entity should take into account at least the following non-exhaustive list of criteria:

1. Objective reasons for the provision of a benchmark or family of benchmarks in a third country

a. Geographical proximity:

An indicator for an objective reason for the provision of the benchmark in the relevant third country can be the occurrence of one or more of the following circumstances:

(i) the market it is intended to measure is geographically limited to a certain region and the benchmark provider is closely linked to that market;

(ii) where the benchmark is based on contributions, the contributors are all, or in majority, located in the same non-EU region of the provider;

(iii) a large existing portion of subscribers to the benchmark are located outside the EU; or

(iv) the third country provider can access the infrastructure available in the non-EU region exclusively or can maintain systems necessary for administering the benchmark only locally.

The indication is strong if the applicant endorser can demonstrate that:

(i) the provider of the third country benchmark is not likely to apply for recognition, particularly if benchmark provision is only an ancillary activity to its core business; or

(ii) the benchmark may not be provided by an administrator in the Union including for technical reasons or, in exceptional cases, a different time zone; or

(iii) providing the benchmark geographically near the market it is intended to measure leads to reduction of costs of the benchmark provision and that this is directly and significantly advantageous to the benchmark users.

b. Specific skills required in the benchmark provision

An indicator for an objective reason for the provision of the benchmark in the relevant third

country can be that:

- the benchmark relies partly on expertise of individuals/firms located in the third country and this expertise is based on individual experience and/or personal skills that are associated with employees of the third-country benchmark provider or third country contributors.

The indication is strong if the applicant endorser can demonstrate that:

(i) the relevant personnel within the third-country provider or, more generally, the third-country provider itself, would not want to or is otherwise prevented from providing its expertise to an entity in the Union; or

(ii) relying on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to reduction of costs and that this is directly and significantly advantageous to the benchmark users.

c. Legal or other restraints to obtain input data

An indicator for an objective reason for the provision of the benchmark in the relevant third country can be that:

- the benchmark is based on third country input data and the necessary data cannot be submitted to an administrator in the Union to be processed for a provision in the EU because of legal, contractual, corporate constraints that extend beyond the individual contractual situation of the input data contributors/submitters.

2. Objective reasons for the use of a third country benchmark or family of third country benchmarks in the Union

a. Effects on benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-use of such benchmark, in absence of an endorsement, would have adverse consequences in the Union.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark is often used in the Union and that there are no substitutes available in the Union; and

(ii) the discontinuation of the use of the third-country benchmark would adversely and materially affect users of the benchmarks in the EU or adversely affect the financial stability or market integrity of the European area in which it is already used, or the consumers, the real economy or the financing of households and businesses in that area.

Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?

6 Technical Advice on “Transitional Provisions”

Extract from the Commission’s request for technical advice (mandate)

Article 51(4) provides a safeguard which allows relevant competent authorities to permit the continued use of a benchmark which does not meet the requirements of the Regulation in financial instruments or financial contracts that already reference that benchmark at the date of the entry into application of the Regulation if "ceasing or changing that benchmark to conform with the requirements of [the] Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark".

It is necessary to develop a consistent approach for competent authorities on how to assess when these conditions arise. In the preparation of its technical advice, ESMA should consider, in particular, whether the methodology, the data gathering process or other elements of the benchmark provision could be changed without resulting in a break in the benchmark time series which would make it impossible or inappropriate to continue using that benchmark in the respective financial products, and whether appropriate substitutes exist or are already envisaged in the respective contracts or documentation accompanying financial products linked to the benchmark in question. The technical advice should outline conditions under which such outcome could be ensured.

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

6.1 Framework and feedback

143. Article 51(1) of the Benchmark Regulation (BMR) provides for a 42 month period after the date of entry into force of the BMR for existing benchmark providers to apply for authorisation or registration under Article 34. This Article does not prohibit during this 42 month period the use of existing benchmarks produced by such providers.

144. Article 51(4) applies where an existing benchmark does not meet the requirements of the Regulation, in which case the use of such benchmark should be permitted by the competent authority of the benchmark administrator only if ceasing or changing that benchmark to conform with the requirements of the BMR would result in a force majeure event, frustrate or otherwise breach the terms of any existing financial contract or financial instrument or the rules of any investment fund which references that benchmark. It should be noted that in accordance with Article 51(4) no financial instruments or financial contracts, or measurements of the performance of an investment fund shall add

a reference to such an existing benchmark after 42 months from the date of entry into force of the Regulation.

145. As explained in the Discussion Paper (DP Chapter 14, para. 350-357), a pre-condition for the application of the "transitional provisions" is the identification of the non-compliant benchmarks to which the provisions could potentially apply. The Discussion Paper (DP) also explains that competent authorities will need information on the contracts/instruments that are at risk of being breached in order to assess the identified non-compliant benchmarks and decide whether the transitional provisions should apply (DP Chapter 14, para 358-362). In the DP ESMA was proposing an active role of both benchmark administrators and users, if they are supervised entities, in order to help a National Competent Authority (NCA) first to identify non-compliant benchmarks, and second to gather the information necessary to produce a proper assessment for deciding whether the transitional provisions are applicable (DP Chapter 14, para 355 and 361).

