



European Securities and
Markets Authority

Consultation Paper

Draft guidelines on non-significant benchmarks



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **30 November 2017**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This paper may be specifically of interest to administrators of benchmarks and to any investor dealing with financial instruments and financial contracts whose value is determined by a benchmark or with investment funds whose performances are measured by means of a benchmark.



European Securities and
Markets Authority

29 September 2017
ESMA70-145-105

Table of Contents

Executive Summary	4
1. Scope.....	5
2. Definitions	5
3. Purpose.....	5
4. Compliance and reporting obligations.....	6
4.1. Status of the guidelines.....	6
4.2. Reporting requirements	6
5. Guidelines on procedures and characteristics of the oversight function (Article 5 BMR) .	7
5.1. Background	7
5.2. Proposed content of the Guidelines	8
5.3. Draft Guidelines	10
6. Guidelines on input data (Article 11 BMR)	13
6.1. Background	13
6.2. Proposed content of the Guidelines	15
6.3. Draft Guidelines	17
7. Guidelines on transparency of methodology (Article 13 BMR)	21
7.1. Background	21
7.2. Proposed content of the Guidelines	23
7.3. Draft Guidelines	24
8. Guidelines on governance and control requirements for supervised contributors (Article 16 BMR).....	27
8.1. Background	27
8.2. Proposed content of the Guidelines	29
8.3. Draft Guidelines	31
9. Annexes	35
9.1. Annex I: List of questions	35
9.2. Annex II: Preliminary cost-benefit analysis.....	36

Executive Summary

Reasons for publication

The Benchmarks Regulation¹ was published in the Official Journal of the European Union on the 29 June 2016, entered into force the following day, and will be fully applicable as of 1 January 2018.

On 30 March 2017 ESMA submitted its draft regulatory and implementing technical standards to the European Commission.

These technical standards apply to critical and significant benchmarks.

For non-significant benchmarks the Benchmarks Regulation envisages that ESMA may issue Guidelines in relation to four areas of the Regulation.

Contents

This Consultation Paper (CP) is organised in four chapters, each dedicated to one of the areas for which the Benchmarks Regulation suggests ESMA to develop Guidelines for non-significant benchmarks, namely: (i) procedures, characteristics and positioning of oversight function, (ii) appropriateness and verifiability of input data, (iii) transparency of methodology, (iv) governance and control requirements for supervised contributors. Each chapter summarises the relevant proposals and their objectives and provides an explanation of the related policy issues.

Next Steps

ESMA will consider the feedback received to this CP and expects to publish a Final Report after the publication by the European Commission of the Commission Delegated Regulations that relate to the same topics.

¹ Benchmarks Regulation published in the EU Official Journal:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011>

1. Scope

Who?

1. These guidelines apply to competent authorities designated under Article 40 of the Benchmarks Regulation, administrators as defined in Article 3(1)(6) of the Benchmarks Regulation and to supervised contributors as defined in Article 3(1)(10) of the Benchmarks Regulation.

What?

2. These guidelines apply to the provision of non-significant benchmarks and the contribution to non-significant benchmarks.

When?

3. These guidelines apply from the date of the publication of translations in all official languages of the EU on ESMA's website.

2. Definitions

4. Unless otherwise specified, terms used in the Benchmarks Regulation have the same meaning in these guidelines. In addition, the following definitions apply:

Competent authority an authority designated under Article 40 of the Benchmarks Regulation

Benchmarks Regulation 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.

3. Purpose

5. The purpose of these guidelines is to ensure common, uniform and consistent application, in relation of non-significant benchmarks, of the oversight function requirements in Article 5 of the Benchmarks Regulation, the input data provision in Article 11 of the Benchmarks Regulation, the transparency of the methodology provision in Article 13 of the Benchmarks Regulation and the governance and control requirements for supervised contributors provision in Article 16 of the Benchmarks Regulation.

4. Compliance and reporting obligations

4.1. Status of the guidelines

6. This document contains guidelines issued under Article 16 of the ESMA Regulation². In accordance with Article 16(3) of the ESMA Regulation competent authorities and financial market participants must make every effort to comply with these guidelines.
7. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

4.2. Reporting requirements

8. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website. Once completed, the notification form shall be sent to ESMA using the following email address: bmr@esma.europa.eu.
9. Administrators of non-significant benchmarks and supervised contributors to non-significant benchmarks are not required to report whether they comply with these guidelines.

² ESMA Regulation published in the EU Official Journal:
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1095&from=FR>

5. Guidelines on procedures and characteristics of the oversight function (Article 5 BMR)

5.1. Background

1. The BMR requires administrators of all benchmarks falling within the scope of Title II to establish a permanent and effective oversight function for all aspects of the provision of their benchmarks. The BMR sets out the minimum responsibilities and characteristics of the oversight function to ensure oversight of all aspects of the provision of the administrator's benchmarks.
2. ESMA developed draft regulatory technical standards (RTS) specifying the detailed procedures and characteristics of the oversight function, in particular its composition and its positioning within the organisation of the administrator, including a non-exhaustive list of governance arrangements. The ultimate aim of the draft RTS is to ensure the integrity of the oversight function and the absence of conflicts of interest; they do not apply to administrators of non-significant benchmarks. The proposed non-exhaustive list of governance arrangements included in the draft RTS leaves the administrators necessary and sufficient discretion to design their governance arrangements most appropriately.
3. ESMA published the draft regulatory technical standards under Article 5 of the BMR, on oversight function, on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 2³).
4. ESMA can issue guidelines (GL) addressed to administrators of non-significant benchmarks to further specify the elements referred to in Article 5(5). The text of the draft RTS submitted to the Commission represents therefore a starting point for the development of the GL, and its content is summarised in the next paragraphs.
5. In relation to the composition of the oversight function, ESMA believes that external stakeholders can provide valuable expertise to the oversight function. Its integrity and independence can be ensured by including independent members, but has decided not to make their membership in the oversight function mandatory for non-critical benchmarks. However, ESMA has left it with the administrators to decide on the composition of the oversight function most fit for the benchmarks they produce, as long as any conflict of interest of external members of the oversight function is adequately mitigated through the general procedures proposed in Article 3 of the draft RTS.
6. As far as the role of the staff of the administrator on the oversight function is concerned, the draft RTS allow their membership to the oversight function but without voting rights if they are directly involved in the provision of the respective benchmark. This will allow staff

³ Final report on the draft technical standards under the Benchmarks Regulation:
https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

from the legal or compliance departments to sit on the oversight functions, and to do so in a voting capacity as the case may be.

7. For external members, including those that represent entities to which some aspects of the benchmark provision process have been outsourced, the draft RTS exclude these members from voting for decisions that would have a direct business impact on the organisation they represent. Observers to the oversight function may be permitted but this lies within the judgement of the administrator as long as the required procedures for their selection according to point (c) of Article 3(1) of the draft RTS apply.
8. The draft RTS allow the oversight function to be carried out by a natural person for non-critical benchmarks as long as that person is not directly involved in the provision of any relevant benchmark and has no potential conflict of interest arising from the level of the benchmark. ESMA has also included a provision to the draft RTS (point (b) of Article 3(2)) requiring an alternate appropriate body or natural person to ensure continuity of the oversight function when exercised by a single natural person.
9. As already mentioned, administrators are free in their decision to include external parties and observers, but ESMA has decided to specify in Article 3 of the draft RTS procedures of the oversight function that adequately address potential conflicts of interest. Members of the board or other decision making bodies of the administrator should not be allowed to be permanent members of the oversight function and should be allowed to be invited to attend meetings from time to time (in non-voting capacity) only.
10. In ESMA's view it is crucial that the oversight function can adequately oversee and address decisions of the management when they are related to the provision of the relevant benchmarks. The BMR also requires that the oversight function should be carried out by a separate committee (as the option of choice) or another governance arrangement that should be as appropriate (Article 5 (4) BMR). ESMA is convinced that the positioning within the administrator's organisation and the attendance of meetings of the oversight function by representatives of the management where appropriate is sufficient to address the need for relevant input in the work of the oversight function.

