

**Memorandum of Understanding concerning  
EU critical benchmarks**



**European Securities and Markets Authority**



**UK FCA**

## **Memorandum of Understanding between ESMA and the UK FCA establishing a cooperation arrangement for the purposes of Article 30(4) of UK BMR**

From 1 January 2022 ESMA has become responsible for the supervision of administrators of European Union ('EU') critical benchmarks.

ESMA and the UK FCA have therefore reached this Memorandum of Understanding ("MoU") whose purpose is to provide ESMA and the UK FCA with an appropriate mechanism for the efficient exchange of information in relation to (i) EU critical benchmarks; and (ii) non-critical benchmarks provided by administrators of EU critical benchmarks supervised by ESMA.

This MoU is an arrangement between ESMA and the UK FCA and not a collective arrangement with other EU authorities. As such, it will not affect any arrangements which may be agreed directly between other EU authorities and the UK FCA, nor does it affect any other arrangements in place between ESMA and the UK FCA.

This MoU is without prejudice to any Supervisory College Arrangements.

### **Article 1**

#### **Definitions**

For the purposes of this MoU:

- a) "Authority" means a signatory to this MoU or any successor thereto;
- b) "Covered Administrator" means an administrator which provides an EU critical benchmark and which is supervised by ESMA;
- c) "Covered Benchmark" means any benchmark which a Covered Administrator provides or intends to provide in the UK;
- d) "Books and Records" means documents, electronic media, books and records within the possession, custody and control of, and other information about a Covered Administrator in respect of its administration of a Covered Benchmark;
- e) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered Administrator, or an event of cessation of publication or material change of a Covered Benchmark;
- f) "Equivalence Decision" means the equivalence decision dated 17 December 2020<sup>1</sup> and made pursuant to the Benchmarks Regulation Equivalence (No. 2) Directions 2020 for the purposes of Article 30(2) of the UK BMR;

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<sup>1</sup> [The Benchmarks Regulation Equivalence \(No. 2\) Directions 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- g) “EU critical benchmark” means a benchmark which the European Commission has specified shall be considered as critical pursuant to Article 20(1), points (a) and (c) of the BMR;
- h) “Laws and Regulations” means, in relation to ESMA, applicable EU legislation within ESMA’s scope of action as set out in Article 1(2) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>2</sup> and, in relation to the UK FCA, any applicable laws and regulations in force in the UK, including the UK BMR;
- i) “Supervisory College Arrangement” means any written arrangement governing the functioning of a supervisory college for an EU critical benchmark established pursuant to Article 46 BMR and any further undertaking ancillary to any such arrangement, including any confidentiality side letter provided by the UK FCA in respect of its participation to a supervisory college<sup>3</sup>;
- j) “UK BMR” means the UK version of Regulation (EU) No 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, which is part of UK law by virtue of the European Union (Withdrawal) Act 2018;
- k) “BMR” means Regulation (EU) No 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<sup>4</sup>;
- l) “On-site Inspection” means any regulatory visit by the FCA to the premises of a Covered Administrator, including inspection of Books and Records, in connection with the Covered Administrator’s provision of a Covered Benchmark;
- m) “Person” includes a natural person, unincorporated association, partnership, trust investment company or corporation and a Covered Administrator;
- n) “Requested Authority” means the Authority to whom a request is made under this MoU; and,
- o) “Requesting Authority” means the Authority making a request under this MoU.

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<sup>2</sup> 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. 84–119)

<sup>3</sup> At the time this MoU is signed, this definition covers the Written Arrangements for the Functioning of the Supervisory College of EURIBOR and the FCA’s confidentiality side letter ‘Confirmations in respect to the FCA’s attendance of EURIBOR College as an observer’ dated 4 July 2022 as amended from time to time.

<sup>4</sup> OJ L 171, 29.6.2016, p. 1

## Article 2

### General provisions

1. This MoU is a statement of intent to consult, cooperate and exchange information in connection with the FCA's prompt access on an on-going basis to all information requested by the FCA regarding a Covered Administrator. The cooperation and information sharing arrangements under this MoU should be interpreted and implemented in a manner that is permitted by, and consistent with, the Laws and Regulations and any relevant Supervisory College Arrangement.
2. This MoU does not create any legally binding obligations, confer any rights or supersede any domestic laws. This MoU does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this MoU.
3. This MoU is not intended to limit or condition the discretion of an Authority in any way in the discharge of its responsibilities or to prejudice or affect in any way the individual responsibilities, competencies or autonomy of any Authority. This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates. In particular, this MoU does not affect any right of any Authority to communicate with or obtain information or documents from any Person subject to its jurisdiction that is established in the territory of the other Authority.
4. The Authorities should, within the framework of this MoU, provide each other with the fullest cooperation permissible under their Laws and Regulations and any relevant Supervisory College Arrangement in relation to all relevant information and supervisory activities regarding a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark. Following a request for assistance, cooperation may be denied:
  - a) where the cooperation would require an Authority to act in a manner that would violate its Laws and Regulations or any relevant Supervisory College Arrangement, including where the cooperation would require ESMA to share with the UK FCA information which it would not be able to share with that Authority in the context of a supervisory college established pursuant to Article 46 BMR according to the applicable Supervisory College Arrangement;
  - b) a request for assistance has not been made in accordance with the terms of this MoU; or
  - c) on the grounds of national public interest for the UK FCA and of EU public interest for ESMA.

