esma European Securities and Markets Authority

Final Report

Draft Regulatory Technical Standards under the Benchmarks Regulation

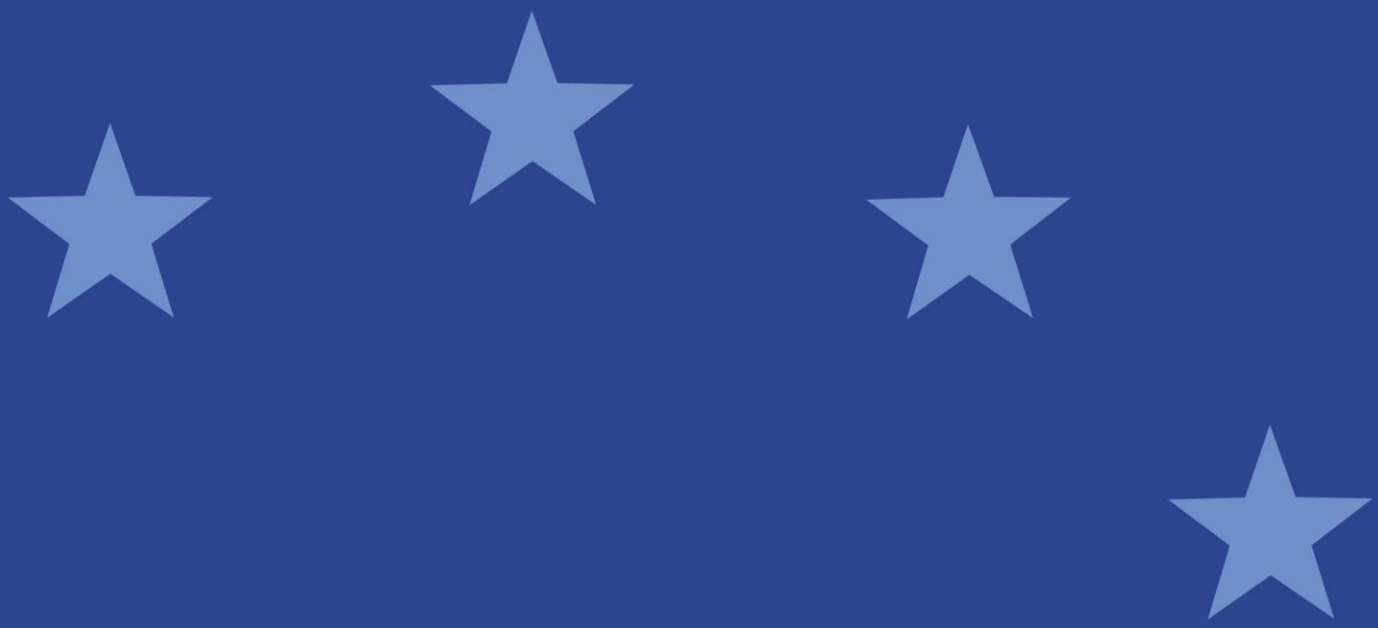

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Table of Contents

1 Executive Summary

Reasons for publication

The Benchmarks Regulation (BMR) entered into application on the 1 January 2018.

The Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 (ESAs' review)[1] requires the European Securities and Markets Authority (ESMA) to develop five draft regulatory technical standards (RTS) to be submitted to the Commission by 1 October 2020.

ESMA issued on 9 March 2020 a Consultation Paper (CP) on 'Draft Regulatory Technical Standards under the Benchmarks Regulation'. ESMA received 36 responses to its open public consultation. ESMA welcomes the predominant support on its approach outlined in the CP and the proposed requirements. Following the feedback received, ESMA has taken note of market participants' concerns with regard to the proportionality of the requirements included in the CP and has further enhanced proportionality in this final report taking into account the different risks each benchmark poses, the materiality of the potential or actual conflicts of interest identified and the nature of the input data. Further, ESMA conducted additional legal analysis to ensure that these draft technical standards would not conflict with its empowerments under the Benchmarks Regulation and has amended some requirements accordingly.