5.2. Proposed content of the Guidelines

11. The control of conflicts of interest and the safeguard of the public confidence in the integrity of a benchmark are the ultimate goals of the oversight function and, as such, they should be reflected in the content of the draft guidelines for administrators of non-significant benchmarks because they are relevant for all types of benchmarks.
12. According to Article 26(1) BMR administrators of non-significant benchmarks may choose not to apply paragraph 2, 3, and 4 of Article 5 BMR on "oversight function requirements". Article 5(1) of the BMR cannot be waived by administrators of non-significant benchmarks. Their administrators will always have to establish and maintain a permanent and effective

oversight function to ensure the oversight of all aspects of the provisions of their non-significant benchmarks.

13. The draft guidelines address all the elements of Article 5(5) BMR, i.e. the composition of the oversight function, its characteristics and positioning within the organisational structure of the administrator, and include a non-exhaustive list of appropriate governance arrangements for the oversight function.
14. An administrator of non-significant benchmarks may choose not to apply some of these elements by virtue of Article 26(1) of the BMR. For this reason, ESMA includes in the draft guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 5 of the BMR, then the corresponding part of the guidelines will not apply either.
15. In relation to the composition of the oversight function, the draft guidelines are proposing to require administrators of non-significant benchmarks to select one or more members with the appropriate skills and expertise, i.e. the suitable knowledge of the underlying market or economic reality the benchmark seeks to measure. It is clear that the members of the oversight function must have a thorough understanding of the relevant benchmarks in all their aspects to be able to deliver the tasks the oversight function is supposed to cover.
16. Conflict of interest is another concept underpinning the draft guidelines on the composition of the oversight function, as they require the administrator to ensure that the number of members with conflicts of interest does not amount to, or exceed, a simple majority. Also, similarly to what was stated in the draft RTS, members of the board or other decision making bodies of the administrator should not be allowed to be permanent members of the oversight function and should be allowed to be invited to attend meetings from time to time, in non-voting capacity only.
17. The section of the draft guidelines dedicated to the characteristics and positioning of the oversight function has the same content of Article 2 of the corresponding draft RTS. This is because ESMA thinks that its content is independent from the degree of use of the benchmarks and therefore should apply in the same manner to administrators of non-significant, significant and critical benchmarks. In particular, the principle that the oversight function should be separate from the management body and other governance functions of the benchmark administrator is valid also for administrators of non-significant benchmarks, as the oversight function should always be in a position to challenge the decision of the management body of the administrator.
18. In relation to the procedures to govern the oversight function for administrators of non-significant benchmarks, the draft guidelines propose to include at least procedures on the selection and removal of the member(s) of the oversight function (including the criteria to be used to check the skills of the candidate), as well as procedures related either to the conflict of interest, or to the core tasks of the oversight function. ESMA believes that all the proposed procedures included in the draft guidelines are essential for a correct function of

any oversight function, and therefore they should be required also in relation to administrators of non-significant benchmarks.

19. Finally, the draft guidelines propose a non-exhaustive list of governance arrangements, including a number of possible arrangements for the oversight function. The proposed list is meant to include examples of governance arrangements, from the simplest, i.e. an oversight function composed only by a single natural person, to more structured ones, i.e. an oversight function consisting of multiple committees each of them responsible for either a single benchmark or a single task of the oversight function.

5.3. Draft Guidelines

1. Composition of the oversight function

The oversight function should be composed of one or more members that together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities the oversight function is required to fulfil. Member(s) of the oversight function should have appropriate knowledge of the underlying market or economic reality the benchmark seeks to measure.

Administrators of regulated-data benchmarks should consider including, as members of the oversight function, representatives from the entities listed in the definition of a regulated-data benchmark at point (a) of Article 3(1)(24) of Regulation (EU) 2016/1011 and, where applicable, from entities contributing net asset values of investment funds to regulated-data benchmarks.

Where a benchmark is based on contributions, and representatives of contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator should ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority. Before the appointment of members, administrators should also give due consideration to conflicts arising from relationships between potential members and other external stakeholders, in particular resulting from a potential interest in the level of the relevant benchmarks.

Persons directly involved in the provision of the benchmark may be non-voting members. Representatives of the management body should not be members or observers but may be invited to attend meetings by the oversight function in a non-voting capacity.

Members of the oversight function should not include persons who have been subject to sanctions of administrative or criminal nature relating to financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.

2. Characteristics and positioning of the oversight function

The oversight function should be embedded within the organisational structure of the administrator, or of the parent company of the group to which it belongs to, but separate from the management body and other governance functions of the benchmark administrator.

The oversight function should assess and, where appropriate, challenge, the decisions of the management body of the administrator with regards to benchmarks provision to ensure the fulfilment of the requirements of Regulation (EU) 2016/1011. Without prejudice to point (i) of

Article 5(3) of Regulation (EU) 2016/1011, the oversight function should address all recommendations on benchmark oversight to the management body.

Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations resulting from a decision of the oversight function, it should record this fact clearly in the minutes of its next meeting, or in its record of decisions.

3. Procedures governing the oversight function

An oversight function of an administrator of non-significant benchmarks should have procedures at least relating to the following areas:

- (a) the criteria to select its member(s), including to evaluate the potential members' expertise and skills and whether they can meet the time commitments required, taking into account their role in any other oversight function;
- (b) the election, nomination or removal and replacement of its member(s);
- (c) the suspension of voting rights of external members for decisions that would have a direct business impact on the organisations they represent;
- (d) requiring member(s) to disclose any conflict of interest before discussion of an agenda item during meetings of the oversight function;
- (e) the exclusion of members from specific discussions in respect of which they have a conflict of interest;
- (f) its access to all documentation necessary to carry out its duties;
- (g) measures to be taken in respect of breaches of the code of conduct, where appropriate;
- (h) the notification to the competent authority of any suspected market abuse by contributors or the administrator;
- (i) the prevention of improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function.

Where the oversight function is carried out by a single natural person points (c) and (e) of the previous paragraph do not apply, and the administrator should appoint an alternate appropriate body or natural person to ensure the duties of the oversight function can be consistently fulfilled in case of the absence of the person responsible for the oversight function.

This section of the guidelines is not applicable to administrators of non-significant benchmarks who chose not to apply Article 5(2) of Regulation (EU) 2016/1011.

4. Non-exhaustive list of governance arrangements of the oversight function

The structure and composition of the oversight function should be determined, where appropriate, in accordance with one or more of the following non-exhaustive list:

- (a) Where the complexity and vulnerability of the non-significant benchmarks allow so, a natural person who is a staff member of the administrator or any other natural person whose services are placed at the administrator's disposal or under the control of the

administrator, who is not directly involved in the provision of any relevant benchmark and is free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;

- (b) Where the complexity and vulnerability of the non-significant benchmarks allow so, multiple natural persons who are a staff member of the administrator and carry out different functions within the administrators, who are not directly involved in the provision of any relevant benchmark and is free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;
- (c) An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
- (d) Where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function, a committee that includes:
 - i. persons involved in the provision of the relevant benchmarks in a non-voting capacity;
 - ii. at least two members of staff representing other parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities or, where appropriate members of staff are not available, at least two independent members.
- (e) An oversight function consisting of multiple committees, each responsible for the oversight of a non-significant benchmark, type of benchmarks or family of non-significant benchmarks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the administrator and the competent authority;
- (f) An oversight function consisting of multiple committees, each performing a subset of the oversight responsibilities and tasks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.

