



European Securities and
Markets Authority

Supervisory Briefing

**Benchmark administrators' presence in their Member States of location
and outsourcing**



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1 Introduction

1. ESMA plays an active role in building a common supervisory culture by promoting common supervisory approaches and practices. National Competent Authorities¹ ('NCAs') are facing a number of supervisory issues related to the presence of benchmark administrators² ('administrator') in their Member States ('MSs') and the outsourcing of functions or relevant services and activities by those administrators.
2. This supervisory briefing has been designed to provide some guidance to NCAs in respect of the presence of an administrator in its MS of location and the outsourcing of functions or any relevant services and activities in the provision of a benchmark under Regulation (EU) 2016/2011³ (the 'BMR').

2 Purpose and scope

3. This supervisory briefing focuses on the presence of an administrator in its MS of location and the outsourcing of functions or relevant services and activities for which supervisory guidance is needed to ensure a consistent application of the BMR across the Union.
4. It provides additional guidance on how NCAs should effectively supervise administrators, that are part of a group which may include or have links with non-EU entities, applying for authorisation or registration in their Member States of location and on appropriate outsourcing arrangements, in particular where the service provider is located outside the Union.

3 Status of this document

5. This supervisory briefing is issued under Article 29(2) of Regulation (EU) No 1095/2010⁴ (the 'ESMA Regulation') which allows ESMA to develop new practical instruments and convergence tools. The purpose of these tools is to promote common supervisory approaches and practices. The content of the briefing is not subject to any 'comply or explain' mechanism for NCAs.
6. Pursuant to Article 29(2) of the ESMA Regulation, ESMA shall, where appropriate, publicly consult and conduct a cost-benefit analysis on tools and instruments issued under Article 29(2) of the ESMA Regulation. It shall also, where appropriate, request advice from the

¹ ESMA publishes and maintains a list of the National Competent Authorities designated under the Benchmarks Regulation: <https://www.esma.europa.eu/sites/default/files/bmr.pdf>

² With regard to supervised entities as defined in Article 3(1)(17) of the BMR, this supervisory briefing should be read subject to any requirement set out in the sectoral legislation applicable to those entities.

³ 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.

⁴ 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 L 331, 15.12.2010, p. 84.

Securities and Markets Stakeholder Group. This supervisory briefing provides guidance addressed mainly to NCAs regarding the presence of an administrator in its MS of location and the outsourcing of functions or relevant services and activities. Therefore, also taking into account that NCAs were involved in the preparation of this briefing, ESMA did not consider it appropriate to publicly consult or to conduct a cost-benefit analysis as these would have been disproportionate in relation to the scope and nature of the briefing. For the same reasons ESMA did not consult the Securities and Markets Stakeholder Group.

7. This supervisory briefing could be updated with additional topics as need may be.

4 Background

8. NCAs need to be able to effectively supervise administrators applying for authorisation or registration under the BMR and avoid letter-box constructions.
9. Article 4(7)(a) of the BMR requires administrators to ensure that their employees and any other natural persons whose services are placed at their disposal or under their control and who are directly involved in the provision of a benchmark are subject in particular to effective management and supervision.
10. Article 10 of the BMR sets out specific conditions for an administrator to outsource functions or relevant services and activities in the provision of a benchmark. In particular, Article 10(1) provides that “an administrator shall not outsource functions in the provision of a benchmark in such a way as to impair materially the administrator’s control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark”.
11. Recital 16 of the BMR further clarifies that an administrator can outsource to a third party one or more of the functions or other relevant services and activities in the provision of a benchmark and points out that the decisive element for a person to be an administrator is whether it has control over the provision of the benchmark. In addition, Recital 24 of the BMR acknowledges that the provision of a benchmark frequently involves outsourcing of important functions but that administrators should not be relieved of any of their obligations and responsibilities.
12. With particular regard to cloud outsourcing, the ESMA Guidelines on outsourcing to cloud service providers⁵ outline a number of principles to help administrators of critical benchmarks and competent authorities to identify, address and monitor the risks and challenges arising from cloud outsourcing arrangements.
13. Finally, Article 41(1) of the BMR sets out several powers of competent authorities, including supervisory and investigatory powers to fulfil their duties under the BMR. These powers include, under certain conditions, the power to carry out on-site inspections or investigations and to enter premises of legal persons in order to seize documents and other data in any form.

