



ESMA-EBA Principles for Benchmark-Setting Processes in the EU

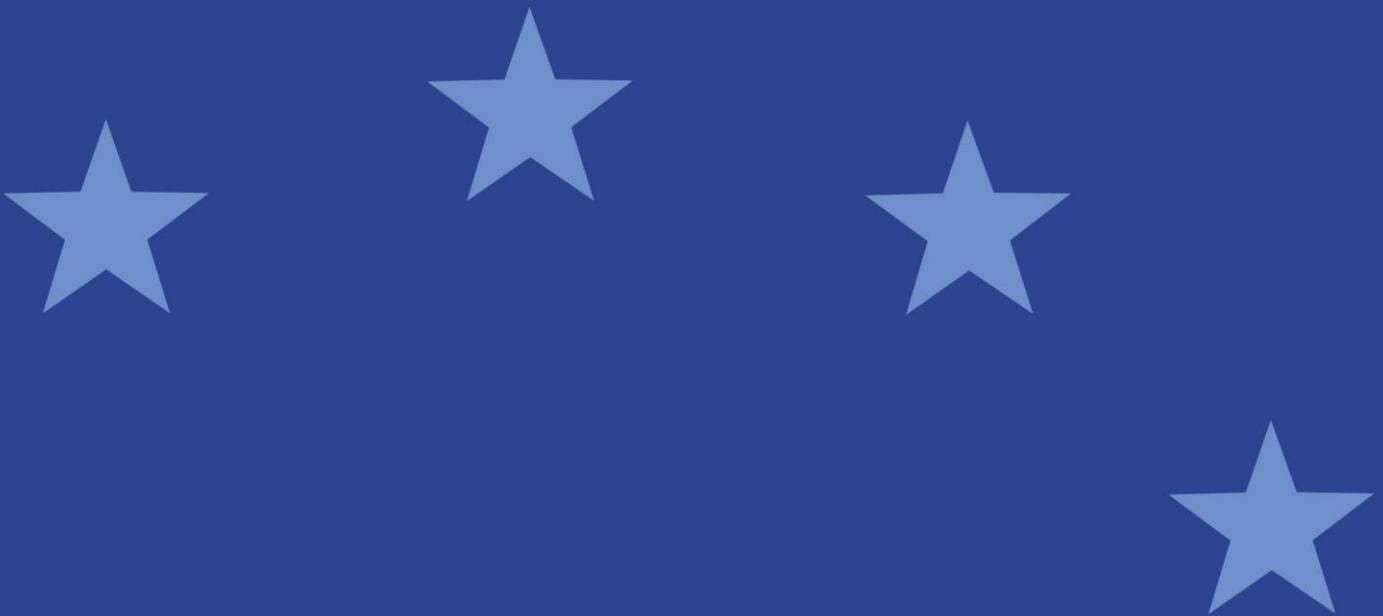


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List of acronyms

EBA European Banking Authority

ESMA European Securities and Markets Authority

IOSCO International Organization of Securities Commissions

MiFID Markets in Financial Instruments Directive

PRA Price Reporting Agency

UCITS Undertakings for Collective Investment in Transferable Securities

Principles for Benchmark-Setting Processes in the EU

Definitions

For the purpose of these Principles, the following definitions apply:

- i. **Benchmark:** A price, rate, index or other value which is
 - a) made available to users, whether free of charge or for payment; and
 - b) 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
 - c) by reference to which
 - i. the amount payable under a financial instrument or the value of the financial instrument is determined; or
 - ii. the performance of a financial instrument is measured.