Q1: Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

6. Guidelines on input data (Article 11 BMR)

6.1. Background

20. Article 11 of the BMR defines the requirements that an administrator of benchmarks must apply in respect of input data.
21. As any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark, the BMR favours the use of transaction-based input data that are less subject to discretion and therefore to manipulation. As a general rule, stated in Article 11 of the BMR, benchmark administrators should use transaction-based input data where possible, but other data can be used in those cases where the transaction data is insufficient or inappropriate to ensure the integrity and accuracy of the benchmark.
22. Article 11 also imposes requirements on the verifiability of input data, on the controls to be established by an administrator in order to validate input data, and additional requirements applying only when input data are received from contributors, e.g. the evaluation of input data.
23. The BMR requires ESMA to provide draft RTS to specify further how the administrator must ensure that the input data used to determine the benchmark is appropriate and verifiable. ESMA is also mandated to specify further the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where the input data is contributed from a front office function. The front office function is defined in Article 11(3) as “ [...] any department, division, group, or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities [...]”.
24. The draft RTS should apply to critical benchmarks and they should apply to significant benchmarks unless their administrator decides not to apply Article 11(3) BMR, as provided for by Article 25(1) BMR. In addition, the draft RTS do not apply to administrators of non-significant benchmarks and of commodity benchmarks subject to Annex II instead of Title II of BMR. Also, Article 17(1) BMR exempts regulated data benchmarks from Article 11(3) BMR .
25. ESMA published the draft regulatory technical standards under Article 11 on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 3⁴).
26. ESMA can issue GL addressed to administrators of non-significant benchmarks to further specify the elements under points (a) and (b) of Article 11(1), as well as the ones under point (b) of Article 11(3). ESMA has addressed these elements in the draft RTS, which

⁴ Final report on the draft technical standards under the Benchmarks Regulation:
https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

apply only to administrators of significant and of critical benchmarks. The text of the draft RTS submitted to the Commission represents the starting point for the development of the draft GL.

27. The draft RTS are composed of two Articles, the first covering points (a) and (b) of Article 11(1) and the second one dealing with input data from front office functions (point (b) of Article 11(3)).
28. The aim of Article 1 of the RTS is to allow administrators to have the necessary information in order to ensure the appropriateness and verifiability of the input data used to determine the benchmark. To assess the appropriateness, administrators need to take into consideration the characteristics of the underlying market or economic reality as well as the applicable methodology. In order to ensure that input data is appropriate and verifiable, input data should be monitored on a regular basis, reflecting the vulnerability of its specific type. Indeed, regulated data, as defined in point (24) of Article 3(1) of the BMR, are less vulnerable because of their nature and of existing Regulations applicable to them, and for these reasons regulated data can be subject to less extensive checks by an administrator.
29. When input data is contributed, one important monitoring check is to ensure that the contributions are provided within a time-period set by the administrator to ensure consistency between contributions from different contributors. Besides this check, Article 1 contains a number of other checks that administrators have to perform on a regular basis and, for critical benchmarks and in relation to a subset of checks only, prior to any publication of the benchmark.
30. Article 2 is dedicated to the internal oversight and verification procedures that an administrator should ensure are in place at the level of the contributor, where the input data is contributed from a front office function. Contributions from a front office function present a particular risk as a result of an inherent conflict of interest between the commercial role of the front office and its role in contributing to a benchmark.
31. The internal oversight and verification procedures proposed in Article 2 of the draft RTS are structured along three different level of control functions. The internal oversight procedure consists of the internal rules of the contributors defining the respective roles of the three levels of control functions, as well as the means of cooperation and flow of information between them.
32. The first level of control function is responsible for the checking of input data prior to contribution in accordance with any requirement for the validation of input data defined in the code of conduct. At this level of control, the contributor should also check, inter alia, that the submitter is authorised to contribute input data on behalf of the contributor.
33. The second level of control function is about the review of input data after contribution, as well as the maintenance of a whistleblowing procedure and of procedures for the internal reporting of any attempted or actual manipulation of input data and any failure to comply with the contributor's benchmark-related policies. Additionally, the second level of control

function is responsible for the establishment and maintenance of a conflicts of interest policy.

34. Finally, a third level of control function that is independent from the first two levels of control is responsible for performing checks, on a regular basis on the controls exercised by the first two levels of control.

6.2. Proposed content of the Guidelines

35. The quality of input data is one of the most prominent issues dealt with in the BMR. The reliability of benchmarks depends on the input data used to determine them: without proper rules governing the contribution of input data and the conflict of interest inherent to this process, the vulnerability of benchmarks is set to increase.
36. Input data must be governed by specific rules, regardless of whether the benchmarks based on such input data are critical, significant or non-significant benchmarks. Even for the less used benchmarks, i.e. non-significant benchmarks, the quality of input data cannot be underestimated. Following the application of the new EU legal framework for benchmarks, administrators of all types of benchmarks must have in place robust procedures for the control of input data.
37. At the same time, administrators of non-significant benchmarks are subject to a less detailed regime under the BMR, and therefore the aim of the draft GL is to strike the right balance between the need for robust input data and the aim of minimising the administrative burden for administrators of non-significant benchmarks.
38. In this context, it should be noted that Article 26 BMR on non-significant benchmarks states that administrators of non-significant benchmarks may choose not to apply point (b) of Article 11(1) BMR on the verifiability of input data, and Article 11(3) BMR on the additional checks the administrator should impose on contributions from front office functions. For this reason, ESMA included in the draft guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 11 of the BMR, then the corresponding part of the guidelines will not apply either.
39. Against this background, ESMA is proposing the following content for the draft GL, and seeks the comments of market participant on the same.
40. In relation to points (a) and (b) of Article 11(1) BMR, regarding the ability of the administrator to ensure that the input data is appropriate, ESMA is proposing a number of checks that administrators of non-significant benchmarks should perform and that should be based on the information retained by the administrator in accordance with the record keeping requirements of the BMR. Article 8 BMR states that all administrators should retain a number of records related to input data, including: all input data and the use of such data, the identities of the submitters and of the natural persons employed by the administrator for the determination of a benchmark.

41. A second source of information for administrators is included in the record-keeping policies established within the applicable code of conduct, although in this case the records are kept by contributors. The draft RTS on code of conduct submitted by ESMA contain the minimum content of the records that contributors have to keep for each contribution of input data (see Final Report on draft standards ESMA70-145-48, section 13.1.4, Article 6⁵).
42. On the basis of these records, an administrator of non-significant benchmarks should have at its disposal all the information needed to perform the checks related to the appropriateness and verifiability of input data. The administrator has to be satisfied that the submitter has been authorised to contribute input data on behalf of the contributor in accordance with the applicable code of conduct. In relation to all types of input data, including regulated input data (i.e. input data contributed entirely and directly from one of the sources listed in point 24 of Article 3(1) of the BMR), the administrator of non-significant benchmarks should check that all characteristics of the input data are fully in line with the methodology.
43. The checks on input data should in particular meet requirements set in the methodology on: the currency or the unit of measurement, the tenor, and the types of counterparties; relevant thresholds for the quantity of input data and standards for the quality of input data; the priority of use of different types of input data; the exercise of any discretion or expert judgement in the contribution of input data (discretion or expert judgement should be exercised also in line with the applicable code of conduct).
44. ESMA considers that the form of the input data to be provided to the administrator and the required level of reliability of the source of input data are elements, already included in the draft RTS on input data, that would also be included by the administrator in the applicable code of conduct. For this reason, these two elements are not considered as core parts of the verifiability requirements of the input data for administrators of non-significant benchmarks, and ESMA proposes not to include them in the draft GL.
45. In relation to point (b) of Article 11(3) BMR on the internal oversight and verification procedures that an administrator should impose on its contributors, where the input data is contributed from a front office function, ESMA is proposing a structure of controls that is similar to the one included in the draft RTS for critical and significant benchmarks, but materially simplified.
46. Contributors contributing to non-significant benchmarks via front office functions should establish an internal oversight procedure structured along three levels of controls and detail the means of cooperation and flow of information between them together with the communication to the administrator of information requested by the administrator relating to the contributor's internal oversight and verification procedures.