5 Presence in the MS of location

14. When NCAs receive an application for authorisation or registration, they should ensure full compliance with the requirements set out in the BMR. NCAs should pay particular attention to situations where the applicant administrator is part of a group which includes or has links with non-EU entities and should therefore assess the group business model/structure etc. In particular, NCAs should carefully assess whether the group

⁵ https://www.esma.europa.eu/sites/default/files/library/esma50-157-2403_cloud_guidelines.pdf

structure within which the applicant administrator will operate may constitute an obstacle to the effective exercise of their supervisory powers.

15. NCAs should mitigate the risk of letter-box entities and ensure that administrators dedicate appropriate human and technical resources as well as have in place adequate governance, control and accountability frameworks as applicable⁶ under the BMR and the relevant delegated and implementing acts for the day-to-day management of the benchmark provision. NCAs should take into account in this assessment the nature, scale and complexity of the activities of the administrator and the systemic importance of critical benchmarks. NCAs should carefully consider which and to what extent functions or any relevant services and activities can be outsourced (and in particular whether they can be outsourced to service providers located outside the Union) without this materially impairing the ability of the administrator to have control over the provision of the benchmark or the ability of the NCA to supervise the benchmark.
16. NCAs should be particularly mindful of the risk of creating letter-box entities which intend to benefit from being able to provide benchmarks in the Union, but, for instance, make an extensive use of outsourcing to perform all substantial activities or functions outside the EU (including when this is done through a group structure). NCAs should also consider to which extent teleworking might have a practical impact on the substance of the local presence of an administrator in its Member State of location when teleworking from abroad is allowed by the administrator.
17. As a general principle, benchmark administrators can only outsource functions, but not responsibilities and obligations. Therefore, administrators wishing to engage in outsourcing remain fully responsible for the functions that are outsourced and for discharging all of their obligations under the BMR. In other words, the ability to supervise and take appropriate action in respect of the outsourced functions or any relevant services and activities must always be retained by the administrator initiating the outsourcing.
18. NCAs should expect that any outsourcing arrangement is clearly structured and set up in a way that does not hinder their ability to efficiently and effectively supervise the administrator and the provision of the benchmark. Administrators must also comply with Section 7 of Annex I of Commission Delegated Regulation (EU) 2018/1646⁷, which clearly sets out the information on outsourcing arrangements that applicant administrators have to provide.

⁶ According to Article 19 of the BMR, the specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities. Where a commodity benchmark is a critical benchmark and the underlying asset is gold, silver or platinum, the requirements of Title II shall apply.

⁷[https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1646#:-:text=Commission%20Delegated%20Regulation%20\(EU\)%202018,for%20req%20\(Text%20with%20EEA](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1646#:-:text=Commission%20Delegated%20Regulation%20(EU)%202018,for%20req%20(Text%20with%20EEA)

19. In addition, pursuant to Article 10(3)(f) of the BMR, NCAs shall have effective access to data related to the outsourced activities and to the business premises of the service provider and NCAs must be able to exercise those rights of access.
20. Outsourcing arrangements should not have an impact on business continuity, contingency plans and conflicts of interest, which have to be appropriately managed. In this respect, it is noted that Article 10(3)(h) of the BMR requires an administrator to take reasonable steps, including contingency plans, to avoid undue operational risks related to the participation of the service provider in the benchmark determination process. This should be assessed by NCAs particularly in case of outsourcing to service providers located outside the Union, taking also into account the importance and nature of the functions or any relevant services and activities which are the subject matter of the outsourcing.
21. ESMA has already provided in paragraph 27 of its final report on the technical advice under the BMR⁸ a distinction between administering the arrangements of a provision of a benchmark (Article 3(1)(5)(a) of the BMR) and established governance arrangements. ESMA stated in this report that the requirements on governance structures⁹ are essentially linked to the administrator and should not be allowed to be outsourced to third parties by contrast to all components of the provision process.
22. The management body or the person(s) who effectively direct the business of an administrator in the EU need to have the effective decision-making powers in relation to the compliance of the administrator with the relevant provisions in the BMR, even when the administrator is part of a group.
23. Furthermore, NCAs should ensure that when the applicant administrator is part of a group which includes or has links with non-EU entities, this cannot in any case impact on the obligation to ensure that the persons at its disposal are effectively managed and supervised pursuant to Article 4(7)(a) of the BMR¹⁰.
24. NCAs should be satisfied that an applicant administrator possesses the ultimate decision-making powers and control over the provision of the benchmark in its MS of location by assessing, *inter-alia*, its governance arrangements and the presence of executive members of the management body or persons in charge of directing the business of the administrator in that MS, taking into account the nature, scale and complexity of the activities of the administrator and the systemic importance of critical benchmarks. NCAs should carefully consider the appropriate sophistication of the governance structures as well as the human and technical resources which should be expected from each administrator. For example, it could be considered to have two or more persons instead