For clarity, this definition does not include credit ratings as defined in Art. 3(1)(a) of the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

- ii. **Benchmark Administration:** Includes all the stages and processes involved in the establishment, design, production and dissemination of a Benchmark from the gathering of the input data and the calculation of the Benchmark based on the input data to the dissemination of the Benchmark to users including any review, adjustment and modification of this process.
- iii. **Benchmark Administrator:** The legal person or entity responsible for Benchmark Administration as defined above, irrespective of whether the legal person or entity owns the intellectual property relating to the Benchmark.
- iv. **Benchmark Calculation:** The activity of performing the calculation of the Benchmark based on the methodology provided by a Benchmark Administrator and the data collected by the entity performing the calculation or the Benchmark Administrator or submitted by Benchmark Submitters.
- v. **Benchmark Calculation Agent:** A legal person or entity performing Benchmark Calculation activities.
- vi. **Benchmark Publication:** The activity of publishing Benchmark values, which includes making available such values on the internet or by any other means, whether free of charge or not.
- vii. **Benchmark Publisher:** A legal person or entity performing Benchmark Publication activities.

- viii. **Benchmark Submitter:** A legal person or entity contributing to Benchmark data submissions to a Benchmark Administrator or Calculation Agent which are used exclusively for the calculation of the Benchmark.¹
- ix. **Benchmark User:** A professional client within the meaning of Annex II to Directive 2004/39/EC that uses a Benchmark in one of the following manners:
- as a reference for a financial transaction or contract that the legal person or entity sells or places, or for financial instruments that it structures; or
 - as a reference for a financial transaction or contract to be entered into by the legal person's or entity's clients, or by itself on behalf of its clients, in the context of its individual or collective portfolio management activities.
- x. **Methodology:** The written rules and procedures according to which the data are collected and the Benchmark is calculated.
- xi. **Stakeholder:** A Benchmark User or a legal person or entity that purchases the Benchmark determination services, or other legal persons or entities who own contracts or financial instruments that reference a Benchmark.
- xii. **Supervisory Authority:** A regulator or a supervisor that has responsibility for the relevant actors, markets or instruments involved in Benchmark setting.

The Benchmark Administration, Calculation and Publication activities may be performed by distinct legal entities, or may be grouped together such that one entity performs more than one.

¹ Legal persons or entities performing market transactions (e.g. equity trading) may indirectly be involved in benchmark setting but are not be considered Benchmark Submitters.

ESMA and EBA have adopted the Principles for Benchmark-Setting Processes (“Principles”). These Principles aim to mitigate governance and incentive issues pertaining to Benchmarks provided by private sector Benchmark Administrators. They may also serve as a useful yardstick for public-sector entities providing relevant Benchmarks or involved in their provision.

ESMA and EBA consider important that these Principles are implemented not only by all market participants, with the aim of reinforcing the robustness of the procedures, ensuring a minimal level of transparency to the public and creating a level-playing field, but also by Supervisory Authorities in their supervisory practices, where relevant and possible.

Market participants and Supervisory Authorities should apply the “Supporting principles” under sections B. (Principles for Benchmark Administrators), C. (Principles for firms involved in Benchmark data submissions), D. (Principles for Benchmark Calculation Agents), E. (Principles for Benchmark Publishers), F. (Principles for Benchmark Users) and G. (Principles for the continuity of Benchmarks) below in a way that is appropriate to the size, nature and complexity of any specific Benchmark. Proportionality should operate both ways: for some Benchmarks, more sophisticated policies or practices will need to be applied in fulfilling the requirements; for other Benchmarks, the requirements of the “Supporting Principles” may be met in a simpler or less burdensome way.

The Principles cover all stages of the Benchmark process:

- Benchmark Data Submission,
- Benchmark Administration,
- Benchmark Calculation,
- Benchmark Publication,
- the use of Benchmarks, and
- the continuity of Benchmarks.

The Principles are not intended to and do not replace any existing EU or national regulations in relevant areas. They are also without prejudice to the IOSCO Principles for Oil Price Reporting Agencies² and of the specific provisions on financial indices in the ESMA Guidelines on Exchange-Traded Funds (ETFs) and other UCITS³.