146. The DP presented also two separate criteria to define, on a case-by-case basis, the timeframe during which the transitional provisions apply: (i) a time limit until the non-compliant benchmark may be used, and (ii) a quantitative limit above which the non-compliant benchmark may be used (DP Chapter 14, para. 348).

147. The feedbacks by the stakeholders on this part of the DP are mixed as respondents raised a number of concerns. A general concern is that the obligation on users to provide information about the benchmark under scrutiny would go beyond what is included in the BMR and therefore should not be included in the technical advice, also because it would add "unnecessary" burden for the users of benchmarks. Some respondents stated that it would be preferable if ESMA and/or each NCA published a list of non-compliant benchmarks and asked the public for a notification of any omissions. Representatives of the investment funds industry said that asset managers would not be a reliable source of information, as they will only provide a limited view of the universe of benchmarks, suggesting that they should be considered as a supplementary source and a backup solution that clearly will not allow a thorough and exhaustive assessment. Also, a benchmark administrator commented that it would not have a clear picture of the extent of use of its benchmarks. In the context of exchange of information with NCAs, respondents rejected the proposal by ESMA that supervised entities should liaise directly with the NCA of the administrator when providing information, preferring a solution where NCAs exchange information with one another.

148. Another broad concern raised by the respondents is the fact that the BMR does not foresee how users would have official access to the authorisation process. Respondents said that users will consult the website of ESMA to see which benchmarks are compliant, but this source will be effective for knowing, by deduction, which indices are non-compliant only at the end of the 42 months delay allowed for administrator to meet BMR obligations. They added that in the DP it is mentioned that in the case of refusal this information lies with the competent authority, but there is no provision as to how the users can be informed by competent authorities. Consequently, some respondents suggested that the process as described by ESMA should not rely on users to help,

adding that it would be helpful if ESMA could provide users of benchmarks with more access to information on the status of authorisations and registrations of benchmarks.

149. In relation to the two criteria to define the timeframe during which the transitional provisions would be used, approximately half of the respondents said that no limits should be fixed, neither a minimum "quantitative" threshold, nor an absolute time limit, and they recommend an indefinite use of non-compliant benchmarks. Their main arguments are: this limit is not foreseen in the BMR; time limit does not suit for investment funds, having a very long lifetime; quantitative limits will probably never be reached in case of investment funds; the intention of transitional provisions is to protect users from an unexpected termination of their contracts, and therefore once the breach of contract is evidenced, no limits should be defined for the use of a non-compliant benchmark; the amount of effort required from benchmark administrators, users and competent authorities to collect and evaluate this data seems disproportionate.

6.2 Proposed criteria to be considered by National Competent Authorities (NCAs)

150. On the basis of the feedback received and of an analysis of the scope of the mandate received by the Commission, ESMA is proposing draft technical advice focusing on the approach that NCAs should follow when assessing whether they should allow the use of a non-compliant benchmark pursuant to the transitional provisions.

151. The content of the draft advice is composed of two parts. The first one deals with the criteria on which the assessment of the NCA should be based. It is a non-exhaustive list of criteria based on the wording of the mandate received by the Commission.

152. The first criterion included in the draft technical advice focuses on whether the changes to input data or methodology would materially change the value of the benchmark. If the compliant input data/methodology would lead to a substantially different value of the benchmark, there is a higher risk of breach or frustration of the terms financial contracts or financial instruments referencing to the benchmark. This criterion, in practice, could be applied by comparing the value of the non-compliant benchmark calculated over a specific period of time with the value of the benchmark, with reference to the same period of time, calculated with input data and methodology subject to the changes that make the benchmark compliant with the BMR.

153. Similarly, a second criterion focuses on whether changes of input data or methodology would undermine the index representativeness of the underlying market or economic reality. Changes to the way the benchmark is computed could bring, in some "extreme" cases, to the situation where the benchmark measures a reality that does not fully coincide with the one originally measured by the benchmark. In these hypothesized circumstances, there is a clear risk of impacting all the financial instruments, contracts and investment funds referencing the benchmark.

154. Another important element to be considered by the NCAs is whether there exists a substitute benchmark. This could be done by checking whether the benchmark

administrators already included in the ESMA register provide a benchmark that measure the same market or economic reality of the non-compliant benchmark. Also the situation in which the financial contracts, financial instruments and investment funds referencing the non-compliant benchmark already include a reference to a possible substitute benchmark should be taken into account. In cases where a substitute benchmark can be identified, the need for the use of transitional provisions will naturally be lower and would need to be reflected in the determination of a potential transitional period.

155. For the application of these criteria it is possible that NCAs would request the collaboration of the non-compliant benchmark provider for accessing some limited and specific information, that is not available and cannot be accessed otherwise, and that is needed for the finalisation of the NCA's assessment justifying the use of a non-compliant benchmark under the transitional provisions,

156. The second part of the draft technical advice focuses on the duration of the transitional period. The DP included two alternative criteria for defining the duration of the period: a time limit or a quantitative threshold. Although some comments received by market participants on this issue disagreed with the proposal of the DP, ESMA believes that the BMR does not allow "open-ended" transitional period where a time limit to the use of the non-compliant benchmark is not defined. Indeed, Recital 63 BMR states that:

> *Benchmarks can reference financial instruments and financial contracts that have a long duration. In certain cases, such benchmarks risk no longer being permitted to be provided once this Regulation comes into effect because they have characteristics that cannot be adjusted to conform to the requirements of this Regulation. At the same time, prohibiting the continued provision of such a benchmark could result in the termination or frustration of the financial instruments or financial contracts and so harm investors. It is therefore necessary to make provision to allow for the continued provision of such benchmarks for a transitional period*.