⁸ https://www.esma.europa.eu/sites/default/files/library/2016-1560_final_report_on_technical_advice_on_benchmarks_regulation.pdf

⁹ The requirements on governance structures set out in Title II of the BMR are not applicable to commodity benchmark administrators applying Annex II of the BMR instead.

¹⁰ This requirement is not applicable to commodity benchmark administrators applying Annex II of the BMR instead of Title II.

of one with the requisite skills, knowledge and experience and sufficient time commitment to be able to effectively direct the business of the administrator.

25. In accordance with the BMR, NCAs have to check that administrators comply with their obligation to retain the necessary expertise to effectively supervise the outsourced functions or any related services and activities and to manage the risks associated with the outsourcing in accordance with Article 10(3)(d) of the BMR. This includes having the technical knowledge and the capability to request the necessary changes to the services provided, to monitor the relevant deployment and to assess the quality of those services provided.
26. Where an administrator has not established a presence in the chosen jurisdiction to the extent indicated in paragraph 24 above, such that the NCA believes that the administrator is not genuinely operating from that MS or that the management body of the administrator or the person(s) directing its business do not have sufficient oversight of the business and control over the provision of the benchmark, this may provide grounds for not granting, suspending or withdrawing authorisation or registration, pursuant to Article 35(1)(c) or (d) of the BMR as the case may be.
27. In addition, after the initial authorisation or registration, supervisory visits can *inter-alia* be used to determine whether an administrator actually operates from the premises indicated in the application and otherwise complies with the conditions under which authorisation or registration was first granted.

6 Outsourcing arrangements¹¹

28. The use of outsourcing arrangements may be an efficient way to perform some functions or relevant services and activities. However, outsourcing can also pose a number of challenges both for administrators and for NCAs, especially when the outsourcing of functions or any relevant services and activities is critical to the functioning of the administrator. Such concerns are heightened where the service provider is located outside the Union, as the ability of administrators and NCAs to, respectively, control and supervise may be significantly impaired.
29. Administrators' outsourcing arrangements should detail all functions or relevant services and activities that are not performed internally and are subject to outsourcing. NCAs should ensure that outsourcing arrangements are properly monitored and fully compliant with the BMR.
30. NCAs should carefully assess the detailed descriptions, explanations and evidence provided by administrators as to the envisaged outsourcing arrangements and be satisfied that there are objective reasons for the outsourcing arrangements (which could, for

¹¹ The ESMA Guidelines on outsourcing to cloud service providers outline a number of principles to help administrators of critical benchmarks and competent authorities to identify, address and monitor the risks and challenges arising from cloud outsourcing arrangements

example, be evidenced by an administrator's analysis of the expected benefits of the envisaged outsourcing compared to the estimated costs to perform the outsourced functions internally and taking into consideration the costs of monitoring the outsourced functions and the risks involved in the outsourcing on an on-going basis). NCAs should also assess that the envisaged outsourcing would not lead to the creation of letter-box entities or allow for a circumvention of the BMR and the responsibilities of the administrator.

31. Outsourcing to service providers located outside the Union could impede the proper oversight and supervision of the outsourced functions or relevant services and activities. Similarly, outsourcing arrangements with long or complex operational chains and/or with a large number of parties involved may result in additional challenges both for administrators and NCAs. In addition, the use of outsourcing of several functions or relevant services and activities may impact the conditions for authorisation or registration and heighten concentration risks as well as the risk of letter-box entities. NCAs should therefore give special consideration to such outsourcing arrangements and the additional risks arising from them and consider whether, for example, to request administrators to submit a detailed exit strategy enabling the administrators to exit from their contractual outsourcing arrangements.
32. Finally, NCAs should ensure that any outsourcing arrangements do not materially impair their ability to enforce the BMR. This implies that NCAs should be able to conduct on-site inspections of outsourced functions or related services and activities without any prior third-party authorisation (except where such authorisation is required by the applicable national law, for example in case of judicial authorisation).