A framework for any Benchmark setting process should include at least the following Principles in order to instil confidence in financial markets and market participants, and guarantee the necessary accuracy and integrity of the Benchmark formation process:

A. General framework for Benchmark setting

A.1 Methodology: The methodologies for the calculation of a Benchmark, including information on the way in which contributions are determined and corroborated, should be documented and be subject to regular scrutiny and controls to verify their reliability. The definition of a specific Benchmark should be precise in order to avoid subjective interpretation of key concepts. A Benchmark should represent adequately the market, strategy or interest to which it refers, and measure the performance of a representative group of underlyings in a relevant and appropriate way. Where appropriate, actual market transactions should be used as a basis for a Benchmark Calculation.

A.2 Governance structure: The process of setting a Benchmark needs to be governed by clear and independent procedures, with detailed information on the process made available publicly, in

² <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf>.

³ ESMA/2012/474, available at: <http://www.esma.europa.eu/system/files/2012-474.pdf>.

order to avoid and manage conflicts of interest and limit its susceptibility to manipulation, discretionary decision making or price distortion. Governing processes should include clear rules on the allocation of responsibilities for the Benchmark Administration. Benchmark structures should be established and managed in a way so as to reduce conflicts of interest as much as possible. Conflicts of interest may arise where Benchmark Submitters have discretion regarding the submitted data, while at the same time they or their clients have an exposure against the Benchmark. Where conflicts of interest are unavoidable, they should be identified, disclosed to the public and monitored so as to be transparent and acceptable to Stakeholders and to maintain confidence in the Benchmark setting process.

A.3 Supervision and oversight: Confidence in a Benchmark is enhanced through regulation and oversight and an appropriate sanctioning regime that allows sanctions for improper conduct, as it will be the case in accordance with future EU legislation on market abuse. In the EU, outside of proposals for market abuse, a formal regulatory regime for Benchmarks does not exist so far. For any existing applicable regimes and rules and for the application of these Principles, Benchmark Submitters, Benchmark Administrators, Benchmark Calculation Agents, Benchmark Publishers and Benchmark Users should co-operate closely with the relevant Supervisory Authorities.

A.4 Transparency: A Benchmark should be transparent and accessible to the public, with fair and open access to the rules governing its establishment and operation, calculation, and publication; the fact that a Benchmark is (or may be) published first to certain Stakeholders before it is to others should be disclosed. A high degree of transparency on the process determining a Benchmark, or any modification thereof, will enhance confidence in its integrity, which would also help foster understanding of the Benchmark in the market place. Transparency may be limited in exceptional circumstances only, based on contractual provisions safeguarding confidentiality and intellectual property rights. The full Methodology along with historical records⁴ should be disclosed to the public wherever possible in order to make it fully replicable. Where this is not possible based on contractual provisions, the relevant information, such as weightings and prices of components, should be disclosed to the public prior to any changes in the composition of the Benchmark, with sufficient notice so as to allow a proper reassessment by Stakeholders.

⁴ Historical records should include the data relating to the historical composition, past performances and Methodology of a Benchmark including its past and current weightings, historical panel composition – if any – past and current Methodology, data on past submissions by Benchmark Submitters, and when possible benchmark data, i.e. the data disclosed by the Benchmark Publisher.

B.Principles for Benchmark Administrators

General principles

- B.1 A Benchmark Administrator should ensure the existence of robust methodologies for the calculation of the Benchmark and appropriately oversee its operations and ensure that there is an appropriate level of transparency to the public regarding the rules governing the Benchmark.

Supporting principles

➤ Methodology

- Calculation criteria

- B.2 A Benchmark Administrator should establish methodologies with well-defined criteria for the calculation of the Benchmark, so that judgement and qualitative assessments or other opportunities for discretionary decision making are limited and confined to well-defined stages of the Benchmark setting process or specific situations, such as cases of market disruption or operational contingencies. *Inter alia*, such criteria should address the composition of panels where applicable, the algorithm for the calculation of the Benchmark, the definition and sourcing of the data used in the calculation, and provisions regarding operational continuity.

- B.3 The methodologies established by the Benchmark Administrator should be rigorous, systematic and continuous. Any amendment to an established methodology should be made according to a transparent and determined process, and be published by the Benchmark Administrator beforehand.