5. In case of denial, the Requested Authority will provide the reasons for not granting the assistance. Where the Requested Authority presents objective grounds as reasons for which the request cannot be fulfilled in part or in whole, the Authorities will consult with a view to reaching an understanding on the assistance to be provided.
6. The Authorities represent that, as of the date upon which this MoU takes effect, their Laws and Regulations should not prevent them from providing assistance to one another as contemplated in this MoU.
7. To facilitate communication and cooperation under this MoU, the Authorities hereby designate contact points whose details are set out in the Appendix. Any amendments to the details of the contact points will be communicated without undue delay to the other Authority.

### **Article 3**

#### **Scope of cooperation**

1. This MoU does not affect any arrangements under any Supervisory College Arrangement or any other agreement or Memorandum of Understanding between the two Authorities.
2. The Authorities recognise the importance of close communication concerning Covered Administrators in respect of their provision of Covered Benchmarks and intend to cooperate regarding:
  - a) general issues, including with respect to regulatory, supervisory or other developments concerning a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark or a Covered Benchmark;
  - b) issues relevant to the operations, activities or services of a Covered Administrator, in connection with the Covered Administrator's provision of a Covered Benchmark, including information on the applicable BMR requirements;
  - c) the coordination of supervisory activities relating to the Covered Administrator's provision of a Covered Benchmark including, where appropriate, On-site Inspections; and
  - d) any other areas of mutual interest.
3. Cooperation will be most useful in circumstances where issues of regulatory and supervisory concern may arise, including but not limited to:

- a) the initial notification by a Covered Administrator of its consent that its actual or prospective benchmarks may be used by supervised entities in the United Kingdom, as referred to in Article 30(1)(c) of the UK BMR;
- b) the on-going monitoring or the withdrawal of the registration of a Covered Administrator pursuant to Article 31(1) of the UK BMR;
- c) any change to a Covered Administrator's activity or internal rules, policies and procedures that could materially affect the way in which the Covered Administrator complies with the applicable BMR requirements;
- d) material changes in the methodology or input data used for the calculation of a Covered Benchmark, or in the functioning of the oversight function related to the provision of a Covered Benchmark;
- e) regulatory or supervisory actions taken, or approvals given by ESMA or the UK FCA in relation to a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark, including changes to the relevant obligations or requirements to which the Covered Administrator is subject that may impact the Covered Administrator's continued compliance with the Laws and Regulations. For the avoidance of doubt, references to regulatory or supervisory actions shall include: (i) any administrative sanctions and other administrative measures imposed by ESMA or the UK FCA in accordance with the BMR or UK BMR; and (ii) any actions taken by ESMA or the UK FCA in the exercise of their supervisory powers under the BMR or UK BMR where the Covered Administrators' provision of a Covered Benchmark may be materially impacted. This does not include supervisory dialogue and interaction nor resulting follow up actions thereto, which are likely to take place in the normal course of a supervisory relationship, unless such a supervisory engagement or action materially impact the Covered Administrators' provision of a Covered Benchmark.

4. *Notification.* The Authorities will seek to inform each other as soon as practicable of:

- a) any known material event that could adversely impact the financial or operational stability of a Covered Administrator, including where the Covered Administrator is deemed to (i) be in breach of the applicable BMR requirements; (ii) act in a manner which is clearly prejudicial to the interests of users of its benchmarks or to the orderly functioning of markets, (iii) have made false statements or used any other irregular means to obtain authorisation or any other license it required directly in connection with the Covered Administrator's provision of a Covered Benchmark
- b) enforcement or regulatory actions or sanctions, including the withdrawal, revocation, suspension or modification of any license or authorisation concerning or related to a Covered Administrator and which may have a

material effect on the Covered Administrator's provision of a Covered Benchmark;

- c) any material change introduced in the legal or regulatory framework applicable to a Covered Administrator in respect of its provision of a Covered Benchmark or to a Covered Benchmark or any material change introduced in the supervisory arrangements affecting a Covered Administrator in connection with its provision of a Covered Benchmark or a Covered Benchmark;

The information should be provided in writing and using a secure transmission procedure or electronic means that ensures that completeness, integrity and confidentiality of the information are maintained during the transmission.