157. ESMA is therefore proposing that the duration of the transitional provision should be defined by the relevant NCA, on a case-by-case basis, taking into account the distribution of maturity of the financial contracts and financial instruments that reference the non-compliant benchmark, as well as the life-cycle of the investment funds referencing the non-compliant benchmark. It is possible that an NCA would decide to use the longest maturity among the ones of financial contracts and financial instruments referencing the non-compliant benchmark, so that the terms of all these contracts and instruments will not be frustrated or breached.

158. Besides this necessary time limit, the DP proposed an alternative way to define the duration of the transitional period. This alternative was based on a "quantitative threshold" a quantitative limit above which the non-compliant benchmark may be used (see DP Chapter 14, para. 348). In light of the feedback received and of a new analysis of the text of the BMR, ESMA has decided not to include this alternative in the text of the draft technical advice.

159. Finally, it is clear a decision to allow the continued use of a non-compliant benchmark for a transitional period is to be adopted by each single NCA on a case-by-case basis.

ESMA therefore believes that it would be important to provide for a certain level of accountability of NCAs when they decide to use the transitional provisions, with a view to ensuring the convergence of supervisory practices in this context. For this reason, the draft technical advice proposes that the assessment by a NCA is published on its website, including the indication of the criteria applied and the maturities considered to establish the duration of the transitional period.

6.3 Identification of non-compliant benchmarks and data for the assessment

160. The processes of identification of non-compliant benchmarks and of data-gathering for the development of the assessment by NCAs are not part of the draft advice, as they are not mentioned in the mandate received by ESMA. However, respondents to the DP asked ESMA for clarification on how in practice the public would be informed of each of the steps electing a non-compliant benchmark for the application of the transitional provisions. In light of these comments, ESMA believes that some guidance could be needed in relation to the practical implementation of the BMR transitional provisions and therefore ESMA stands ready to use its powers under Regulation (UE) No. 1095/2010 to inform market participants in due time.

6.4 Draft Technical Advice on transitional provisions

Conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark

1. Where a benchmark, existing on the date of entry into force of the Benchmarks Regulation, does not meet the requirements of the Benchmarks Regulation ("*non-compliant benchmark*"), the use of such benchmark after 42 months following the entry into force of the Benchmark Regulation is permitted only if the relevant competent authority of the Member State where the provider is located decides that ceasing or changing that benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark.

2. A competent authority shall base its assessment of whether ceasing or changing a non-compliant benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark on the following non-exhaustive list of conditions, applied on a case-by-case basis:

    - In cases where changing a benchmark to conform with obligations of the Benchmarks Regulation would lead to a material change to the input data, to the methodology, to the data gathering process or to other elements of the benchmark provision, the competent authority should consider whether this change would lead to a significantly different value of the benchmark.

    - Whether any change in the input data or to the methodology due to the obligations of the Benchmarks Regulation would undermine the benchmark's representativeness of the market or economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark.

    - Whether there exists a substitute benchmark for the non-compliant benchmark that measures the same market or economic reality of the non-compliant benchmark and is compliant with the Benchmark Regulation (i.e. it is included under the Register of administrators and benchmarks envisaged in Article 36 of the Benchmarks Regulation or is provided by an administrator listed therein).

    - Whether the existing financial contracts, financial instruments and investment funds (or their accompanying documents) referencing the non-compliant benchmark already include reference to a possible substitute benchmark

and, if yes, how such substitute benchmark has to be determined.

- Whether the transitioning of the benchmark to another administrator would lead to a substantial change in the benchmark.

3. When applying these conditions to a non-compliant benchmark, a competent authority should rely, where necessary and appropriate, on the expertise and arrangements of the benchmark provider

4. If a competent authority concludes that the use of a non-compliant benchmark should be permitted under the transitional provisions, the competent authority shall define the duration of the transitional period during which the use of the non-compliant benchmark shall be permitted. The duration of the transitional period shall be defined by the competent authority, on a case-by-case basis, taking into account the distribution of maturity over time of the financial contracts and financial instruments that reference the non-compliant benchmark, as well as the life-cycle of the investment funds referencing the non-compliant benchmark.

5. The assessment of a competent authority concluding that the use of a non-compliant benchmark is permitted under the transitional provisions should be published on the website of the competent authority, and should include an indication of the criteria applied and of the distribution of maturities used to define the duration of the transitional period.

Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?

7 Annexes

7.1 Annex I - Summary of questions

Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?

Q2: Do you agree with the proposed specification of what constitutes *administering the arrangements for determining a benchmark?*

Q3: Do you agree that the 'use of a benchmark' in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, …)?

Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?

Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in the case where the regulatory data is not available or sufficient?

Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?

Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?

Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?

Q9: Do you think that the concept of "significant share of" should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?

Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?

Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?

7.2 Annex II - Commission mandate to provide technical advice

Link to the request for technical advice by the Commission:

http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf

08/02/2016

REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON INDICES USED AS BENCHMARKS IN FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS

With this mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts concerning the Regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts (the "**Regulation**")[32]. These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),[33] the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),[34] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").[35]

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

The mandate focuses on technical issues which follow from the **Regulation**. The following delegated acts provided for by this Regulation should be adopted so that they enter into application by 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3 months):

[32] The text referred to here is the text of the political agreement reached between the European Parliament and the Council as adopted by COREPER (doc. 14985/15 EF 224 ECOFIN 956 CODEC 1664). It might still be subject to change until finalised by the co-legislators. Should the final text differ in parts relevant to this request the Commission might update its request. http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf

[33] Communication of 9.12.2009. COM(2009) 673 final.

[34] 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 L331/84, 15.12.2010, p.84.

[35] The Framework Agreement on relations between the European Parliament and the European Commission, OJ L304/47, 20.11.2010, p.47.

a) The measures to "*specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index"* (Article 3, paragraph 2, of the Regulation);

b) The measures to "*specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in article 14b(1)(a);* (Article 13, paragraph 3, point i, of the Regulation);

c) The measures to "*specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States*" (Article 13, paragraph 3, point iii, of the Regulation);

d) The measures to "*to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union.*" (Article 21b, paragraph 8, of the Regulation);

e) The measures "*to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.*" (Article 39, paragraph 6, of the Regulation).

This request does not cover delegated acts on issues, such as reviews, which do not have to be in place at the date of application of the Regulation. The Commission might request technical advice on these delegated acts at a later stage.

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The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

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On 20 October 2011, Commission published its proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts. On 25 November 2015 the European Parliament and the Council reached political agreement on a compromise text of the regulation in the trilogue. This compromise text was endorsed by COREPER on 09 December 2015.

The Regulation has as main objectives to:

- improve the governance and controls over the benchmark process;
- improve the quality of the input data and methodologies used by benchmark administrators;
- ensure that contributors to benchmarks provide adequate data and are subject to adequate controls;
- ensure adequate protection for consumers and investors using benchmarks;
- ensure the supervision and viability of critical benchmarks.

Certain elements of the Regulation need to be further specified in delegated acts to be adopted by the Commission: These delegated acts should enter into application by 18 months after the entry into force of the Regulation.

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- **Proportionality:** the technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation. In particular, ESMA should distinguish between the different types and categories of benchmarks and sectors as set out in this Regulation and take into account the vulnerability of the benchmarks to manipulation and any impact of such manipulation, as well as developments in benchmarks and financial markets, including international convergence of supervisory practices in relation to benchmarks.
- **Comprehensive:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.
- **Coherent**: While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.

- **Proactive:** In accordance with the ESMA Regulation, ESMA should not feel confined in its advice to elements that are addressed by the delegated acts but, if appropriate, it may include advice, guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. In addition it may indicate how the delegated act should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.

- **Autonomy in working methods**: ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.

- **Consultation**: In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.

- **Evidenced and justified**:

    - ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its impact assessment. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.

    - ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.

    - ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the Directive and Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- **Clarity**: The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.

- **Advice, not legislation**: The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.

- **Responsive**: ESMA should address to the Commission any question they might have concerning the clarification on the text of the Regulation, which they should consider of relevance to the preparation of its technical advice.

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act and in particular answers to the questions in section 3 of this mandate.

This mandate is made in accordance with the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudge the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Regulation.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission has informed the European Parliament and the Council about this mandate. As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

Definitions: measures to "specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index" (Article 3, paragraph 2, of the Regulation)

Making available to the public

Article 3(1), point 1, defines an index as "any figure (a) that is published or made available to the public; (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys".

This definition is critical since it determines the scope of the Regulation. As stated in recital 8, the scope of the Regulation should be broad to provide a comprehensive preventative framework.

The concept of 'making available to the public' is a concept stemming from the EU acquis on copyright. Although of a different nature and not providing a legal definition of the concept, the discussion in that context may provide useful guidance for the preparation of the technical advice.

Administrating the arrangements for determining a benchmark

Article 3(1), point 3, defines one of the elements of provision of a benchmark as "administering the arrangements for determining a benchmark". Given the variety of business models employed for the provision of benchmarks, it would be useful to further clarify what 'administering the arrangements' means in the context of benchmark determination.

Use of a benchmark

Article 3(1), point 5, lists five activities or situations which are considered to represent use of a benchmark under the Regulation. Some of the uses, such as point (a) "issuance of a financial instrument which references an index or a combination of indices", could benefit from further clarification in order to ensure a uniform application of the definition of 'use of a benchmark' across the Union.

ESMA is invited to provide technical advice on how to specify *what constitutes making available to the public for the purposes of the definition of an index",* taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying *what constitutes* administering *the arrangements for determining a benchmark taking into account different exsiting business practices.*

ESMA is invited to provide technical advice on specifying *what constitutes the issuance of a financial instrument for the purpsoes of defining use of a benchmark.*

Critical and significant benchmarks: measures to "specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in Article 14b(1)(a); (Article 13, paragraph 3, point i, of the Regulation)

The concepts of critical and significant benchmarks are defined in Article 3 and further expanded upon in Chapters 3 and 5 respectively.