- Calculation errors

- B.4 Benchmark Administrators should have clear policies for communicating errors in the Benchmark (whatever the reason for the error), and any subsequent re-fixing.

- Withdrawals

- B.5 Without prejudice of the principles under Section G. below, a Benchmark Administrator should encourage Benchmark Submitters not to withdraw from surveys or panels.

- Representativeness and liquidity

- B.6 A Benchmark Administrator should regularly review the Benchmarks or the range of Benchmarks provided (such as, for example, asset classes, currencies and tenors). It should ensure that any Benchmark reflects the market or interest it seeks to represent.

- B.7 The data used to construct a Benchmark determination should be sufficient to represent accurately and reliably the underlying assets or prices, interest rates or other values measured by the Benchmark. These data should be anchored by observable transactions entered into at arm's length between buyers and sellers in the market for the underlying assets or prices, interest rates or other values the Benchmark measures in order for it to function as a credible indicator of prices, rates, indices or values.

Administrators may rely on non-transactional data such as offers and bids and adjustments based on expert judgment for purposes of constructing an individual Benchmark determination, but such data should only be used as an adjunct or supplement to transactional

data. The principle does not prohibit the use of non-transactional data for indices that are not designed to represent transactions and where the nature of the index is such that non-transactional data is used to reflect what the index is designed to measure.

- Disclosure of the Methodology

B.8 A Benchmark Administrator should fully disclose the Methodology to the public. Where this is not possible for legal reasons, the relevant information, such as weightings and prices of components, should be disclosed to the public prior to any changes in the composition of the Benchmark, with sufficient notice so as to allow for a proper reassessment by Stakeholders.

➤ **Governance structure**

B.9 A Benchmark Administrator should have governance and compliance functions and processes to enable it to operate effectively and ensure the quality of the Benchmark. A Benchmark Administrator should provide well-defined criteria and procedures to select members of the governance and compliance functions that participate in the determination of the methodologies for the calculation of the Benchmark. Governance bodies of Benchmark Administrators should include members who are independent and appointed from outside those that through ownership or other linkages could face conflicts of interest, in particular those representing members contributing to the Benchmark. Members of governing bodies should be present and fully involved in ensuring that Benchmark Administration respects internal rules and procedures. Details of the membership of the relevant governance and compliance functions should be disclosed to the public, along with any declarations of conflicts of interests and the processes for appointment to and removal from the governance and compliance functions.

➤ **Oversight and control**

- Submission controls

B.10 A Benchmark Administrator should have procedures to enable its oversight functions to report to their respective Supervisory Authorities, if any, any irregularities, unusual submissions or misconduct by the Benchmark Submitters of which the Administrator becomes aware.

- Supervision

B.11 A Benchmark Administrator should comply with any query from its Supervisory Authority or, when it is not under the responsibility of a Supervisory Authority, is encouraged to co-operate with the Supervisory Authorities responsible for the other actors, markets and instruments involved in the setting of the Benchmark to which it contributes.

- Record-keeping requirements

B.12 A Benchmark Administrator should record minutes of relevant meetings of its oversight functions along with details of all interactions between the Benchmark Administrator and Benchmark Submitters, Benchmark Calculation Agents and Benchmark Publishers. Meeting minutes should be kept for a minimum of five years and be made available to Supervisory Authorities upon request. A Benchmark Administrator should keep audit records of all data used by Benchmark Calculation Agents and Benchmark Submitters in the process of calculating the Benchmark as well as of all the Methodologies used to calculate the Benchmark.

- Internal control mechanisms

- B.13 The governance and compliance functions of a Benchmark Administrator should seek to ensure that Principles applying to Benchmark Submitters, Benchmark Calculation Agents and Benchmark Publishers are implemented. In particular, the Benchmark Administrator should require Benchmark Submitters, where they are part of the Benchmark setting process, Benchmark Calculation Agents and Benchmark Publishers to publically and periodically confirm adherence to these Principles.
- B.14 A Benchmark Administrator should establish an effective whistleblowing mechanism as well as complaints procedures in order to facilitate early awareness of any misconduct or other irregularities that may arise.
- B.15 A Benchmark Administrator should establish, implement and maintain adequate internal control mechanisms on the data contributed. This should include consistency and plausibility checks on the basis of transaction-based or other verifiable data where available.