⁵ Final report on the draft technical standards under the Benchmarks Regulation:
https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

47. A first level of control function should be responsible for: the review of input data prior to contribution to check its integrity and accuracy; effective checking of input data prior to contribution; checking that the submitter is authorised to contribute input data on behalf of the contributor; the restriction of contributed input data to persons involved in the contribution process, except where access is justified under the rules and procedures of the contributor.
48. ESMA considers that the requirements applicable for significant benchmarks should also be applicable for non-significant benchmarks, as the first level of control is of paramount importance to identify as soon as possible any error or misconduct.
49. A second level of control should have three main objectives: the review of input data after contribution, the maintenance of a whistleblowing procedure, and the establishment of a conflicts of interest policy. ESMA considers that the requirements included in the RTS in relation to the internal reporting for any operational problems and the physical presence of a staff member from the second level of control function should not apply to the contribution to non-significant benchmarks, and therefore this is not included in the draft GL.
50. In relation to conflicts of interest, ESMA considers that this procedure should only cover the material conflicts of interest for non-significant benchmarks and should include: the identification and disclosure to the administrator of actual or potential material conflicts of interest in relation to the contributor's front office staff who are involved in the contribution process, as well as the separation of the remuneration of a submitter from the benchmark related determinations that might give rise to a conflict of interest linked to the contribution to the benchmark.
51. Administrators of non-significant benchmarks should also establish a third level of control function responsible for evaluating the performance of the first and the second level of control.

6.3. Draft Guidelines

1. Ensuring appropriate and verifiable input data

For the purpose of points (a) and (b) of Article 11(1) of Regulation (EU) 2016/1011, an administrator of non-significant benchmarks should ensure the availability of all information necessary to check, where applicable, that:

- a) the submitter has been authorised to contribute input data on behalf of the contributor in accordance with any requirement for authorisation under point (b) of Article 15(2) of Regulation (EU) 2016/1011;
- b) input data is provided by the contributor or is selected from a source specified by the administrator within a time-period prescribed by the administrator;

- c) input data is contributed from the input data sources as defined in point 24 of Article 3(1) of Regulation (EU) 2016/1011;
- d) the input data meets the requirements set out in the methodology, in particular:
 - i. the requirements on the currency or the unit of measurement, the tenor, and the types of counterparties;
 - ii. relevant thresholds for the quantity of input data and standards for the quality of input data;
 - iii. the priority of use of different types of input data;
 - iv. the exercise of any discretion or expert judgement in the contribution of input data.

For the purposes of a) to d) above, administrators should rely on information retained in accordance with the record-keeping requirements in Article 8 of Regulation (EU) 2016/1011 and with any record-keeping policies established pursuant to point (iv) of paragraph (d) of Article 15(2) of Regulation (EU) 2016/1011.

Points a) and b) of this section of the guidelines are not applicable to administrators of non-significant benchmarks who chose not to apply point (b) of Article 11(1) of Regulation (EU) 2016/1011.

2. Internal oversight and verification procedures of a contributor to a non-significant benchmarks

Where input data is contributed from a front office function, the administrator should ensure that the contributor has an internal oversight procedure in place that describes:

- 1. communication to the administrator, upon request, of information requested by the administrator relating to the contributor's internal oversight and verification procedures.
- 2. regular reporting of the operations of the three levels of control functions to the senior management of the contributor;
- 3. the respective roles as well as the means of cooperation and flow of information of the following three levels of control functions:
 - a. a first level of control function that is responsible for:
 - i. the review of input data prior to contribution to check its integrity and accuracy;

- ii. effective checking of input data prior to contribution in accordance with any requirement for the validation of input data to which it is subject pursuant to point (iii) of paragraph (d) of Article 15(2) of Regulation (EU) 2016/1011;
 - iii. checking that the submitter is authorised to contribute input data on behalf of the contributor in accordance with any requirement under point (b) of Article 15(2) of Regulation (EU) 2016/1011;
 - iv. the restriction of contributed input data to persons involved in the contribution process, except where access is justified under the rules and procedures of the contributor, such as for persons involved in audits related to the contribution of input data or persons involved in investigations relating to suspicious input data or errors;
- b. a second level of control function that is responsible for:
- i. the review of input data after contribution, that is independent from the first level control function, in relation to the integrity and accuracy of the contributions;
 - ii. the maintenance of a whistleblowing procedure that includes appropriate safeguards for whistleblowers;
 - iii. the maintenance of procedures for the internal reporting of any attempted or actual manipulation of input data and any failure to comply with the contributor's benchmark-related policies and procedures as well as for the investigation of such events as soon as they become apparent;
 - iv. surveillance of communications between front office function staff directly involved in contributions and between front office function staff directly involved in contributions and other internal functions or external bodies;
 - v. the establishment and maintenance of a conflicts of interest policy regarding the actual or material conflicts of interest that covers:
 - 1. the identification and disclosure to the administrator of actual or potential material conflicts of interest in relation to the contributor's front office staff who are involved in the contribution process;
 - 2. the separation of the remuneration of a submitter from the value of the benchmark, the specific values of the submissions made and any performance of an activity of the contributor that might give rise to a conflict of interest related to the contribution to the benchmark;
 - 3. a clear segregation of duties between front office staff involved in contributing input data and other front office staff, where appropriate, taking into account: the level of discretion involved in the process of

contribution; the nature, scale and complexity of the contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor;

- c. a third level of control function that is independent from the first two levels of control and responsible for performing checks, on a regular basis on the controls exercised by the first two levels of control.

This section of the guidelines is not applicable to administrators of non-significant benchmarks who chose not to apply point (b) of Article 11(3) of Regulation (EU) 2016/1011.

Q2: Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q3: Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

7. Guidelines on transparency of methodology (Article 13 BMR)

7.1. Background

52. The accuracy and reliability of a benchmark in representing the economic reality it is intended to measure depends on its methodology. It is therefore necessary that all administrators adopt a methodology that is appropriate to ensure the reliability and accuracy of the benchmark and that is transparent to increase the administrator's accountability.
53. Article 13 of the BMR focuses on the transparency of the methodology and requires administrators to publish or make available a number of information, including: the key elements of the methodology used, details of the internal review and the approval of a given methodology, and the procedures for consulting on any proposed material change in the methodology.
54. Once the methodology is established and internally approved by the benchmark's administrator, it may be subject to changes, in order to ensure the continued accuracy and reliability of the benchmark. According to Article 13(1)(b) the BMR, the definition of the frequency of the review of the methodology lies with the administrator.
55. Any changes to the methodology have an impact on users and stakeholders of the benchmark. It is therefore necessary for the administrator to follow procedures that ESMA is required to further specify when changing the methodology of the benchmark. In particular, when the changes are deemed material, a consultation is needed in order to allow users and stakeholders to take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes.
56. In the draft RTS under Article 13(3) of the BMR, ESMA further specified the key elements of the methodology to be disclosed in order for users to understand how the benchmark is provided and to assess the appropriateness of the benchmark to their intended use, the details of the internal review and approval of a given methodology and the procedures for consulting on any proposed material change in the administrator's methodology. ESMA published the draft regulatory technical standards under Article 13 of the BMR on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48⁶, chapter 4).
57. The draft RTS do not cover or apply to administrators of non-significant benchmarks (and they also do not apply to administrators of commodity benchmarks subject to Annex II instead of Title II of BMR). However, ESMA can issue GL addressed to administrators of

⁶ Final report on the draft technical standards under the Benchmarks Regulation:
https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

non-significant benchmarks to further specify the elements included in Article 13(1) and (2) BMR. These elements are further specified in the draft RTS, which are applicable only to administrators of significant and critical benchmarks, and therefore the text of the draft RTS submitted to the Commission represents the starting point for the development of the draft GL.

