



Questions and Answers for supervised entities on the Benchmarks Regulation

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1. Introduction

The CNMV has been designated as the competent authority to apply the new regulation¹ on benchmarks in financial instruments and contracts or to measure the performance of investment funds as included in the Regulation (UE) 2016/1011 (hereinafter, the Regulation)² directly applicable from 1 January 2018.

For this reason, the CNMV assumes new responsibilities related to the authorisation and registration of benchmark administrators located in Spain and the supervision of administrators, contributors, supervised entities regarding the use of the benchmarks and any other persons involved in their preparation.

In order to facilitate supervised entities their adaptation to the requirements established by the Regulation, the CNMV has [published a communication on the application of the new Benchmarks Regulation](#) and has elaborated these [questions on Benchmarks Regulation that complement the questions and answers elaborated by ESMA](#).

This document does not contain regulatory provisions. Its purpose is to transmit to the supervised entities - benchmark administrators, contributors and entities using benchmarks- interpretation criteria for the proper application of the Benchmarks Regulation.

For any additional questions or concerns regarding the application of the Regulation, please contact the CNMV through the address: CNMV-Benchmarks@cnmv.es.

¹ In Spain, the CNMV is the competent authority designated with regard to the tasks contained in the Regulation. The Bank of Spain has certain powers in relation to the supervision of certain financial loan contracts as well as the supervision of the contributors to benchmarks elaborated by the Bank of Spain. The CNMV is also the authority responsible for coordinating the cooperation and exchange of information with the European Commission, ESMA and the competent authorities of other Member States (paragraph 6 of article 233 of the revised text of the Securities Market Law, approved by Royal Legislative Decree 4/2015, of October 23).

² [Regulation \(EU\) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as a benchmark 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](#).

2. General Questions

2.1 According to the Regulation, not all indices fall within its scope of application; only those that are considered to be a benchmark are included. What is the difference between an index and a benchmark?

Response of CNMV

The Regulation defines an index (Article 3(1)(1)) as any figure that is published or made available to the public, that is regularly determined by the application of a formula or any other methodology, 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.

An index becomes a benchmark and therefore is subject to the Regulation (Article (2)) when it is used as a benchmark to determine the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, or it 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 (as defined in Article 3(1)(3)).

2.2 Which individuals and activities related to the benchmarks are regulated by the Regulation?

Response of CNMV

The Regulation applies to the elaboration, to the provision of input data and to the use of benchmarks in the European Union (Article 2(1)). In accordance with this, the persons and entities subject to the Regulation are the administrators or providers of benchmarks, the contributors of input data and the supervised entities that use the indices in the terms established in the Regulation.

There are some indices, activities and persons to which the Regulation does not apply (such as commodities indices calculated with contributions from non-supervised entities, central banks as administrators of benchmarks or the media in the sole exercise of their journalistic activity) in the terms set out in Article 2(2).

2.3 What obligations does the Regulation establish for administrators, contributors and users of benchmarks?

Response of CNMV

In order to ensure the robustness of the benchmarks and their proper use, the Regulation establishes requirements to be met by administrators, contributors of input data and entities using the benchmarks. For this purpose:

- Reinforces the governance of the administrators, who must have an organizational structure and resources for the adequate management of conflicts of interest.

- It also strengthens the methodology and requires transparency on the data used.
- It regulates contributors of input data, which are also subject to rules of governance, control and prevention of conflicts of interest as well as to the compliance with a code of conduct.
- Supervised entities may only use a benchmark or a combination of benchmarks that are provided by a registered administrator. When using benchmarks, supervised entities shall prepare a plan of measures to be taken if the benchmark changes significantly or is no longer produced.
- The prospectus of issuing, offering and admission of financial instruments, as well as those of investment funds using a benchmark, must state whether the benchmark is provided by an administrator included in the public register under the responsibility of ESMA.
- The Regulation also establishes a regime of equivalence, recognition or endorsement of benchmarks administrated in third countries for use by supervised entities in the territory of the European Union.

2.4 How can a European Union benchmark provider obtain approval to perform its activity?

Response of CNMV

Administrators of benchmarks in the European Union may obtain the required approval to carry out their activity either through an authorisation procedure or through a registration procedure (Article 34 of the Regulation).