- Oversight of outsourced activities

- B.16 A Benchmark Administrator, when outsourcing Benchmark Calculations to a third party, should retain adequate access to and control over the activities of the third party. A Benchmark Administrator should have formal selection criteria as well as contractual and service level arrangements in place when outsourcing Benchmark Calculations to a third party, and periodically audit the services performed by the Benchmark Calculation agent. In particular, a Benchmark Administrator should retain adequate access to and control over the activities of the Benchmark Calculation agent, including a proper functioning of its Benchmark computation process, and the ability to check its compliance with the Methodology of the Benchmark.

➤ **Transparency**

- B.17 A Benchmark Administrator should publicly disclose a confirmation by its management of compliance with the above principles as well as the confirmation received from the Benchmark Submitters, the Benchmark Calculation Agent and Benchmark Publisher.

C. Principles for Benchmark Submitters

General principles

- C.1 A Benchmark Submitter should have in place internal policies covering the submission process, governance, systems, training, record keeping, compliance, internal controls, audit and disciplinary procedures, including complaints management and escalation processes.
- C.2 A Benchmark Submitter should maintain and operate effective organisational and administrative arrangements with a view to avoid and manage conflicts of interests from affecting the Benchmark data submitted.

Supporting principles

➤ Governance structure

- Conflicts of interest policy

- C.3 A Benchmark Submitter should establish, implement and maintain an effective conflicts of interest policy to enable it to identify, with reference to the activities related to Benchmark data submissions, conflicts of interest that may arise, along with the procedures to be followed and measures to be adopted, in order to manage such conflicts.

- C.4 The conflicts of interest policy should include:

- effective procedures to prevent or control the exchange of information between staff engaged in activities involving a risk of a conflict of interest where the exchange of that information may affect the Benchmark data submitted;
- contingency provisions in case of absence of control of the flow of information;
- rules to avoid collusion between Benchmark Submitters and between Benchmark Submitters and Benchmark Administrators;
- measures to prevent any person from exercising inappropriate influence over the way in which staff involved in Benchmark data submission carry out activities;
- the removal of any direct link between the remuneration of staff involved in Benchmark data submissions and the remuneration of, or revenues generated by, different staff principally engaged in another activity, where a conflict of interest may arise in relation to those activities.

- Record-keeping requirements

- C.5 Record keeping should mean for a Benchmark Submitter to arrange for records of all relevant aspects of the submission process to be kept for a period of at least five years in line with the requirements on record keeping in MiFID. These records should cover but not be limited to:

- procedures and methodologies governing submissions and the underlying data;
- names and role of the individuals responsible for submission and submission oversight;
- relevant communication of submitting parties with the Benchmark Administrator and

the Benchmark Calculation Agent;

- substantial exposures of individual traders or trading desks to Benchmark related instruments;
- any transaction reversing positions subsequent to a submission; and
- findings of external or internal audits related to Benchmark submission, remedial actions and progress in their implementation.

Records should be retained in a medium that allows the storage of information in a way accessible for future reference, and in such a form and manner that it must not be possible for the records to be manipulated or altered.

- Governance policy

C.6 A Benchmark Submitter's governance policy should ensure that:

- clearly accountable, named individuals, at the appropriate level of seniority within the firm, are responsible for Benchmark data submissions;
- staff involved in Benchmark data submissions are aware of the procedures which must be followed for the proper discharge of their responsibilities.

C.7 A Benchmark Submitter should ensure that staff involved in Benchmark data submissions have the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. Staff involved in Benchmark data submissions should undergo appropriate training and development programmes.