58. The draft RTS are composed of three Articles that, respectively, further specify points (a), (b), and (c) of Article 13(1) of the BMR.
59. Article 1 details the key elements of the methodology to be published or made available by the administrator. In this context, it should be considered that the BMR states in Recital 27 that the transparency of the methodology should not be meant as the publication of the formula applied for the determination of a benchmark, but rather the disclosure of the elements sufficient to allow stakeholders to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use.
60. ESMA therefore considered that the publication of the formula used should not be included in the list of the key elements. Instead, Article 1 of the draft RTS includes a list of elements that should provide users and potential users with all the information they need to understand how a benchmark is determined, what it measures and therefore to understand the appropriateness of the benchmark for their purposes and any limitations or risks of the methodology. Also, ESMA believes that uniform disclosure of the key elements of the methodology across the EU will allow users and potential users to easily compare the methodologies of different benchmarks and choose appropriately according to their intended use.
61. The elements listed in Article 1 of the draft RTS relate to the input data used to determine the benchmark, the use of expert judgement, the panel of contributors, changes to the methodology and limitations of the methodology.
62. Article 2 of the draft RTS relates to the elements of the internal review and approval of the methodology to be published or made available by the administrator, and requires administrators to disclose their policies and procedures regarding the internal review and the approval of the same, including the specific events that may trigger an internal review and the bodies or functions within the administrator's organisational structure that are involved in reviewing and approving the methodology.
63. According to Article 2, for critical benchmarks, administrators should also disclose the roles performed by any persons involved in reviewing and approving the methodology, as well as a description of the procedure for the nomination and removal of the persons involved in reviewing and approving the methodology.
64. Finally, Article 3 is about the information on a proposed material change to an administrator's methodology that an administrator should publish or made available. It is important that users or potential users of benchmarks understand how an administrator will consult on a proposed material change to a benchmark, and therefore ESMA believes that

the administrator should disclose in advance certain information on how it will conduct the consultation, and on the rationale for a proposed material changes including how it will assess the impact of a proposed change.

65. In specific circumstances, such as in case of sudden market events, ESMA appreciates that the administrator might conduct a consultation within a shorter time frame than the standard period otherwise set out.

7.2. Proposed content of the Guidelines

66. The general principles of transparency of the methodology of the benchmark, ensuring the reliability and accuracy of the same, apply to all benchmarks and it is therefore independent from the degree of use of the benchmarks, i.e. independent from whether the benchmarks are critical, significant or non-significant. Also, the need to provide users or potential users with elements sufficient to allow them to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use is a general principle independent from the degree of use of a benchmark.
67. At the same time, administrators of non-significant benchmarks are subject to a less detailed regime under the BMR, and therefore the aim of the draft GL is to strike the right balance between the general principles of transparency of methodology and providing users and potential users with the appropriate information. ESMA aims to minimise the administrative burden for administrators of non-significant benchmarks.
68. Against this background, ESMA is proposing the following content for the draft GL, and seeks the comments of market participant on the same.
69. In relation to the key elements of the methodology to be published or made available by an administrator of non-significant benchmarks (i.e. the specification of point (a) of Article 13(1) of the BMR), ESMA is proposing that the general information regarding benchmarks, i.e. the definition and description of the benchmark and of the market or economic reality it is intended to measure and the unit of measurement of the benchmark (e.g. the currency or other metric) should always be published or made available.
70. Further, the information regarding the input data should be published also for non-significant benchmarks since it gives users information about the reliability of the benchmark and also it allows them to understand the relevance and appropriateness of a non-significant benchmark vis-a-vis their needs. The following elements should be covered: types of input data used and the priority given to each type, any minimum requirements for the quantity of input data and minimum standards for the quality of input data, as well as a description of the constituent elements of a benchmark and the criteria used for their selection and for assigning weights to them (if any).
71. The key elements of the methodology to be published or made available should also always cover the use of expert judgement and in particular rules identifying how and when discretion may be exercised in the determination of the non-significant benchmarks, as this

information would allow users and potential users to assess the reliability and accuracy of the benchmark.

72. Another element to be published or made available is whether the benchmark takes into account any reinvestment of dividends and coupons paid by its constituent elements. The reinvestment of dividends and coupons is the key characteristic for a benchmark being a total return index or a price index. This is essential for the value of the index and for the value of financial instruments referring to it, so there should be no differentiation among significant and non-significant benchmarks.
73. The composition of panel contributors and the limitations of the methodology and indications of the applicable methodology in exceptional circumstances should also be included in the public document on the methodology.
74. As specified in the BMR (point (a) of Article 13(1)), the key elements of the methodology could, when applicable, be provided by the administrator for each family of benchmarks or for each single benchmark.
75. In relation to point (b) of Article 13(1) of the BMR, details of the internal review and the approval of a given methodology, as well as the frequency of such review, ESMA is proposing that administrators of non-significant benchmarks should publish or make available a description of the relevant policies and procedures and a description of any specific event that may give rise to an internal review of the methodology.
76. Finally, in relation to point (c) of Article 13(1) of the BMR, ESMA is proposing in the draft GL that an administrator of non-significant benchmarks should publish or make available the key elements of the methodology that will in its view be impacted by a proposed material change. ESMA considers that together with the other requirements already provided for in point (c) of Article 13(1) BMR, users will have sufficient information regarding non-significant benchmarks. On the other hand, the burden on the administrators of such benchmarks would be minimised.

7.3. Draft Guidelines

1. Key elements of the methodology to be published or made available by administrators of non-significant benchmarks

For the purpose of point (a) of Article 13(1) of Regulation (EU) 2016/1011, an administrator of non-significant benchmarks should publish or make available at least the following information, as applicable to the relevant benchmark and input data used:

- a) a definition and description of the benchmark and of the market or economic reality it is intended to measure;
- b) the currency or other unit of measurement of the benchmark;

- c) types of input data used and the priority given to each type;
- d) a description of the constituent elements of a benchmark and the criteria used for their selection and for assigning weights to them;
- e) any minimum requirements for the quantity of input data and minimum standards for the quality of input data;
- f) rules identifying how and when discretion may be exercised in the determination of the benchmark;
- g) the composition of any panel of contributors and the criteria determining eligibility for panel membership;
- h) whether the benchmark takes into account any reinvestment of dividends and coupons paid by its constituent elements;
- i) limitations of the methodology and indications of the applicable methodology in exceptional circumstances including in illiquid markets or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable;

2. Elements of the internal review of the methodology to be published or made available

For the purpose of point (b) of Article 13(1) of Regulation (EU) 2016/1011, an administrator of non-significant benchmarks should publish or make available the following information regarding the internal review and approval of the methodology of a benchmark:

- a) a description of the policies and procedures relating to the internal review or approval;
- b) a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable.

3. Information on a proposed material change to an administrator's methodology

For the purpose of point (c) of Article 13(1) of Regulation (EU) 2016/1011, an administrator should publish or make available the key elements of the methodology that will in its view be impacted by a proposed material change.

