

Implementing measures under the Benchmarks Regulation

Committee on Economic and Monetary Affairs Scrutiny Session of 11 July 2018

This briefing has been drawn up to support ECON's work on the scrutiny of delegated acts, in particular for the discussion of 11 July 2018 on Level-2 measures under [Regulation \(EU\) No 2016/1011](#) on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds¹.

In brief

On 30 June 2016, the Benchmarks Regulation (**BMR**) entered into force. As of 1 January 2018, most of the rules² for entities providing benchmarks, contributing input data to a benchmark or using a benchmark, apply. BMR empowers the Commission to adopt delegated acts (**DAs**) and implementing acts (**IAs**), including Regulatory and Implementing Technical Standards (**RTS** and **ITS**). This briefing provides an overview of selected issues that are expected to be covered by the forthcoming RTS, including rules on input data and the authorisation/registration of an administrator, as well as other outstanding issues. The RTS are still to be adopted by the Commission and will be based on preparatory work by the European Securities and Markets Authority (ESMA) finalised already mid-2017, in particular their final reports of [30 March](#) and [1 June 2017](#). The DAs under BMR that were [adopted](#) by the Commission on 29 September and on 2 October 2017 and have been covered by a [previous version](#) of this briefing for the Scrutiny session of 8 June 2017.

REGULATORY TECHNICAL STANDARDS (RTS)

The RTS under BMR mainly cover the **governance arrangements** for benchmark administrators (oversight function, input data, methodology, transparency thereof and the benchmark statement) and for contributors (code of conduct, governance and control of supervised contributors), as well as criteria for add-on requirements by NCAs for administrators of significant benchmarks and the information to be

Table 1. BMR Implementing measures

	ESMA Discussion Paper	ESMA Consultation paper	ESMA Technical advice or Final Report	COM Adoption
DAs	15 Feb. '16	27 May '16	10 Nov. '16	29 Sept. '17 3 Oct. '17
RTS	15 Feb. '16	29 Sept. '16	30 March '17 pending and 1 June '17	
ITS	15 Feb. '16	29 Sept. '16	30 March '17 pending	

¹ Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJ L 171, 29.6.2016, p. 1–65.

² BMR contains transitional provisions for (i.) existing EU entities that provide indices and (ii) third-country entities that provide indices already used in contracts or instruments in the EU. In these cases, the full application of BMR is set to start on 1 Jan 2020. Furthermore, the rules on the procedure for designating critical benchmarks, the mandatory administration of and contribution to such benchmarks and the functioning of the supervisory colleges related to such benchmarks are applicable since 30 June 2016.

included in the application for authorisation and registration and for recognition of third-country administrators. The ITS provide templates for the **compliance statement**, rules on procedures, and forms for **exchange of information between NCAs and ESMA**.

Characteristics and procedures of the oversight function (Article 5)

The objective of these draft RTS is to **ensure integrity and absence of conflicts of interests**. The RTS set out details and requirements for the oversight function, as regards its:

- **Composition**, i.e. in accordance with the ownership and control structure of the administrator, including a list of possible arrangements that is annexed to the RTS.
- **Positioning** within the administrator's organisation, i.e. embedded within the organisational structure but separate for management and governance functions.
- Governing **procedures**, i.e. minimum procedures for an oversight function, including disclosure of conflicts of interest but excluding the obligation to publish names of members and meeting minutes as initially included in the Consultation Paper.

Input data (Article 11)

These draft RTS specify how to ensure **the appropriateness and verifiability of input data** and what procedures should be in place to ensure that input data obtained from a front office function is subject to **oversight and verification procedures**. The draft RTS embed certain proportionality for some benchmarks, with stricter requirements for critical benchmarks, and more flexibility for some requirements taking into account the nature, scale and complexity of the activities of the contributors and the level of discretion in the contribution process. The draft RTS would not apply to administrators of non-significant benchmarks.

Transparency of methodology (Article 13)

These draft RTS determine the **information to be provided by administrators of critical or significant benchmarks on methodologies and their approval**. Depending on the type of benchmark, the draft RTS allow some administrators to opt out of certain disclosure requirements. The draft RTS furthermore specify the disclosure of some information on the **internal review of the methodology** as well as of the procedures for consulting on **material changes in the administrator's methodology**.

Code of conduct for contributors (Article 15)

In view of the higher risk for the integrity of **benchmarks based on contributions**, the benchmark administrator shall require that the contributors adhere to a code of conduct. The draft RTS further specify elements to be included, e.g., rules on the description of input data, on submissions by contributors and on policies to ensure that input data is relevant. Policies on the **use of discretion** when contributing input data are also required, to counter the risk of data manipulation.

Governance and control requirements for supervised contributors (Article 16)

For supervised contributors, specific governance and control requirements are provided. In particular, controls on **submitters** include sign-off processes of their contributions, verifications of their knowledge and measures to avoid conflicts of interest. Remuneration of the submitters, for example, should not be linked to the benchmark or specific values of the submissions, nor to the performance of a specific activity of the supervised contributor that may raise a conflict of interest with the contribution to the benchmark.

Qualitative criteria for significant benchmarks (Article 25)

ESMA was also asked to develop draft RTS that further specify the **nine criteria** that NCAs may use to determine that an administrator of a significant benchmark should not be allowed to opt out of certain requirements of BMR ("add-ons"). ESMA proposes minimum requirements for each criterion of the level-1 text that NCAs have to assess, including elements on the vulnerability of the benchmark to manipulation, the nature of the input data and the importance of the benchmark for financial stability.

Benchmark statements (Article 27)

The draft RTS defining the minimum contents of the **benchmark statements** include general disclosure requirements for all benchmarks, the contents to be included depending on the type of benchmark (regulated-data, interest rate, commodity, critical, significant and non-significant benchmarks) and changes in the benchmark or its methodology, which give rise to an update of the statement.

Authorisation and registration of an administrator (Article 34)

These draft RTS contain two annexes on information to be provided in **the application for authorisation and for registration**. The provisions explicitly distinguish the information to be provided for each type of benchmark. There are some small differences in the information required for authorisation compared to registration, mainly in the way in which the information is to be provided (in a summary form).

Recognition of third-country administrators (Article 32)

The last draft RTS included in ESMA's final report of 30 March 2017 specify the information that an **application for recognition of third-country benchmarks** should contain as well as the **presentation of information in the notification to ESMA**. They also require for applicants to explain their choice of the specific Member State (MS) of reference and the identity and role of the appointed legal representative in that MS.

Minimum content for cooperation arrangements (Article 30)

In its second final report of 1 June 2017, ESMA formulates draft RTS on the **minimum content for cooperation arrangements**, as those referred to under Article 30(4) BMR, with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent to BMR.

Regulated data benchmarks

Market participants have been particularly vocal on their concerns regarding the definition of "Regulated data benchmarks". The definition, in Article 3(1)(24)(a) BMR, contains the words "**entirely and directly**" - which could be interpreted as data used by the regulated data benchmark being both unaltered and received directly from regulated data sources. Data sourced by Market Data Vendors would then be considered as outsourcing according to Article 10 BMR and benchmarks using these services considered as falling outside of the scope of a regulated data benchmark. Stakeholders believe that certain administrators would, under this interpretation, not be able to benefit from the alleviated regulatory controls even though they might be less vulnerable to manipulation through their use of "regulated data" - as opposed to "contributed data".

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