Contents

This final report consists of five chapters, each dedicated to one of the areas for which the ESAs' review mandates ESMA to develop draft technical standards. Each chapter provides first the background information on ESMA's legal mandate to develop the draft technical standards. In a different section, the feedback received to the open public consultation and at the open hearing, and finally the general ESMA approach and the different proposals for each draft technical standards are outlined. The final report also includes in the annexes the draft technical standard and a cost-benefit analysis.

Next Steps

The draft regulatory technical standards will be submitted to the European Commission. The Commission has three months to decide whether to endorse the regulatory technical standards.

[1] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010

2 Governance arrangements (Article 4 BMR)

2.1 Background and legal basis

1. Pursuant to Article 4(1) of the BMR, administrators shall "have in place robust governance arrangements including clear organisational structure with well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark". This paragraph further states that administrators should identify and prevent or manage conflicts of interest between themselves (managers, employees or other persons directly or indirectly linked to them by control, contributors or users) and ensure that where any judgement or discretion in the benchmark determination process is required, it is independently and honestly exercised.

2. Article 4(9) of the BMR states that "ESMA shall develop draft regulatory technical standards to specify the requirements to ensure that the governance arrangements referred to in paragraph 1 [of Article 4 of the BMR] are sufficiently robust."

3. Robust governance arrangements of the administrator are necessary to prevent manipulation of benchmarks. Recital 1 of the BMR mentions that *"[…] The use of discretion and weak governance regimes, increase the vulnerability of benchmarks to manipulation […]*". Recital 21 further elaborates that in order to ensure the integrity of benchmarks, benchmark administrators should be required to implement adequate governance arrangements to control conflicts of interest and to safeguard confidence in the integrity of benchmarks.

4. ESMA believes that the RTS should aim, amongst other, at establishing suitable and well-defined lines of responsibilities for the decision-making and monitoring and control processes.

5. ESMA also considers that the concept of "robust governance arrangements" should be interpreted in accordance with the nature, scale and complexity of the benchmark administrator in line with the BMR that imposes different levels of requirements on administrators of non-significant, significant and critical benchmarks. Similarly, the future provisions on "robust governance arrangements" should not jeopardise the operation of smaller administrators with limited resources.

6. Regarding the scope of the mandate, ESMA notes that the BMR includes various requirements which relate to the governance and controls by administrators. Article 4 of the BMR includes specific conflicts of interest requirements. Furthermore, an administrator must have in place an oversight function (Article 5 of the BMR), a control

establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334, 27.12.2019, p. 1

and an accountability framework (Articles 6 and 7 of the BMR), a system of record-keeping (Article 8 of the BMR) and a complaints-handling mechanism (Article 9 of the BMR). An administrator must also comply with specific requirements on outsourcing of functions in the provision of a benchmark (Article 10 of the BMR).

7. It is ESMA's understanding that these requirements and functions are not within the mandate of these RTS, which are limited to the governance arrangements referred to in Article 4(1) of the BMR.

8. ESMA also notes that some administrators can be subject to organisational requirements deriving from other European legislative frameworks (e.g. CRD IV or MiFID II). This could notably be the case for administrators that are part of a wider group. In this case, ESMA considers that administrators may leverage internal arrangements already set up in accordance with such other European legislative frameworks in order to comply with any additional requirements applicable under the BMR. Given the nature of the contemplated provisions, ESMA does not foresee any specific situation where the two sets of organisational requirements would be contradictory. If, however, this situation materialises, ESMA will clarify how to implement the conflicting provisions.

2.2 Feedback from stakeholders

9. The majority of the respondents supported the requirements of the draft RTS stressing the importance of the governance structure and resulting relationships of the administrator being well documented to understand and mitigate risks associated with conflicts of interest.

10. Several respondents requested clarifications with regard to the requirements of the draft RTS or the accompanying report. In particular, while neither Article 4(3) of the BMR nor the draft RTS contains an obligation for an administrator to be a distinct legal person when the administration activity is comprised within a group structure, conflicts of interest between all companies of the group should be properly managed. ESMA agrees that in accordance with Article 4(3) of the BMR the conflicts of interests that may arise from the administrator's ownership structure, controlling interests or other activities conducted by the group of the administrator should be adequately mitigated. This has been reflected in the next section of this chapter on the content of the draft RTS.