Q4: Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest

to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q5: Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

8. Guidelines on governance and control requirements for supervised contributors (Article 16 BMR)

8.1. Background

77. Article 16 of the BMR is dedicated to specific obligations that supervised contributors have to comply with when contributing input data to benchmark administrators.
78. Under the BMR, contribution of input data means the provision of any input data not readily available to an administrator, if required in connection with the determination of a benchmark, and if the input data is provided for that purpose (point (8) of Article 3(1) BMR). A supervised contributor is defined as a supervised entity that contributes input data to an administrator located in the Union (point (10) of Article 3(1) BMR). Supervised entity, in turn, is defined in point (17) of Article 3(1) BMR: the definition contains a list of thirteen types of market participants that are regulated by different EU Regulations or Directives and therefore are considered as supervised (e.g. credit institutions, investment firms, insurance undertakings).
79. Article 16(5) BMR requires ESMA to develop draft regulatory technical standards (RTS) to specify further the requirements concerning systems and control for supervised contributors set out in paragraphs 1, 2 and 3 of the same Article. ESMA published the draft regulatory technical standards under Article 16 on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 6⁷).
80. The draft RTS on the governance and control requirements for supervised contributors do not apply to supervised contributors of non-significant benchmarks. Furthermore, paragraph 5 of Annex 1 of the BMR states that the draft regulatory technical standards do not cover interest rate benchmarks: instead, paragraphs 6 to 12 of Annex I contain rules specifically for contributors to interest rate benchmarks.
81. It should be noted that Article 26 BMR on non-significant benchmarks states that administrators of non-significant benchmarks may choose not to apply Article 16(2) and 16(3) BMR. For this reason, ESMA included in the draft guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 16 of the BMR, then the corresponding part of the guidelines will not apply either.
82. Article 16 (6) BMR states that ESMA may issue GL addressed to supervised contributors to non-significant benchmarks to specify the elements referred to in Article 16 (5) BMR. Paragraph 5 of Article 16 BMR requires ESMA to develop draft RTS specifying further the requirements set out in paragraphs (1) to (3).

⁷ Final report on the draft technical standards under the Benchmarks Regulation:
https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

83. The draft RTS under Article 16 BMR are the only ones applicable directly to (supervised) contributors, as all the others are directly applicable to administrators only. Also these draft GL are directly applicable to contributors, and in particular to supervised contributors to non-significant benchmarks.
84. Because the GL will have to specify how the elements further specified in the draft RTS would apply to supervised contributors to non-significant benchmarks, the starting point of the GL is the content of the draft RTS submitted by ESMA to the Commission.
85. Article 1 of the draft RTS on “Control framework” specifies point (b) of Article 16(1) of the BMR and contains provisions requiring periodic review of the process for contributing input data, effective oversight of the same, and policy on whistleblowing, including appropriate safeguards for whistleblowers.
86. Article 2 on “Controls on submitters”, specifying point (a) of Article 16(2) of the BMR, details the minimum elements to be included in the systems and control of a supervised contributor in relation to the process of submitting input data. The Article requires the establishment of a process for the designation of submitters (i.e. natural persons working for the contributor) and states that the controls of a supervised contributor should include a process for sign-off of a contribution by a natural person senior to the submitter either when it is required by the applicable code of conduct, or when the supervised contributor considers the sign-off proportionate on the basis of a number of elements listed in the Article (see Article 2(2) of draft RTS).
87. Article 3 of the draft RTS is about the training for submitters (specifying point (b) of Article 16(2) of the BMR), and requires adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality and for critical benchmarks only, adequate knowledge of all the elements of the applicable code of conduct. For critical benchmarks the knowledge of submitters should periodically, and at least annually, be re-assessed.
88. Article 4 is about conflicts of interest (specifying point (c) of Article 16(2) of the BMR). In particular, paragraph 2 requires the remuneration of submitters not to be linked to the benchmark or to the specific values of the submissions made, and also not to be linked to the performance of a specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the benchmark. The same Article also states that there should be a physical and operational separation between submitters and other staff within a supervised contributor where, inter alia, there could be a conflict of interest between the contribution to the benchmark and other activities performed by the contributor.
89. Article 5 is about the records to be kept by the supervised contributors regarding the submission process, and it specifies points (d) and (e) of Article 16(2) of the BMR.
90. Finally, Article 6 on expert judgement, specifying Article 16(3) of the BMR, requires supervised contributors to establish a framework to ensure a consistent approach among

submitters in relation to the use of expert judgement, the identification of the information that can be used to its support and procedures for the systematic review of any use of expert judgement.

8.2. Proposed content of the Guidelines

91. In relation to the general control framework that supervised contributors should have in place to ensure the integrity, accuracy and reliability of input data, and that input data is provided in accordance with the BMR and the applicable code of conduct, ESMA has a preliminary view that similar requirements should apply to supervised contributors of significant and non-significant benchmarks alike. This is because the conformity of the input data to the BMR and the code of conduct, and their accuracy, are qualities that are independent from the degree of use of the benchmarks, and they should always be met by contributors to all benchmarks.
92. Supervised contributors to non-significant benchmarks should therefore establish effective oversight of the process for contributing input data with clear identification of the senior personnel responsible for it. The oversight of the contribution process should also include the involvement of the compliance and internal audit function, if these are already present in the internal organisation of the supervised contributor.
93. A policy on whistleblowing should be part of the control framework, because this is considered an effective tool to prevent and detect potential misconduct, and its importance is not less relevant for non-significant benchmarks. As part of the tools for the identification of misconduct, the control framework should comprise a procedure for detecting breaches of the BMR.
94. If compared with the requirements included in Article 1 of the draft RTS, applicable to supervised contributors' contributions to critical and significant benchmarks, the control framework envisaged for supervised contributors' contributions to non-significant benchmarks is less demanding as ESMA is proposing not to include the obligation to periodically review the process for contributing data, to be conducted, in the case of significant and critical benchmarks, at least annually and whenever there is a change in the applicable code of conduct.
95. In relation to the controls that a supervised contributor should establish over its submitters when contributing to non-significant benchmarks (point (a) of Article 16(2) of the BMR), ESMA is considering requesting the establishment of a process through which "official" submitters are designated within the contributor, as well as the designation of alternate submitters, in order to be able to submit input data also when the "official" submitter is unexpectedly unavailable.
96. ESMA believes that, as part of the controls on submitters, a supervised contributors to non-significant benchmarks should also establish procedures and systems for monitoring the data used for the contributions, in order to create an extra-layer of checks potentially

capable of producing alerts in relation to unusual values of the data used for the determination of the input data.

97. For contribution to non-significant benchmarks, ESMA thinks that there is no need to specify a process for sign-off of a contribution by a natural person senior to the submitter in the draft GL. If a sign-off is requested by the applicable code of conduct under Article 15 of BMR, the supervised contributor will nevertheless have to comply with the code and therefore establish a process for sign-off. Under this approach, it would be therefore up to the code of conduct, defined by the administrator of the non-significant benchmark, to decide whether a sign-off process is needed or not.
98. Regarding point (b) of Article 16(2) of the BMR, ESMA believes that the obligation already included in the text of the BMR, i.e. the need for appropriate training for submitters, covering at least the BMR and Regulation (EU) No 596/2014 (Market Abuse Regulation), are sufficient for the supervised contributors to non-significant benchmarks. This is different from the approach favoured by ESMA in relation to critical and significant benchmarks, for which in the draft RTS ESMA proposed additional training besides the one already established by the BMR.
99. The management of conflicts of interest is one of the main focuses of the BMR and also in this context it is one of the main areas that the draft GL should cover. In Article 16 of the BMR conflicts of interest are covered by point (c) of paragraph 2. ESMA believes that the measures that a supervised contributor should establish in order to address conflicts of interest are independent from the degree of use, and therefore the requirements proposed in the draft GL are similar to the ones ESMA proposed for critical and significant benchmarks in the draft RTS.
100. Under the draft GL, supervised contributors should establish a register of material conflicts of interest, to be kept up to date and used to record any conflicts of interest identified and any measures taken to manage them. The register shall be accessible by internal (if any) or external auditors. Also, where appropriate, the measures for the management of conflicts of interests should include physical separation of submitters from other employees of the contributor. In order to decide whether the physical separation is needed, the supervised contributors should take into account the following elements: the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor.
101. One of the dimensions in which conflicts of interest often materialise is the remuneration of the persons involved in the submission of input data. ESMA therefore considers necessary to include in the draft GL for non-significant benchmarks an obligation to minimise the exposure of a supervised contributor's submitters to incentives to manipulate the contribution of input data. The draft GL therefore proposes that the measures for the management of conflict of interest of supervised contributors to non-significant benchmarks also include remuneration policies in relation to submitters that ensure that