For critical benchmarks, recital 30 makes clear that the failure of a critical benchmark would have important implications for the Union or individual Member States. Therefore Article 13 and recital 31 indicate that several methods are available to designate such critical benchmarks. In particular, point (a) and point (c) of paragraph 1 of Article 13 refer to two

thresholds of EUR 500 billion and EUR 400 billion, respectively, in order to ascertain whether a benchmark is critical.

Similarly, recital 31b explains the rationale for significant benchmarks, and paragraph 1 of Article 14b provides two methods for their designation, one of which relies on a threshold of EUR 50 billion.

In all of these cases, the thresholds refer to the total value of direct use of a benchmark and its indirect use within a combination of benchmarks in financial instruments or financial contracts or in the determination of the performance of investment funds on the basis of all the range of maturities or tenors of the benchmark, where applicable.

Given the large scope of different instruments which can use benchmarks and are therefore to be taken into account in the determination of a benchmark as critical or significant, it is necessary to have a standardised way of determining the value of these financial instruments, financial contracts and investment funds.

The empowerment in paragraph 3 of Article 13 is limited to the specification of how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds can be determined. It does not mention other possible ways in which the total value of financial instruments, contracts and funds using a benchmark could be determined.

It does, however, address the question how indirect reference to a benchmark within a combination of benchmarks could be taken into account. The main issue to be discussed in the technical advice is whether the value of a financial instrument, contract or fund should be taken into account fully or only partially in the calculation of the total value of a benchmark if that financial instrument, contract or fund uses a combination of benchmarks.

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes of assessing benchmarks under the thresholds in Article 13(1) and Article 14b(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

Critical Benchmarks: measures to "specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States" (Article 13, paragraph 3, point iii, of the Regulation)

One of the conditions for a benchmark to be deemed a critical benchmark under Article 13, paragraph 1, point (c), is noted in subparagraph (iii): namely that "In case the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of

the underlying market or economic reality or unreliable input data, there would be significant and adverse impacts on market integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member State."

In order to ensure that these criteria can be applied by competent authorities across the Union in a consistent and harmonised manner it is necessary to provide some further specification of how these criteria are to be applied. ESMA is tasked to specify what would be significant and adverse impacts on a number of different economic factors: market integrity, financial stability, consumers, the real economy, and the financing of households and corporations in one or more Member States.

In particular, ESMA should consider whether numerical measures, in absolute or relative terms, could be developed to ensure objective consideration of these criteria. If so, ESMA should provide advice on such numerical measures and how they should be interpreted in the respective economic and financial context. The technical advice should allow competent authorities to base their assessment on objective grounds instead of subjective reasoning which is hard to assess.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

Endorsement of an administrator in a third country: measures to "to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union." (Article 21b, paragraph 8, of the Regulation)

Article 21b provides for a regime of endorsement of third country benchmarks by EU entities. In order to be endorsed, three conditions listed in Article 21b, paragraph 1, have to be met by a third country benchmark. The third condition provides that "there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union". This condition should ensure that the location of the provision of the benchmark to be endorsed is not dictated by factors such as legislation or non-business related factors, i.e. it should ensure that the endorsement regime is not misused to circumvent the direct application of the Regulation in the Union.

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take

into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

Transitional provisions: measures "to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark." (Article 39, paragraph 6, of the Regulation)

Article 39(3) provides a safeguard which allows relevant competent authorities to permit the continued use of a benchmark which does not meet the requirements of the Regulation in financial instruments or financial contracts that already reference that benchmark at the date of the entry into application of the Regulation if "*ceasing or changing that benchmark to conform with the requirements of [the] Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark*".

It is necessary to develop a consistent approach for competent authorities on how to assess when these conditions arise. In the preparation of its technical advice, ESMA should consider, in particular, whether the methodology, the data gathering process or other elements of the benchmark provision could be changed without resulting in a break in the benchmark time series which would make it impossible or inappropriate to continue using that benchmark in the respective financial products, and whether appropriate substitutes exist or are already envisaged in the respective contracts or documentation accompanying financial products linked to the benchmark in question. The technical advice should outline conditions under which such outcome could be ensured.

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

This mandate takes into consideration the expected date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation.

The delegated acts provided for by the Regulation and addressed in this mandate should be adopted so that they enter into application 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and the Council to object

to a delegated act within 3 months (which can be extended by 3 months). Therefore it is of the utmost importance to start preparatory work on these measures as soon as possible.

The deadline set to ESMA to deliver the technical advice is four (4) months after the entry into force of the Regulation.

The establishment of the deadlines for the work set out in this mandate is based on the following timetable which is based on the assumption that the Regulation will enter into force in May or June 2016.