➤ **Oversight and control**

C.8 A Benchmark Submitter should establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the firm. Internal procedures should stipulate, for example, periodic internal and, where appropriate, external audit of submissions and procedures. Controls performed on the data submitted should be appropriate to the nature of the Benchmark. Controls should include comparisons with actual, transaction-based, verifiable data. Where actual data is not available, documentation by the submitter of a verifiable basis for their qualitative assessment should be required and scrutinised for appropriateness by oversight functions. The Benchmark Submitter should record transactions which may form the basis of the submission to verify that they represent arm's length commercial transactions, and are not transacted solely for the purpose of Benchmark submission. Compliance reports containing explanations of the compliance function's findings should be submitted to senior management and any oversight function on a regular basis. This, as well as any relevant data for submission controls based on a reasoned request by the Benchmark Administrator, should be made available to the Benchmark Administrator on request.

C.9 A Benchmark Submitter should comply with any reasonable query from its Supervisory Authority, where relevant, and is encouraged to co-operate with the Supervisory Authorities responsible for the other actors, markets or instruments involved in the setting of the Benchmark to which it contributes.

C.10 A Benchmark Submitter should establish a zero-tolerance policy, including disciplinary measures, for non-compliance with internal policies, with an effective whistle-blowing policy.

➤ **Transparency**

- C.11 A Benchmark Submitter should submit to the Benchmark Administrator a confirmation by its management of compliance with the above principles which should be published by the Benchmark Administrator in line with Principles B.13 and B.17.

D. Principles for Benchmark Calculation Agents

General principles

- D.1 A Benchmark Calculation Agent should ensure a robust calculation of the Benchmark and ensure the existence of appropriate internal controls over the Benchmark Calculations it makes.

Supporting principles

➤ Record keeping

- D.2 A Benchmark Calculation Agent should duly document and keep records of all interactions with submitting parties, if any, so as to easily identify anomalies, and make these available to Supervisory Authorities upon request. A Benchmark Calculation Agent should keep audit records of all data used in the process of calculating the Benchmark as well as of all contributions by Benchmark Submitters.

- D.3 A Benchmark Calculation Agent should keep records of contacts with the Benchmark Administrator (where Benchmark Administration and Benchmark Calculation activities are not exercised by the same legal entity or person), and make these available to Supervisory Authorities upon request.

➤ Governance structure

- D.4 A Benchmark Calculation Agent should have clearly accountable, named individuals, at the appropriate level of seniority within the entity, responsible for Benchmark computation.
- D.5 A Benchmark Calculation Agent should implement and maintain systems for pre- and post-calculation control that are adequate to ensure consistent and timely Benchmark computation.

➤ Oversight and control

- D.6 A Benchmark Calculation Agent should establish an effective whistleblowing mechanism in order to facilitate early awareness of any misconduct or other irregularities that may arise.
- D.7 A Benchmark Calculation Agent should have clear policies in place on how to publicise any errors in calculation due to any reason and communicate clearly any new Benchmark fixing or determination.

➤ Transparency

- D.8 A Benchmark Calculation Agent should submit to the Benchmark Administrator a confirmation by its management of compliance with the above Principles which should be published by the Benchmark Administrator in line with Principles B.13 and B.17.

E. Principles for Benchmark Publishers

General principles

E.1 A Benchmark Publisher should ensure reliable publication of the Benchmark it has agreed to publish.

Supporting principles

➤ Governance structure

E.2 A Benchmark Publisher should have clearly accountable, named individuals, at the appropriate level of seniority within the entity, responsible for Benchmark publication.

E.3 A Benchmark Publisher should implement and maintain systems for pre- and post-publication control that are adequate to ensure consistent and timely Benchmark Publication.

➤ Oversight and control

E.4 Before publishing Benchmark data, the Benchmark Publisher should obtain a confirmation from the Benchmark Administrator that the procedures for the validation of the submissions and calculations have been followed.

E.5 A Benchmark Publisher should have clear policies in place on how to publicise any errors in calculation due to any reason; and communicate clearly any new Benchmark fixing or determination.

➤ Transparency

E.6 A Benchmark Publisher should publish any changes to the Benchmark composition, Benchmark Submitters or any other feature of the Benchmarks.