The approval procedure applies to critical benchmark administrators. It also applies to managers of commodities benchmarks, interest rate benchmarks as well as significant benchmarks, as long as in these cases the manager is not a supervised entity.

If the administrator does not provide critical benchmarks and is a supervised entity, he will follow the registration procedure to perform his activity.

The Regulation (Article 51) establishes a deadline of 1 January 2020 for existing administrators at its entry into force on 30 June 2016 to obtain approval. See [paragraph 9 of ESMA's Q&A](#) and paragraph 6 of this document which addresses different aspects of the transitional regime.

Any benchmark administrator established in Spain must apply to the CNMV to obtain its authorisation or registration as such.

2.5 Persons or entities who, in accordance with Article 34 of the Regulation, obtain their authorisation or registration as a benchmark administrator will be listed as such in the ESMA public register referred to in Article 37 of the Regulation. Does this mean that the authorisation and registration procedures with the competent authority of the State in which the administrator is located must be conducted in English?

Response of CNMV

No. Persons and entities located in Spain that apply for authorisation or registration as a benchmark administrator with the CNMV may submit the documents and information that make up their application³ in Spanish (in accordance with article 16.1 of Law 39/2015, of 1 October, on Common Administrative Procedure for Public Administrations).

Documents to be published by the administrator, such as the statement of compliance referred to in Article 27 of the Regulation, may also be written in other languages either for commercial reasons or because of their cross-border impact ([see ESMA Q&A question 7.3 on the language of that statement](#)).

3. Scope of Application

3.1 Is the use of benchmarks for discretionary portfolio management subject to the Regulation?

Response of CNMV

No. The use of benchmarks in discretionary portfolio management is not covered by the uses defined in Article 3(1) (7) of the Regulation and would therefore fall outside its scope.

3.2 Is the use of benchmarks by personal and occupational pension funds subject to the Regulation?

Response of CNMV

The obligation under Article 29 of the Regulation to use benchmarks registered or provided by an administrator registered in the ESMA register applies only to supervised entities listed in Article 3(1)(17). Among the supervised entities listed in that Article are institutions for occupational retirement provision (Article 3(1)(17)(g) of the Regulation), but not personal pension funds.

³ See [Commission Delegated Regulation \(EU\) 2018/1646 of 13 July 2018 supplementing Regulation \(EU\) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the information to be provided in an application for authorisation and in an application for registration](#). This Regulation was published on 5 November 2018 and is applicable from 25 January 2019.

As a consequence, only the use of benchmarks by the pension funds of employment in the terms of Article 7, where applicable, would be subjected to the Regulation.

3.3 Are consumer price indices or inflation indices published by public authorities (such as INE or Eurostat) subject to the Regulation?

Response of CNMV

The providers of such indices, as public authorities, would be exempted from the Regulation in accordance with Article 2(2) (b) of the Regulation. However, the European Commission must publish a list of public authorities in the European Union within the meaning of Article 3(1)(29) of the Regulation.

Without prejudice to the foregoing, the use of such benchmarks by supervised entities as well as contributors of input data, if any, to such benchmarks would be subject to the relevant provisions of the Regulation ([see question 4.1 of ESMA's Q&A regarding central banks as providers of benchmarks](#)).

4. Definitions

4.1 Are benchmarks calculated on the basis of lending operations with retailers considered to be interest rate benchmarks for the purposes of the Regulation? And benchmarks elaborated on the basis of prices of transactions or quotations, firm or not, of public or private debt instruments?

Response of CNMV

The term ‘interest rate benchmark’ is defined in Article 3(1)(22) of the Regulation as a benchmark that is determined on the basis of the rate at which banks may lend to, or borrow from, other banks, or agents other than banks, in the money market.

Consequently, benchmarks determined on the basis of interest rates not related to lending or bank financing operations in the money markets are not considered as interest rate benchmarks for the purposes of applying Articles 24, 25 and 26 of the Regulation and could therefore benefit from the derogations provided for in those Articles.

To the extent that these benchmarks are calculated on the basis of input data provided by contributors, Article 16(5) of the Regulation and the rules adopted pursuant to this paragraph would also apply to them. However, Article 18 and Annex I of the Regulation would not apply to these indices.

5. Use of benchmarks by supervised entities

5.1 Are the prospectuses of alternative collective investment institutions (regulated in the Directive 2011/61/EU) excluded from the obligation to include administrator's information (Articles 29(2) and 52 of the Regulation)?