Deadline	Action
Entry into force of Benchmark Regulation [June 2016, (expected)]	Date of entry into force of the Regulation (day following that of its publication in the Official Journal of the European Union)
4 months after entry into force	ESMA provides its technical advice.
4th to 7th month after entry into force	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA
8th to 12th month after entry into force	Adoption and translation process of draft delegated acts [The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) on the draft delegated acts. The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.]
13th to 18th month after entry into force	Objection period for the European Parliament and the Council (three months which can be extended by another three months)
18 months after entry into force 2017	Date of application of the Benchmark Regulation and delegated acts

7.3 Annex III - Draft technical advice

Draft Technical Advice under Article 3 on Definitions

"Making available to the public"

1. An index shall be deemed to be made available to the public in the meaning of Article 3, paragraph 1, point 1(a), of the [BMR] if the following conditions are met:

(i) the index is accessible by a large or potentially indeterminate number of recipients; or

(ii) the index is provided or is accessible to one or more supervised entities to allow the use of the index in the meaning of Article 3(1)(5) of the [BMR] and through such use the index becomes accessible to an indeterminate number of people.

2. To be made available to the public as defined in paragraph 1, an index may be accessed through a variety of media and modalities, set out by the administrator or agreed between the administrator and the users, including, but not limited to, telephone, File Transfer Protocol, internet, open access, news, media, subscription or through financial instruments, financial contracts or investment funds referencing it.

"Administering the arrangements for determining a benchmark"

The administration of the arrangements for the determination of a benchmark in Article 3, paragraph 1, point 5, letter (a), of the BMR means:

- the ongoing management of the infrastructure and of the personnel that are involved in the determination process of a benchmark, and

- the setting of a specific methodology for the determination of each benchmark or, with the necessary adaptations, each family of benchmarks provided, and its maintenance through periodic reviews.

"Issuance of a financial instrument"

The issuance of a financial instrument that references an index or a combination of indices is to be intended as the initial offering of the financial instrument types specified in paragraphs (1) to (3) within the list of Annex I, Section C, of Directive 2014/65/EU to third parties through negotiation on trading venues and/or systematic internalisers.

The following measures, expressed in EUR (contracts in other currencies shall be converted into EUR using the daily euro foreign exchange rate published by the European Central Bank on its website), should be taken into account when assessing benchmarks under the thresholds in Article 20(1) (at a specified point in time) and under the thresholds in Article 24(1)(a) (over a period of six months):

a) Nominal amount of financial instruments other than derivatives[36]

For bonds, money market instruments and other forms of securitised debt including structured finance products, the total issued nominal amount in monetary value, as reported under Article 27 of Regulation (EU) No 600/2014 and in accordance with RTS 23 "Draft regulatory technical standards on supply of financial instruments reference data under Article 27 of MiFIR", Table 3, field 14.

b) Notional amount of derivatives

The Notional amount as reported under Article 9 of Regulation (EU) No 148/2013 of the European Parliament and of the Council and in accordance with Commission Delegated Regulation (EU) No .../.., Table 2, field 20, with the following additional specifications:

- If the notional amount is negative, the absolute value should be taken into account;
- For credit derivative index transactions the notional amount should be applied to the index factor, as derived from Commission Delegated Regulation (EU) No .../.., Table 2, field 89.

The following additional measurement methods should be applied to the non-exhaustive list of derivatives below:

- In the case of swaps and forwards traded in monetary units, the reference amount from which contractual payments are determined in derivatives markets;
- In the case of options, Number of contracts * number of units of options * strike price;
- In the case of futures, Number of contracts * number of units of futures * settlement price;
- In the case of financial contracts for difference and derivative contracts relating to commodities designated in units such as barrels or tons, the resulting amount of the quantity at the relevant price set in the contract.

c) Net asset value of investment funds

For investment funds subject to Directive 2009/65/EC, the latest available net asset value per

[36] In line with ESMA TS under MiFID II / MiFIR https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

unit, as reported in the most recent annual or half-yearly report in accordance with Article 68(2) and Annex I, Schedule B of the same Directive, times the number of units.

For investment funds subject to Directive 2011/61/EU, the latest available net asset value per unit published in accordance with Article 19(10) of the same Directive, times the number of units.

d) Transitional regime

Whenever data as set out above in paragraphs a), b) and c) is not available or not sufficient, when assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a), the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds, or proxies for these values, such as open interest data, as reported by alternative private providers of information available to administrators and competent authorities may be taken into account. In such cases, the competent authority or the administrator shall provide written justification of this use, in particular in relation to the non-availability of the regulatory data.

e) The indirect reference to a benchmark within a combination of benchmarks

For the purpose of assessing a benchmark under the thresholds in Article 20(1) and Article 24(1)(a), where an investment fund, a derivative or a financial instrument other than a derivative makes indirect reference to that benchmark within a combination of benchmarks the following measures, expressed in EUR, should be taken into account:

- When the weighting of the benchmark, within the combination of benchmarks, is available, the portion of the nominal amount of the financial instrument other than derivatives, notional amount of the derivative and net asset value of the investment fund indirectly referencing such benchmark;

- When the weighting of the benchmark, within the combination of benchmarks, is not available, the portions of the total nominal amount of the financial instruments other than derivatives, of the total notional amount of the derivatives and of the total net asset value of the investment funds indirectly referencing such benchmark, assuming an equally weighted combination of benchmarks.