the remuneration of a submitter: (i) is not linked to the benchmark nor to the specific values of the submissions made; and (ii) is not linked to the performance of a specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the benchmark.

102. Points (d) and (e) of Article 16(2) of the BMR relate to the records to be kept by supervised contributors. Records are essential for supervisory activities, and also for the supervised contributor in order to demonstrate its compliance with the applicable rules. In the draft GL ESMA proposes an approach similar to the one proposed for significant benchmarks in the draft RTS. Supervised contributors to non-significant benchmarks would be required to keep records not only for all the contributions made, but also the names of the acting submitters.
103. Finally, expert judgment is also an element included in Article 16 of the BMR that the draft GL could further specify. Under the BMR, expert judgement is defined in Article 3(1) as *“the exercise of discretion by an administrator or a contributor with respect to the use of data in determining a benchmark, including extrapolating values from prior or related transactions, adjusting values for factors that might influence the quality of data such as market events or impairment of a buyer or seller’s credit quality, and weighting firm bids or offers greater than a particular concluded transaction”*.
104. It is clear that any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark, and the so called expert judgement is the means through which contributors apply discretion to the submission of input data. The proper management of expert judgement is key to the reliability of all benchmarks, and therefore also for non-significant benchmarks.
105. ESMA is thus proposing to include in the draft GL the following specifications. The policies of a supervised contributor to non-significant benchmarks in relation to the use of expert judgement or the exercise of discretion should include a framework for ensuring consistency between different submitters, and consistency over time, , as well as procedures for the systematic review of any use of expert judgement or the exercise of discretion. The two elements are strictly connected as the second should be understood as the procedure by which the supervised contributor satisfies itself that the “consistency framework” for expert judgement works properly.

8.3. Draft Guidelines

1. Control framework of supervised contributors to non-significant benchmarks

For the purpose of point (b) of Article 16(1) of Regulation (EU) 2016/1011, the control framework of a supervised contributor to non-significant benchmarks should include:

- a) effective oversight of the process for contributing input data, including risk management, the identification of senior personnel responsible for the process, and

the involvement, if any, of the compliance and internal audit functions in the oversight of the same;

- b) a policy on whistleblowing, including appropriate safeguards for whistleblowers; and
- c) a procedure for detecting and managing breaches of Regulation (EU) 2016/1011. The procedure for managing breaches should include reviewing any detected breach or error, and recording the actions taken as a consequence.

2. Controls on submitters of supervised contributors to non-significant benchmarks

For the purpose of point (a) of Article 16(2) of Regulation (EU) 2016/1011, the controls of a supervised contributor to non-significant benchmarks should include a documented and effective process for contributing data, including:

- a) a process for the designation of submitters and procedures for making contributions when a submitter is unexpectedly unavailable, and a process for the designation of alternate submitters; and
- b) procedures and systems for monitoring the data used for the contributions, and the contributions, which should be capable of producing alerts in line with predefined parameters established by the supervised contributors.

This paragraph is not applicable to the contribution to non-significant benchmarks for which the administrators chose not to apply Article 16(2) of Regulation (EU) 2016/2011.

3. Management of conflicts of interest of supervised contributors to non-significant benchmarks

For the purpose of point (c) of Article 16(2) of Regulation (EU) 2016/1011, the measures for the management of conflicts of interest of a supervised contributor to a non-significant benchmark should include:

- a) a register of material conflicts of interest, that should be kept up to date and used to record material conflicts of interest identified and measures taken to manage them. The register should be accessible by internal or external auditors;
- b) physical separation of submitters from other employees of the contributor, where appropriate, taking into account: the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflicts of interest may rise between the contribution of input

data to the benchmark and trading or other activities performed by the contributor;
and

- c) appropriate internal oversight procedures; when there is no organisational or physical separation of employees, the oversight procedures should prescribe rules on the interaction of submitters with front office employees of the supervised contributor, if any.

The measures for the management of conflict of interest should also include remuneration policies in relation to submitters that ensure that the remuneration of a submitter of a supervised contributor to non-significant benchmarks:

- a) is not linked to the benchmark nor to the specific values of the submissions made;
and
- b) is not linked to the performance of a specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the non-significant benchmark.

This paragraph is not applicable to the contribution to non-significant benchmarks for which the administrators chose not to apply Article 16(2) of Regulation (EU) 2016/2011.

4. Record keeping requirements for supervised contributors to non-significant benchmarks

For the purpose of point (d) of Article 16(2) of Regulation (EU) 2016/1011, the records to be kept of communications in relation to provision of input data by the supervised contributor of non-significant benchmarks should include the contributions made (i.e. the figure submitted to the administrators) and the names of the acting submitters.

This paragraph is not applicable to the contribution to non-significant benchmarks for which the administrators chose not to apply Article 16(2) of Regulation (EU) 2016/2011.

5. Policies on expert judgement of supervised contributors to non-significant benchmarks

For the purpose of Article 16(3) of Regulation (EU) 2016/1011, where the contribution of input data relies on expert judgement, the policies of a supervised contributor to non-significant benchmarks in relation of the use of judgement or the exercise of discretion should include:

- a) a framework for ensuring consistency between different submitters within the contributor, and consistency over time, in relation to the use of expert judgement or the exercise of discretion; and

- b) procedures for the review of the use of expert judgement on a regular basis, so as to check whether the consistency on the use of expert judgement referred to in the previous point did take place and, if not, take remedial actions.

This paragraph is not applicable to the contribution to non-significant benchmarks for which the administrators chose not to apply Article 16(3) of Regulation (EU) 2016/2011.