The information to be provided by an Authority pursuant to this paragraph will refer to a Covered Administrator and/or a Covered Benchmark. The determination of what constitutes "material changes", "material event", "adversely impact" or "material effect" will be left to the reasonable discretion of the Authority providing the information.

5. *Exchange of Written Information.* Each Authority, upon written request and to the extent permissible under their Laws and Regulations and any relevant Supervisory College Arrangement, intends to provide the other Authority with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the BMR , provided that the Requested Authority is authorised to collect such information on behalf of the Requesting Authority. Such requests will be made pursuant to Article 4 of this MoU, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimising administrative burdens.

The information covered by this paragraph includes without limitation:

- a) relevant regulatory and supervisory information and filings that a Covered Administrator is required to submit to the Requested Authority in connection with the Covered Administrator's provision of a Covered Benchmark; and
- b) regulatory and supervisory reports and assessments, or findings or information contained therein, prepared by an Authority in respect of a Covered Administrator in connection with the Covered Administrator's provision of a Covered Benchmark or a Covered Benchmark.

6. The Authorities acknowledge that the cooperation and information exchange referred to in this Article could also be fulfilled through their participation in a supervisory college established pursuant to Article 46 BMR, provided that both Authorities are present at the supervisory college meeting where the relevant information is disclosed.

## **Article 4**

### **Execution of requests for information**

1. A request for written information pursuant to Article 3(5) should be made in writing and using a secure transmission procedure or electronic means that ensure that completeness, integrity and confidentiality of the information are maintained during the transmission. Such request for written information should be addressed to the relevant contact person identified in the Appendix. A request generally should specify at least the following:
  - a) the information sought by the Requesting Authority;
  - b) a concise description of the matter that is the subject of the request and the purpose for which the information is sought including the Laws and Regulations applicable to the subject of the request;
  - c) to whom, if anyone, onward disclosure of information is likely to be necessary and the reason for such disclosure; and
  - d) the desired time period for reply and, where appropriate, the urgency thereof.
2. In Emergency Situations, the Authorities will endeavour to notify each other of the Emergency Situation and communicate information between each other as deemed appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

## **Article 5**

### **On-site Inspections**

1. The FCA does not intend to conduct any On-site Inspection of a Covered Administrator as part of its monitoring of the ongoing compliance of the Covered Administrator and Covered Benchmarks with the requirements under the BMR since the Equivalence Decision determines that the applicable legal and supervisory arrangements ensure that Covered Administrators and Covered Benchmarks comply with legally binding requirements which are equivalent to the requirements of the UK BMR, and that the binding requirements are subject to effective supervision and enforcement by ESMA. This position is further supported by the fact that the UK FCA may participate as an observer to any supervisory colleges established pursuant to Article 46 BMR, which will enable the UK FCA to understand the supervisory approach of ESMA and any competent authorities that are supervisors of contributors to the Covered Benchmarks.



2. Given that the UK FCA, in respect of Covered Administrators and Covered Benchmarks, relies on the supervision and enforcement capabilities of ESMA, which supervises and enforces compliance with the applicable BMR requirements, On-site Inspections by FCA officers will only be considered in exceptional circumstances and subject to the prior written agreement of ESMA.
3. In such exceptional circumstances, the Authorities should discuss and reach an understanding on the terms regarding an On-site Inspection by FCA officers, in particular with regard to the respective roles and responsibilities of the Authorities. The Authorities will act in accordance with the following procedure before conducting an On-site Inspection:
  - a) the UK FCA will submit to ESMA an initial written request with respect to the On-site Inspection. The request will include the factual and legal background to, the objective of, and an estimated time frame for, the On-site Inspection.
  - b) ESMA will acknowledge receipt of the initial written request in writing within 10 working days of receipt;
  - c) When establishing the scope of any proposed On-site Inspection by UK FCA officers, the UK FCA will give due and full consideration to the supervisory activities of ESMA given the UK FCA's reliance on the supervisory and enforcement capabilities of ESMA in respect of the Covered Administrator and Covered Benchmarks and will consider any information that was made available or is capable of being made available by ESMA.
4. In the event of an On-site Inspection, the Authorities will also consult each other with a view to reaching an agreement in relation to what (if any) assistance ESMA will provide to the UK FCA in reviewing, interpreting and analysing the contents of public and non-public Books and Records and obtaining information from directors and senior management of the Covered Administrator in respect of its provision of a Covered Benchmark. ESMA will separately determine whether the UK FCA officers will be accompanied by its own officers during the On-site Inspection.