Draft Technical Advice on the criteria referred to in Article 20(1)(c) subparagraph (iii)

1. For the purpose of recognising a benchmark as critical pursuant to Article 20(1)(c), the following non-exhaustive list of criteria should be taken into account, in the assessment of whether the cessation of the provision of that benchmark or its provision on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, would have significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.

2. These criteria should be considered jointly, with the ultimate aim of developing an assessment that analyses the benchmark in a holistic manner, and they should be calibrated considering the idiosyncratic features of the benchmark and of the economic and financial environment in which the benchmark is used.

3. Not all the criteria will always be relevant for, or applicable to the benchmark under scrutiny. The criteria based on quantitative data should be included in the assessment only when the available data are considered by the Commission and national competent authorities to be reasonably precise and up-to-date. The assessment has to clearly indicate which of the criteria below have not been considered and include a brief explanation of the reasons for doing so.

4. Where the assessment analyses the benchmark in more than one Member State, it should clearly state which Member States are considered, and all of the criteria included in the assessment should be considered in each of these Member States. For the purpose of computing the criteria based on quantitative data, the quantitative data of the same type referring to different Member States should be added together in order to apply the criteria simultaneously to all the Member States involved.

Criteria related to market integrity

   a. The value of financial contracts that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of financial contracts outstanding in the Member State(s) considered.

   b. The value of financial instruments that reference the benchmark, directly or indirectly within a combination of benchmarks, and are traded on trading venues in the Member State(s) considered and whether this is a significant share of the total value of financial instruments traded on trading venues in the Member State(s) considered.

   c. The value of investment funds referencing the benchmark for measuring their performance, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total value of investment funds present in the Member State(s) considered.

   d. Whether the benchmark is considered or used as a potential successor for other benchmarks that are included in the list of critical benchmarks, envisaged in

Article 20(1) of the [Regulation …/…].

e. The diversity of financial instruments and financial contracts referencing the benchmark, and in particular:

    1. the number of different types of derivative contracts that reference the benchmark, in the Member State(s) considered and its relevance in terms of an estimate of the total number of types of derivative contracts traded in the financial system of the Member State(s) considered;

    2. the reference of the benchmark simultaneously in derivatives, securities, investment funds and financial contracts;

    3. The average and maximum tenors of the existing financial instruments and financial contracts referencing the benchmark.

f. The use of the benchmark as a standard for accounting purposes or as a reference for other regulatory purposes:

    1. whether the benchmark is used as a reference for prudential regulation such as capital, liquidity or leverage requirements;

    2. whether the benchmark is used in international accounting standards;

    3. whether the benchmark is used for tax purposes.

Criteria related to financial stability

g. The value of financial instruments, financial contracts and investment funds that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of:

    1. the total assets of the financial sector[37] in the Member State(s) considered;

    2. the total assets of the banking sector in the Member State(s) considered.

Criteria related to consumers

h. The use of the benchmark in financial instruments and investment funds offered to retail investors[38], and in particular:

[37] The European Central Bank's monthly "Report on Financial Structures" may provide helpful figures in this respect: https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf

[38] "Retail investor" is defined in Article 4(6) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

1. The value of the financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, sold to retail investors in the Member State(s) considered and whether this is a significant share of the total value of financial instruments and investment funds sold to retail investors in the Member State(s) considered;

2. An estimate of the number of retail investors who have bought financial instruments and investment funds referencing the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

i. The use of the benchmark by pension funds, and in particular:

1. The value of pension funds referencing the benchmark for measuring their performance in the Member State(s) considered and whether this is a significant share of the total value of the pension funds in the Member State(s) considered.

2. An estimate of the number of consumers participating in pension funds referencing the benchmark for measuring their performance, in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered;

j. The use of the benchmark in credit agreements for consumers[39], and in particular:

1. The value of credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total value of the credit agreements for consumers in the Member State(s) considered.

2. An estimate of the number of consumers that has subscribed credit agreements for consumers referencing the benchmark in the Member State(s) considered and whether this is a significant share of the total population in the Member State(s) considered.

Criteria related to the real economy

k. The value of financial instruments, financial contracts and investment fund that reference the benchmark, directly or indirectly within a combination of benchmarks, in the Member State(s) and whether this is a significant share the gross national product of the Member State(s) considered.

[39] The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers) was adopted on 23 April 2008 and defines what credit agreements for consumers are.

Criteria related to the financing of households and businesses

I. The use of the benchmark in loans, and in particular:

1. The value of loans to households and non-financial corporates referencing the benchmark in the Member State(s) and whether this is a significant share of the total value of loans to households or non-financial corporates[40] in the Member State(s) considered.

2. An estimate of the number of households that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of households in the Member State(s) considered;

3. An estimate of the number of non-financial corporates that has subscribed loans referencing the benchmark in one or more Member States and whether this is a significant share of the total number of non-financial corporates in the Member State(s) considered.