11. In Article 1(4) of the draft RTS in the CP, the term "discharge a function" could either mean to relieve a person from a function, or to carry out a function. ESMA has amended the RTS to clarify that it relates to the latter.

12. Some respondents highlighted the existence of redundant requirements within the draft RTS of the CP on the governance arrangements, in particular between Article 2(1)(b) and Article 2(1)(d) as both address conflicts of interest and between Article 3(2) and Article 1(2). ESMA highlights that although Article 2(1)(b) and Article 2(1)(d) refer to the

conflicts of interest, the first requirement is linked to the publication and the second to the identification and reporting of the same therefore for clarity purposes, ESMA suggests to keep the two requirements separate. With regard to Article 1(2) and Article 3(2), ESMA has amended the draft RTS by deleting the duplicate requirement.

13. Several respondents highlighted that the difference between the additional requirements in Article 1(1) and Article 2(1)(a) of the draft RTS in the CP and the accountability framework should be further clarified. ESMA believes that the accountability framework in accordance with Article 7 of the BMR covers record-keeping, auditing and review, and a complaints process however does not cover the governance and conflicts of interest process that is in the scope of these draft RTS. In addition, respondents requested to align the two requirements with regard to the level of granularity of the decisions impacted. ESMA has amended the different provisions to ensure consistency.

14. Respondents highlighted that Article 2 of the draft RTS in the CP should refer to the persons accountable for the various elements rather than to those responsible or involved in the different elements. This would allow flexibility for firms of different sizes who may in some cases have fora or committees responsible for carrying out activities, with an individual retaining accountability. ESMA acknowledges this and has amended the draft RTS accordingly. Further, ESMA has amended Article 2(1)(d) of the draft RTS in the CP to reflect that all staff of an administrator should be expected to identify and declare any potential conflict of interest that arises.

15. With regard to Article 2(2) of the draft RTS in the CP on the outsourcing requirements, several respondents highlighted that the requirements should only apply to the activities of benchmark administration to allow administrators the flexibility, to share staff and functions with group entities for support services e.g. Human resources, audit etc. ESMA has amended the draft RTS to refer only to the activity of provision of benchmarks as this is the relevant activity for the BMR and this could create conflicts of interests. In addition, as requested by stakeholders Article 2(2) of the CP has been amended in line with the proportionality approach set out in Article 10 of the BMR, which only applies to outsourcing arrangements which may "*impair materially the administrator's control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark*".

16. With regard to the proportionality of the draft RTS, many respondents highlighted the need for additional proportionality related to the nature, scale and complexity of the administrator's business and benchmarks provided. ESMA has amended the draft RTS taking into account the different risks each benchmark poses, the materiality of the potential or actual conflicts of interest identified and the nature of the input data.

17. Some respondents disagreed with ESMA's statement in paragraph (5) of the CP that in case an administrator administers different types (i.e. non-significant, significant or critical) of benchmarks, the most stringent requirements should apply to them. Administrators may have only one or a small number of benchmarks that are critical

and many more that are not. In such arrangements administrators may choose to have enhanced governance structures for their critical benchmarks while taking advantage of the BMR proportionality for the non-critical benchmarks. ESMA agrees that the BMR allows each administrator to apply different governance arrangements per type of benchmark provided.

18. While supporting the proposals, one respondent further specified that the governance should focus on the division of the roles of the administrator as user or contributor to the administrated benchmark. ESMA agrees that the conflicts of interest that may rise from the different roles of the administrator should be properly mitigated and has included in the additional proportionality a requirement depending on the different activities performed by the administrator.

19. In addition, several respondents raised issues that are out of the mandate of these RTS. In particular, with regard to the Composition of Oversight Committees or management body, or the regime applicable to interest rate benchmarks for which Annex I of the BMR is applicable and the proportionality per critical, significant, non-significant benchmarks is not included. Others stressed that ESMA should consider any relevant provisions of the joint EBA/ESMA guidelines on the assessment of the suitability of members of the management body as regards internal governance structures[2] or the UK senior managers regime. ESMA has already included the relevant provisions from the EBA/ESMA guidelines e.g. the sufficient time commitment to perform functions and responsibilities is included in Article 2.4 of the draft RTS and the relevant persons within the entity are aware of the responsibilities that are allocated to them is included in Article 4(1) of the draft RTS. Some other requirements are considered not to be within the mandate of these draft RTS that focuses on the governance arrangements.