Response of CNMV

The prospectuses of alternative collective investment schemes (Directive 2011/61/EU) are not mentioned in Articles 29(2) and 52 of the Regulation and therefore fall outside their scope.

5.2 Article 28(2) of the Regulation establishes that supervised entities must reflect in the contractual relationship with clients⁴ the plans for measures in cases where the benchmark varies significantly or ceases to be provided. In the case of investment funds, can this obligation be met by including the reference in the prospectus?

Response of CNMV

Yes, this obligation can be fulfilled in different ways; entities may choose to include such a reference in the prospectus of the investment fund.

In this case, since Article 28.2 applies from 1 January 2018 and entities must reflect the plans in contracts entered into from 1 January 2018 onwards ([see question 8.1 of the ESMA Q&A](#)), entities may choose to update prospectuses approved prior to 1 January to ensure that all new investors in the investment fund also have such information.

Supervised entities may also choose to include such reference in other contractual documents that are formalized with new investors.

6. Transitional Regime

6.1 Do the obligations imposed by the Regulation on contributors and users benefit from the transitional regime contained in the Regulation?

Response of CNMV

No. The Benchmarks Regulation contains a number of transitional provisions affecting benchmark administrators and the use of benchmark by supervised institutions ([see questions 9.1, 9.2 and 9.3 of ESMA's Q&A](#)).

⁴ Although the Spanish version of the Regulation mentions that the supervised entities, "if possible", will reflect such plans in the contractual relationship with clients, it must be considered that the correct version is the original version in English (*"The supervised entities (...) shall reflect them in the contractual relationship with clients"*) which has been translated in the same sense in all the other languages of the European Union.

Without prejudice to the foregoing, contributors and supervised entities using benchmarks in the terms of the Regulation shall apply the requirements contained in Articles 16, regarding contributors, and in Articles 28 and 29, as regards supervised entities using benchmarks.

The regulation must be completed with second and third level regulations still in the process of being approved. Taking into account the above and the fact that the Regulation grants a transitional period (until 2020) for the administrators of benchmarks to apply for their authorisation and/or registration in the corresponding register, the CNMV will take into account in the initial phase of its actions the best efforts made by entities to implement and comply with the Regulation ([see the communication of the CNMV dated 20 March 2018 on the Application of the new Benchmarks Regulation](#)).

6.2 Can a benchmark administrator located in the European Union created during the transitional period, i.e. between 1 January 2018 and 1 January 2020, benefit from the transitional provisions of the Regulation or must it obtain a corresponding authorisation or registration in order to carry out its activities as benchmark provider?

Response of CNMV

The transitional provisions of the Regulation are only applicable to benchmark administrators located in the European Union and already existing at the date of entry into force of the Regulation or created between 1 July 2016 and 31 December 2017 ([see questions 9.1 and 9.2 of the ESMA Q&A](#)). Consequently, benchmarks administrators located in the European Union that are created on or after 1 January 2018 must obtain authorisation or registration and be included in the ESMA Register in order to be able to carry on the activity of providing benchmarks.

6.3 Can a benchmark administered by an administrator based in a third country (outside the European Union) created during the transitional period (between 1 January 2018 and 1 January 2020) be used as a reference for new instruments issued from 1 January 2020 onwards?

Response of CNMV

No, unless the administrator or the benchmark has been recognised (Article 32 of the Regulation), endorsed (Article 33 of the Regulation), or is covered by an equivalence agreement (Article 30 of the Regulation).

From 1 January 2020 new financial instruments may only use third country benchmarks that are included in the ESMA Register of Administrators and Benchmarks.

6.4 During the transitional period (until 1 January 2020), how can a supervised entity know whether or not the provider of a benchmark has applied for authorisation or registration and whether this application has been rejected?

Response of CNMV

According to the Regulation (Article 36), ESMA will publish and regularly update the register with administrators and benchmarks from third countries that fulfil the conditions to be included in that register. In accordance with the Regulation, there is no specific mechanism for determining whether an application from a particular administrator or benchmark has been rejected by the relevant competent authority.

However, supervised entities may contact the CNMV (through the address CNMV-Benchmarks@cnmv.es) to check the situation of a certain administrator or benchmark from a third country.