[40] ECB maintains updated statistics on outstanding loans to households and non-financial corporations in its Statistical Data Warehouse : https://sdw.ecb.europa.eu/home.do

Measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union

When considering an application for endorsement of a third country benchmark or family of benchmarks, the competent authority of the administrator or other supervised entity should take into account at least the following non-exhaustive list of criteria:

1. Objective reasons for the provision of a benchmark or family of benchmarks in a third country

a. Geographical proximity:

An indicator for an objective reason for the provision of the benchmark in the relevant third country can be the occurrence of one or more of the following circumstances:

(i) the market it is intended to measure is geographically limited to a certain region and the benchmark provider is closely linked to that market;

(ii) where the benchmark is based on contributions, the contributors are all, or in majority, located in the same non-EU region of the provider;

(iii) a large existing portion of subscribers to the benchmark are located outside the EU or the third country provider has can access the infrastructure available in the non-EU region exclusively or can maintain systems necessary for administering the benchmark only locally;

The indication is strong if the applicant endorser can demonstrate that:

(i) the provider of the third country benchmark is not likely to apply for recognition, particularly if benchmark provision is only an ancillary activity to its core business: or

(ii) the benchmark may not be provided by an administrator in the Union including for technical reasons or, in exceptional cases, a different time zone; or

(iii) providing the benchmark geographically near the market it is intended to measure leads to reduction of costs of the benchmark provision and that this is directly and significantly advantageous to the benchmark users.

b. Specific skills required in the benchmark provision

An indicator for an objective reason for the provision of the benchmark in the relevant third country can be that:

- the benchmark relies partly on expertise of individuals/firms located in the third

country and this expertise is based on individual experience and/or personal skills that are associated with employees of the third-country benchmark provider or third country contributors.

The indication is strong if the applicant endorser can demonstrate that:

(i) the relevant personnel within the third-country provider or, more generally, the third-country provider itself, would not want to or is otherwise prevented from providing its expertise to an entity in the Union; or

(ii) relying on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to reduction of costs and that this is directly and significantly advantageous to the benchmark users.

c. Legal or other restraints to obtain input data

An indicator for an objective reason for the provision of the benchmark in the relevant third country can be that:

- the benchmark is based on third country input data and the necessary data cannot be submitted to an administrator in the Union to be processed for a provision in the EU because of legal, contractual, corporate constraints that extend beyond the individual contractual situation of the input data contributors/submitters.

2. Objective reasons for the use of a third country benchmark or family of third country benchmarks in the Union

a. Effects on benchmark users in the Union

An indicator for an objective reason for the use of a third country benchmark in the Union can be that the non-use of such benchmark, in absence of an endorsement, would have adverse consequences in the Union.

The indication is strong if the applicant endorser can demonstrate that:

(i) the benchmark is often used in the Union and that there are no substitutes available in the Union; and

(ii) the discontinuation of the use of the third-country benchmark would adversely and materially affect users of the benchmarks in the EU or adversely affect the financial stability or market integrity of the European area in which it is already used, or the consumers, the real economy or the financing of households and businesses in that area.

Draft Technical Advice on Transitional Provisions

Conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark

1. Where a benchmark, existing on the date of entry into force of the Benchmarks Regulation, does not meet the requirements of the Benchmarks Regulation ("*non-compliant benchmark*"), the use of such benchmark after 42 months following the entry into force of the Benchmark Regulation is permitted only if the relevant competent authority of the Member State where the provider is located decides that ceasing or changing that benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark.

2. A competent authority shall base its assessment of whether ceasing or changing a non-compliant benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark on the following non-exhaustive list of conditions, applied on a case-by-case basis:

    - In cases where changing a benchmark to conform with obligations of the Benchmarks Regulation would lead to a material change to the input data, to the methodology, to the data gathering process or to other elements of the benchmark provision, the competent authority should consider whether this change would lead to a significantly different value of the benchmark.

    - Whether any change in the input data or to the methodology due to the obligations of the Benchmarks Regulation would undermine the benchmark's representativeness of the market or economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark.

    - Whether there exists a substitute benchmark for the non-compliant benchmark that measures the same market or economic reality of the non-compliant benchmark and is compliant with the Benchmark Regulation (i.e. it is included under the Register of administrators and benchmarks envisaged in Article 36 of the Benchmarks Regulation or is provided by an administrator listed therein).

    - Whether the existing financial contracts, financial instruments and investment funds (or their accompanying documents) referencing the non-compliant benchmark already include reference to a possible substitute benchmark and, if yes, how such substitute benchmark has to be determined.

    - Whether the transitioning of the benchmark to another administrator would

lead to a substantial change in the benchmark.

3. When applying these conditions to a non-compliant benchmark, a competent authority should rely, where necessary and appropriate, on the expertise and arrangements of the benchmark provider

4. If a competent authority concludes that the use of a non-compliant benchmark should be permitted under the transitional provisions, the competent authority shall define the duration of the transitional period during which the use of the non-compliant benchmark shall be permitted. The duration of the transitional period shall be defined by the competent authority, on a case-by-case basis, taking into account the distribution of maturity over time of the financial contracts and financial instruments that reference the non-compliant benchmark, as well as the life-cycle of the investment funds referencing the non-compliant benchmark.

5. The assessment of a competent authority concluding that the use of a non-compliant benchmark is permitted under the transitional provisions should be published on the website of the competent authority, and should include an indication of the criteria applied and of the distribution of maturities used to define the duration of the transitional period.