20. With regard to the management body proposals, one respondent believed that these go beyond the scope of the Level 1 text of the BMR as the BMR does not include any requirements in relation to an administrator's management body. Further, another respondent highlighted that the wording of the "management body" may not be equally applicable to banks and other larger organisations. Even if the benchmark administrator is part of a larger organisation, the management board is not necessarily involved in the decision-making process. Article 1(2) of the draft RTS in the CP should therefore be modified by restricting its application to the managing or governance body of the benchmark administrator. ESMA has made sure to be consistent with the Level 1 by mentioning that an administrator is not obliged to set up a management body and refers to the definition of the management body as outlined in Article 3(1)(20) of the BMR.

[2] https://eba.europa.eu/sites/default/documents/files/documents/10180/1972984/43592777-a543-4a42-8d39-530dd4401832/Joint%20ESMA%20and%20EBA%20Guidelines%20on%20the%20assessment%20of%20suitability%20of%20members%20of%20the%20management%20body%20and%20key%20function%20holders%20(EBA-GL-2017-12).pdf

21. As requested by some respondents, ESMA has included an additional Article on the scope of these draft RTS and in particular with regard to Article 19 of the BMR on commodity benchmarks.

22. With regard to the remuneration framework, the respondents view was mixed with some of the respondents supporting the proposal and specifying that it should be narrowly tailored to target the prevention of conflicts of interest. Further mentioning that this additional requirement would complement the requirement already in Article 5(2) of Commission Delegated Regulation 2018/1640 on governance and control requirements for supervised contributors according to which the remuneration of submitters must not be linked to the value of the benchmark, specific values or a related activity. Some respondents stated that it is standard practice for many corporate entities to establish a remuneration framework, but that specific and additional requirements should not be imposed on administrators in relation to the content and structure of a remuneration framework.

23. The other part of the stakeholders did not support the proposal mentioning the already existing requirements in the BMR under Article 4(7)(b) to (e) and that these requirements are sufficient and proportionate in addressing conflict of interests and persons involved in the provision of benchmarks. One respondent further highlighted that a statement to this affect should suffice as the remuneration of staff is based on the quality of administration for benchmark determinations, and not on the actual published levels. ESMA acknowledges these elements that should be included in the remuneration framework that the administrator would set up and the draft RTS give flexibility to administrators to set the appropriate remuneration framework that best fit their activity.

24. Several respondents further highlighted that the wording of Article 1(5) of the draft RTS in the CP on the remuneration framework “appropriately set” is unclear and suggested to follow more closely IOSCO Principles for Financial Benchmarks that focuses on remuneration policies of staff involved in benchmark determination not being “rewarded or incentivized by the levels of the Benchmark”. ESMA has amended the draft RTS that no longer refers to appropriately set.

25. While some respondents stressed the need for such a framework in the context of administrators forming part of larger groups, others highlighted that this framework could be problematic for administrators which are part of a group which sets remuneration policies centrally and suggested to delete “establish a remuneration framework to” from the provision. Benchmark administrators that are part of a group can be subject to different remuneration frameworks as well as subject to additional country-specific provisions. Alignment of remuneration rules is necessary for a firm’s ability to comply, and avoid any potential for regulatory arbitrage. ESMA points out to the provision in Article 3(2) of the draft RTS in the CP that explicitly takes into account the group structure and the synergies between the different group entities and functions.

26. Several respondents stressed the need to apply proportionality to this requirement that should only apply to benchmarks where the risk of manipulation is significant. ESMA agrees that additional proportionality should be introduced with regard to this provision and has amended the draft RTS accordingly.

27. One respondent mentioned that this requirement should be optional as a remuneration framework is not the only solution that may be applied in order to avoid a conflict of interest, as per Article 4(5) of the BMR. ESMA agrees with this last statement however ESMA believes that the remuneration framework complements the existing rules in the BMR.