Q6: Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q7: Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

9. Annexes

9.1. Annex I: List of questions

Q1: Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q2: Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q3: Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

Q4: Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q5: Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

Q6: Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

Q7: Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

9.2. Annex II: Preliminary cost-benefit analysis

Draft guidelines on procedures and characteristics of the oversight function

<p><i>Benefits</i></p>	<p>The main benefit of the proposed draft guidelines is to further specify key aspects of the oversight function, such as its positioning in the administrator’s organization and its composition. To this end the draft guidelines expand the general procedures, including characteristics of the oversight function, so as to provide administrators of non-significant benchmarks with a practical indication on how to implement Article 5 of the BMR in their organisations.</p> <p>For this reason, administrators of non-significant benchmarks would be the ones who will benefit the most from the proposed draft guidelines. Also investors and consumers would indirectly benefit from the draft guidelines, because the draft guidelines focus on the avoidance of potential conflicts of interest. This should allow non-significant benchmarks provided under the control of an appropriate oversight function that is established in compliance with the draft guidelines to be more robust against potential conflict of interest, i.e. the integrity of the benchmark should be enhanced.</p> <p>The proposed guidelines have the advantage to further define the content of Article 5 of the Benchmarks Regulation while, at the same time, leaving administrators of non-significant benchmarks with a well-balanced level of flexibility so as to adapt the oversight function to their specific needs and to adjust it on the basis of their size and the nature of the non-significant benchmarks they provide.</p> <p>Although the list of governance arrangements is non-exhaustive, it should represent a very useful tool for administrators of non-significant benchmarks in order to define the structure of their oversight function appropriate to their non-significant benchmarks. The elements included in the list represent different organisational solutions to which most of the administrators of non-significant benchmarks should be able to relate their own specific situation. In particular, the list defines a spectrum of possible structures of oversight functions that reaches from a basic form, in which the oversight function is composed by a single natural person, to a structured form where a function is composed of multiple committees performing a subset of the oversight tasks.</p>

	<p>Thereby administrators of non-significant benchmarks should be able to gain direct benefit from the implementation of this section of the proposed draft guidelines. Without the non-exhaustive list of appropriate governance requirements there was a risk that administrators of non-significant benchmarks apply Article 5 of the Benchmarks Regulation in significantly diverging ways.</p> <p>Investors and consumers should also benefit from the proposed draft guidelines, because the draft guidelines allow administrators of non-significant benchmarks to establish an appropriate oversight function which will enhance the integrity of the benchmarks and will therefore directly benefit the ultimate users. In this context, the possibility of having independent members, external stakeholders, and also observers in the oversight function should improve even further the effectiveness of the oversight function and the quality of its decisions.</p>
<p><i>Costs</i></p>	<p>Potential additional costs will be borne by administrators of non-significant benchmarks only.</p> <p>Depending on the structure of the oversight function chosen by the administrator of non-significant benchmarks, cost will vary. An independent oversight committee or an oversight function consisting of multiple committees possibly represent the costliest form of oversight function, as opposed to the oversight function composed by a single natural person. The proposed draft guidelines allow administrators of non-significant benchmarks to embed the oversight function within their organisation rather than to create an external committee: this flexibility should substantially minimise costs for administrators of non-significant benchmarks.</p> <p>Specific costs for administrators of non-significant benchmarks could arise from section 3 of the proposed draft guidelines that sets out “procedures governing the oversight function”. The section specifies Article 5(2) of the Benchmarks Regulation, that requires administrators to develop and maintain robust procedures regarding their oversight function. Section 3 of the proposed guidelines identifies a number of elements to be included. In particular, those relating to disclosure and the ones requiring the administrator to create new policies could incur costs at the administrator level as they may have to adopt existing structures to the new requirements, although these would likely be one-off costs.</p> <p>Another source of ongoing cost, mostly in staff time, could be the requirement to record decisions.</p>

	Potentially, there can be some minor detrimental effects on benchmarks users as administrators would likely pass on costs to the users through increased license fees.
--	--

Draft guidelines on input data

Benefits	<p>The proposed approach for ensuring appropriateness and verifiability of input data as well as ensuring the internal oversight and verification procedures within a contributor would promote a common and consistent control framework across different administrators of non-significant benchmarks to the main benefit of users.</p> <p>The different checks to be conducted on input data aim at strengthening the reliability of the non-significant benchmark through ensuring the integrity and accuracy of the input data and reducing the opportunity of its manipulation.</p> <p>Further, the internal oversight and verification procedures where input data are contributed from a front office function would allow to mitigate the specific risk of conflicts of interest that arises in this particular case, and to reduce the opportunity to manipulate data by implementing a robust internal oversight at the contributor level.</p>
Costs	<p>Potential costs arising from these draft guidelines will be borne by administrators of non-significant benchmarks and contributors to non-significant benchmarks.</p> <p>The incremental costs stemming from the proposed approach in relation to input data are not expected to be significant. Indeed, the draft guidelines specify further the requirements already included in the Benchmarks Regulation regarding the appropriateness and verifiability of input data and the internal oversight and verification procedures of contributors.</p> <p>Moreover, the draft guidelines have been designed in a way to minimise the burden on administrators of non-significant benchmarks, in accordance with the principle of proportionality which is a general requirement under the Benchmarks Regulation. Where possible, the requirements in these draft guidelines have been reduced or simplified, if compared to the requirements included in the corresponding draft RTS, applicable to administrators of significant and critical benchmarks.</p>

Draft guidelines on transparency of methodology

<p><i>Benefits</i></p>	<p>The proposed minimum list of key elements to be disclosed by administrators of non-significant benchmarks would promote common and consistent transparency principles across different administrators of such benchmarks, to the principal benefit of users and potential users. This could turn out to prove beneficial also for administrators, as it has the potential to create a fairer competitive environment.</p> <p>The key elements of the methodology would be available to all markets participants who would have access to the minimum list of information required regarding non-significant benchmarks and thus have a better view on the possibilities of investments available in the market.</p> <p>Through the publication of any policies and procedures relating to the internal review or approval of the methodology, administrators of non-significant benchmarks would provide market participants with additional information on the mechanisms ruling the governance of the methodology.</p>
<p><i>Costs</i></p>	<p>Potential costs arising from these draft Guidelines will be borne by administrators of non-significant benchmarks.</p> <p>The incremental costs stemming from the proposed transparency of the methodology are not expected to be significant. Indeed, the draft Guidelines specify further the requirements already included in the Benchmarks Regulation regarding the publication of the key elements of the methodology, the internal review of the methodology and the specific procedure for any material change to the methodology.</p> <p>Moreover, most of the already established index providers are already familiar with providing transparency of the methodology applied.</p> <p>Additionally, the draft guidelines have been designed in a way to minimise the administrative burden on administrators of non-significant benchmarks, in accordance with the principle of proportionality which is a general requirement under the Benchmarks Regulation. Only the necessary information to be disclosed has been included in these draft guidelines, which are less burdensome if compared with the related draft RTS for administrators of significant and critical benchmarks.</p>

Draft guidelines on governance and control requirements for supervised contributors

<p><i>Benefits</i></p>	<p>There will be benefits from the further specification of the requirements on supervised contributors included in Article 16 of the Benchmarks Regulation both for supervised contributors to non-significant benchmarks, and for the administrators of non-significant benchmarks to which supervised contributors provide input data.</p> <p>The main benefit of the further level of specification of the requirements will be to ensure consistent application of the requirements throughout the Union. Without such further clarification, each supervised contributor to non-significant benchmarks would have to make its own judgement of the way in which it should comply with the high level requirements in the Benchmarks Regulation.</p> <p>Different interpretation of the requirements by different supervised contributors within a Member State would mean that each national competent authority would have to establish for itself criteria for judging compliance of contributors it supervises with the requirements. Even if each national competent authority established consistent application, a benchmark administrator could find that its contributors in different Member States were applying different standards.</p> <p>The further specification provided by the draft guidelines is even more relevant taking into account the likely high number of benchmarks that will be classified as non-significant.</p>
<p><i>Costs</i></p>	<p>The incremental costs of these draft Guidelines for supervised contributors are minimal for two main reasons.</p> <p>First, the draft Guidelines just specify the elements already included in Article 16 of the Benchmarks Regulation, and therefore the main source of costs is the text of the BMR. In other words, the further specification of the obligations for supervised contributors included in the draft guidelines does not imply incremental costs compared to the mere application of L1.</p> <p>Second, supervised contributors already have established systems and controls in relation to contribution of input data, and therefore the additional costs should be limited and focused on the adjustment of the already existing systems to the requirements of the draft Guidelines.</p> <p>The draft Guidelines include a reduced number of requirements, if compared to the corresponding draft RTS for supervised contributors to significant and</p>

	critical benchmarks. The impact of these draft Guidelines from a cost perspective is therefore considered to be minimal.
--	--