E.7 A Benchmark Publisher should submit to the Benchmark Administrator a confirmation by its management of compliance with the above Principles which should be published by the Benchmark Administrator in line with Principles B.13 and B.17.

F. Principles for Benchmark Users

General principles

- F.1 Benchmark Users should regularly assess the benchmarks they use in financial products or transactions, and verify that the Benchmark used is appropriate, suitable and relevant for the targeted market. Any potential irregularities observed in a Benchmark should be notified to the Benchmark Administrator or the relevant Supervisory Authorities if appropriate.

Supporting principles

➤ Due diligence

- F.2 A Benchmark User should use sufficient due diligence to ascertain whether the relevant Benchmark Administrator and Benchmark Calculation Agent comply with the Principles applying to Benchmark Administrators and Benchmark Calculation Agents. In order to comply with this requirement, the Benchmark User may rely, among other sources, on the confirmation of compliance publicly disclosed by the Benchmark Administrator.
- F.3 A Benchmark User should regularly assess the appropriateness, suitability, and relevance of the use of a Benchmark, both when it acts as a principal and when it acts as an agent for any third party. When the Benchmark User uses the Benchmark as a reference for financial transactions or contracts to be entered into by its clients, or by itself on behalf of its clients, the extent of the assessment done by the Benchmark User may be limited by the contractual relationship with its clients, but this is without prejudice of the requirement for the Benchmark User to at least inform its clients about the continued appropriateness, suitability, and relevance of the use of a Benchmark for their needs.

G. Principles for the continuity of Benchmarks

General principles

G.1 All those participating in the Benchmark setting process and, where relevant, Benchmark Users should put in place robust and credible contingency provisions for cases in which there is a risk to the continuity of the provision of a Benchmark due to, for example, a drying-up of market liquidity, an operational failure, a lack of submissions, transactions or quotes or the unavailability of the Benchmark.

Supporting principles

➤ Benchmark Administrators

G.2 The contingency provisions put in place by Benchmark Administrators should be transparent and ideally written into contract, so as to reflect the needs of contracting parties. The range of possible solutions may include the use of alternative data sources, including derivatives, or proxies such as algorithms or expert judgments to complement market transactions; increasing the time window for Benchmark submissions; lowering minimum threshold amounts for Benchmark submissions; or the use of a substitute rate based on comparable underlying data. Benchmark Administrators should disclose to the public any temporary switch – due to a contingency situation – from a transaction-based system to an expert judgment-based system and provide evidence for such a switch.

➤ Benchmark Submitters

G.3 A Benchmark Submitter should implement and maintain systems that are adequate to ensure consistent and timely delivery of submissions, including during adverse events.

➤ Benchmark Calculation Agents

G.4 A Benchmark Calculation Agent should have appropriate technical and procedural contingency plans in case of technical failure.

➤ Benchmark Publishers

G.5 A Benchmark Publisher should have robust contingency provisions for unavailability of the systems required to ensure consistent and timely Benchmark Publication.

➤ Benchmark Users

G.6 The contingency provisions put in place by Benchmark Users, where relevant, should be transparent and ideally written into contract, so as to reflect the needs of contracting parties.

G.7 A Benchmark User should develop robust contingencies for the unavailability of a Benchmark within contracts referenced to it. The contingency provisions should be used in the event of interruptions in the provision of a Benchmark, or other market disruptive events which lead to the Benchmark not being calculated or published in the usual manner.

Legal continuity, revision and review

Without prejudice of the above Principles, ESMA and EBA are conscious that any change to a benchmark framework (calculation methodologies and procedures) should be managed so as to ensure that any disruption to existing benchmark-referenced contracts are proportionate and minimised.

ESMA and EBA may revise the above Principles in light of potential future EU regulations, material changes in market practices or the agreement of international standards pertaining to benchmarks.

ESMA and EBA plan to conduct a review of the application of the above Principles eighteen months after their publication, but may alter that timeframe should they deem it to be appropriate or necessary.