28. Finally, the large majority of the respondents supported the applicability of the same requirements to administrators that are natural person mentioning that it is not the legal form of the administrator that is important but rather the nature of the benchmarks provided. Some respondents further mentioned that with a natural person acting as administrator the business interest inevitably causes conflicts of interest, and that the revenue should not be linked to the performance or value of a benchmark.

29. Therefore, in accordance with the mandate of these draft RTS, ESMA suggests not to include any additional requirement for natural persons as the requirement on the remuneration not being linked to the performance of the benchmark is already covered by the remuneration framework provision.

2.3 Content of the draft RTS

30. As outlined in the previous section and following the feedback received to the CP, ESMA has added a new article that relates to the scope of the draft RTS and in particular the exemption applicable to commodity benchmarks that apply Annex II of the BMR in accordance with Article 19 of the BMR.

Decision-making procedures, allocation of functions and responsibilities and reporting lines

31. Different organisational and ownership structures may influence an administrator's ability to provide benchmarks and to manage the risks inherent in this activity. Article 4(1) of the BMR requires "*well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark*".

32. To this end, ESMA believes that benchmark administrators should establish, implement and maintain an organisational structure which in a clear and well documented manner specifies management decision-making procedures, reporting lines, functions and responsibilities and accountability of the persons involved in the provision of the benchmarks. These written procedures should focus primarily on the roles and responsibilities of the persons involved in the provision of the benchmark (including the management body as well as the internal and oversight functions) and include at least the following key components:

a. the composition, roles and responsibilities of the management body or the persons who effectively direct the business of the administrator and related committees, if any;

b. the structure of the management body;

c. an organisational chart of the different functions specifying any outsourced functions and any shared staff within the administrator's group;

d. the procedures for the appointment of the management body and its members or the persons who effectively direct the business of the administrator.

33. The final report does no longer refer to the implementation of the decisions of the management body as this provision is already included in Article 2 of Commission Delegated Regulation (EU) 2018/1637[3] that provides that the oversight function shall assess, and where appropriate challenge, the decisions of the management body concerning the provision of a benchmark.

34. The BMR does not set a requirement for an administrator to include a management body as defined in Article 3(1)(20) of the BMR. However, where such management body exists, the governance arrangements established should ensure that its members are subject to effective monitoring and controls. Further, the governance arrangements should clearly design and establish procedures that promote compliance with the management body's decisions.

35. Consistently with the spirit of the BMR, it is important to adopt in these RTS proportionality regarding some of the requirements depending on the benchmarks provided. Therefore, administrators of non-significant benchmarks may opt not to provide the procedures for the appointment of the management body and its members.

36. When designing its governance arrangements an administrator should ensure that the performance of multiple functions or involvement in various committees still allows the persons involved in the provision of a benchmark to commit sufficient time to the responsibilities allocated to them and does not or is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally. An administrator may take into account the number of meetings that the relevant person has to attend, the nature of the specific position and the related responsibilities and whether the relevant person carries out any other function and activity.

37. In addition, in order to minimise conflicts of interest, administrators should establish a remuneration framework in order to ensure that the remuneration of the persons involved in the provision of the benchmark are not subject to conflicts of interest. In the final report, ESMA has exempted non-significant benchmarks from setting this

[3] COMMISSION DELEGATED REGULATION (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function

remuneration framework in order to limit burden on administrators of these benchmarks for which the BMR remuneration requirements of Article 4(7) are applicable.

38. As requested by stakeholders, ESMA has enhanced proportionality in this final report based on the nature, scale and complexity of the activities of the administrator, the likelihood of a conflict of interest arising between the provision of the benchmark and any other activities of the administrator, and the level of discretion involved in the process of provision of benchmarks. This additional proportionality aims at limiting the burden on administrators and taking into account the different risks that different types of benchmarks raise.

Accountability

39. The governance arrangements should clearly state the persons accountable for decisions that could have a significant impact on the provision of the benchmark, in particular, where tasks are subject to delegation.