## **Article 6**

### **Data Protection**

The Authorities acknowledge that the transfer of personal data will take place in accordance with the applicable data protection legislation in the jurisdictions of the Authorities.

## **Article 7**

### **Permissible uses and storage of information**

1. The Requesting Authority may use information obtained under this MoU for the purpose set out by that Authority in its request for the information or, if the information was provided other than by means of a request, solely for the purpose of enabling that Authority to exercise its applicable regulatory, enforcement and supervisory functions.
2. Before using information obtained under this MoU for any purpose other than that stated in Article 7(1), the Requesting Authority will obtain the prior written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult to discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
3. If an Authority ("Receiving Authority") receives, via a party that is not a signatory to this MoU, information originally provided by the other Authority ("Disclosing Authority") that is related to the Disclosing Authority's supervision and oversight of a Covered Benchmark or a Covered Administrator and that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information in accordance with the terms of this MoU.
4. The Receiving Authority will store the information obtained under this MoU securely on a medium that ensure that completeness, integrity and confidentiality of the information and that allows the storage of information to be accessible for future reference.
5. The restrictions in this Article do not apply to an Authority's use of information it obtains directly from a Covered Administrator.

## **Article 8**

### **Confidentiality and onward sharing of information**

1. Except as provided in paragraphs 3, each Authority will keep confidential information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU. The terms of this MoU are not confidential.
2. Each Authority acknowledges that measures are in place in its jurisdiction to ensure that professional secrecy is ensured, and confidential information is protected.

3. Except where disclosure is necessary for legal proceedings or as provided in paragraph 5, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing information received under this MoU to any non-signatory to this MoU. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided such communication is confirmed in writing as promptly as possible. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
4. In the event that disclosure of information obtained under this MoU is necessary for legal proceedings, the Requesting Authority should, to the extent legally permissible, notify the Requested Authority prior to disclosing such information (or as soon as reasonably practicable after disclosing such information if prior notification is not practicable) and will assert all appropriate legal exemptions or privileges with respect to such information as may be available.
5. With regard to information concerning an EU critical benchmark or its Covered Administrator, where it may become necessary for the UK FCA to share that information obtained under this MoU with the Prudential Regulation Authority, as permitted by the UK Laws and Regulation, the FCA shall to the extent permitted by law:
  - (a) notify ESMA of its intention to share such information with the Prudential Regulation Authority to enable it to fulfil its statutory responsibilities and mandate;
  - (b) prior to sharing the information, provide adequate assurances to ESMA concerning the use and confidential treatment of the information by the Prudential Regulation Authority, including, as necessary, assurances that the information will not be shared by the Prudential Regulation Authority with other parties without obtaining the prior consent of ESMA. For the avoidance of doubt this paragraph shall apply in respect of relevant information relating to any EU critical benchmarks and its Covered Administrator, unless it has been specifically disapplied in the applicable Supervisory College Arrangement or other relevant written arrangement (including any confidentiality side letter mutually agreed by the Authorities) relating to that EU critical benchmark or Covered Administrator.
6. The Authorities intend that the sharing or disclosure of information, including deliberative and consultative materials, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.
7. The Authorities acknowledge that nothing in this Article 8 prevents an Authority from disclosing information it receives directly from a Covered Administrator.

## **Article 9**

### **Successor authorities**

Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of the MoU will apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities will become a signatory or signatories to this MoU without the need for any further amendment to this MoU, and notice will be provided to the other Authority. This will not affect the right of any Authority to give written notice as provided in Article 12(2) that it no longer wishes to be a signatory to this MoU if it wishes to do so.

## **Article 10**

### **Amendments**

The Authorities intend to periodically review the functioning and effectiveness of cooperation arrangements between them. This MoU may be amended with the written consent of all signatories.

## **Article 11**

### **Taking effect of the MoU**

This MoU will enter into force on the date that it is signed by the Authorities.

## **Article 12**

### **Termination**

1. This MoU will remain operative until terminated by either of the Authorities in accordance with Article 12(2).
2. If an Authority wishes to no longer be a signatory to this MoU, it will provide thirty (30) calendar days prior written notice to the other Authority.
3. If an Authority gives such notice, the parties will consult concerning the disposition of any pending requests. If an agreement cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MoU before the expiration of the 30-day period until all requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance.

4. Termination of this MoU does not affect obligations under any Supervisory College Arrangement or other agreement or Memorandum of Understanding between the two Authorities.
5. In the event of termination of this MoU, information obtained under this MoU will continue to be treated in the manner described under Articles 6, 7 and 8.