40. Robust governance arrangements also require to have in place robust procedures to manage the possible risk of conflicts of interest that may arise within a benchmark administrator. The arrangements should in particular include processes to identify, address and manage potential conflicts of interest.

41. The governance arrangements of the administrator should clearly state the persons accountable for the publication or disclosure of potential conflicts of interest pursuant to Article 4(5) of the BMR. Furthermore, the governance arrangements should clearly state the persons accountable for the establishment of specific internal control procedures to ensure the integrity and reliability of the employee or the person determining the benchmark pursuant to Article 4(8) of the BMR. The governance arrangements should also specify the persons accountable for reporting any circumstances which may give rise to conflicts of interest that could impede the ability of the relevant persons, in the provision of the benchmark, to perform their duties independently and objectively. For example, these could be personal, professional or economic relationships with other persons (including other persons of the administrator's legal entity) or entities; past or present positions held; other economic interests (e.g. loans to the member's or prospective member's company); or other interests, including family interest, that may create actual conflicts of interest. As opposed to the CP, the final report only includes the identification of the persons accountable for the reporting of conflicts of interests because as outlined by stakeholders all the staff should be able to identify conflicts of interest.

Transparency

42. In order for the governance arrangements of an administrator to be sufficiently robust, an administrator should establish lines of responsibility which are clear, consistent and well-documented. To that end, the governance arrangements should be transparent and the persons involved in the provision of a benchmark should be aware of the

responsibilities that are allocated to them and the procedures which must be followed for the proper discharge of these responsibilities.

43. The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a person from being involved in the provision of the benchmark. The administrator should nevertheless identify any circumstance which may give rise to a perceived conflict of interest or an actual conflict of interest, assess it and decide, where appropriate, on mitigating measures. The governance arrangements should facilitate the disclosure of any new circumstances which may give rise to a perceived conflict of interest or new actual conflicts of interest including the mitigating measures.

44. Pursuant to Article 4(3) of the BMR, an administrator that is part of a group, should duly assess any implications of the group's structure for its own governance arrangements including whether any conflict of interest may compromise the administrator's ability to meet its regulatory obligations and whether its independence could be compromised by the group structure or by any member of the administrator's management body also being a member of the board of other entities of the same group. Such an administrator should adopt specific procedures for preventing and managing conflicts of interest that may arise from this group structure.

45. Administrators that operate under the umbrella of a parent company should remain capable to seek synergies with the functions that operate at group level including internal and oversight functions. However, this should not prevent these delegated functions to operate in line with the general principles set out in Article 10 of the BMR and in full compliance with all other relevant provisions of the BMR.

3 Methodology (Article 12 BMR)

3.1 Background and legal basis

46. Article 12 of the BMR specifies the conditions for a methodology to be used by an administrator for determining a benchmark. Recital 17 of the BMR mentions that "*An index is calculated using a formula or some other methodology on the basis of underlying values. There exists a degree of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. Therefore, all benchmarks sharing that characteristic of discretion should be covered by this Regulation […]*".

47. Article 12(4) of the BMR states that "ESMA shall develop draft regulatory technical standards to specify the conditions to ensure that the methodology referred to in paragraph 1 [of Article 12 of the BMR] complies with points (a) to (e) of that paragraph."

48. Pursuant to Article 12(1) of the BMR, the draft RTS should therefore specify the conditions to ensure that a methodology:

a. is robust and reliable;

b. has clear rules identifying how and when discretion may be exercised in the determination of that benchmark;

c. is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data;

d. is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity;

e. is traceable and verifiable.

49. The BMR includes additional requirements with regard to the calculation of a benchmark. Pursuant to Article 13 of the BMR, the administrator should adopt a transparent methodology that ensures the reliability and accuracy of the benchmark. Further, pursuant to Article 5 of the BMR, the oversight function is responsible for the review of the methodology at least annually and overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes.

50. Recital 17 of the BMR specifies that an index is calculated using a formula or some other methodology on the basis of underlying values. There is a level of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. Therefore, the BMR recognises that the construction of a methodology embeds a level of discretion that is to be defined by each administrator. These RTS ensure that the methodology, as defined by the administrator, is sufficiently robust, reliable and when discretion is used an appropriate control system is in place.

3.2 Feedback from stakeholders

51. The large majority of the respondents did not suggest any additional requirements to ensure that the methodology complies with the requirements of the BMR. However, as also mentioned in the previous RTS on the governance arrangements, several respondents requested to clarify the scope with regard to the exemption from Annex II of the BMR applicable to commodities benchmarks. ESMA has therefore included this clarification in the draft RTS.

52. Several respondents stressed the need for additional proportionality as the application of the requirements of the draft RTS would raise significant operational challenges. Some respondents suggested to exempt regulated data benchmarks and benchmarks that use readily available data in order to take into account the different risks posed by benchmarks highlighting that the draft RTS is not suitable for these types of benchmarks. One respondent further requested an opt out from all the requirements of the RTS for non-significant benchmarks that would still be subject to the less detailed

regime of Article 12 of the BMR. In particular additional proportionality with regard to the stress-testing and back-testing provisions was proposed by respondents that should (i) depend on the nature, use, complexity and scale of a benchmark and its underlying market (ii) applicable only to critical benchmarks (ii) exempt benchmarks based on transaction data (iii) long lasting benchmarks.

53. ESMA acknowledges the need for further proportionality and has modified the draft RTS accordingly however ESMA does not believe that non-significant benchmarks could be exempted from the RTS as the Level 1 text does not allow for this possibility as is the case for example in Article 11 of the BMR on input data for which guidelines have been set for non-significant benchmarks instead of RTS.

Methodology is robust and reliable

54. With regard to the robustness of the methodology, one respondent requested to define robust methodology: either when (i) the methodology is hard to manipulate, (ii) the methodology is conceptually clear, or (iii) the benchmark can always be calculated, without interruptions or malfunctions. ESMA has further clarified in the report that the robustness means that the methodology is conceptually clear and hard to manipulate.

55. With regard to Article 1(1) of the draft RTS in the CP, in order to enhance proportionality, ESMA has included changes to reflect that the benchmark methodology should not be required to incorporate all relevant factors that are relevant to measure the underlying market. Further, ESMA gives flexibility to administrators to define the key assumptions of the methodology in order to perform the assessment of the relationship between these assumptions and the sensitivity of the benchmarks. ESMA points out that the methodology should be assessed against the different key assumptions, in particular, whether a change of the key assumptions would result in a material impact on the calculation of the benchmark.

56. With regard to Article 1(3) of the draft RTS in the CP, some respondents stated that transaction data should be used where available and appropriate as it is not always appropriate to use such data in particular for commodity and bond benchmarks. As this is a repetition of a provision already included in Article 11(1)(a) of the BMR, ESMA has decided to delete this reference from the draft RTS.

Clear rules identifying how and when discretion may be exercised in the determination of that benchmark

57. With regard to the use of discretion in the benchmark methodology, several respondents referred to the extreme market conditions experienced in March 2020 and the delay of rebalancing decided by some administrators and stressed the need for additional transparency whenever discretion is used. These respondents highlighted that although the administrator rulebook entitled them to exercise such discretion, such decisions may have significant economic consequences on investors and pension funds and, therefore, regulators should set up standards to guide any future similar

decisions. ESMA acknowledges the need for transparency with regard to the use of discretion however, these draft RTS do not address transparency of the methodology that is included in Article 13 of the BMR. ESMA will further assess the need for additional guidance with regard to the use of discretion possibly through Level 3 measures.

58. Further, the draft RTS has been updated to include a non-exhaustive list of the conditions that may cause disruption from using transaction data or any other deviation from the standard methodology. It was also suggested to only use the wording expert judgement throughout the draft RTS as it is defined in Article 3(13) of the BMR as opposed to the discretion and to clarify the difference between Article 2(1)(c) of the draft RTS in the CP and the definition of expert judgement, ESMA points out to the use of discretion in Article 12 of the BMR as opposed to the expert judgement and that the definition of expert judgement includes some potential changes of the use of input data in case of discretion however it does not cover all the cases of changes to the methodology of each benchmark. This is why in ESMA's view the draft RTS should include the need to specify the input data to be taken into account when discretion is used, which may be already covered by the definition of expert judgement.

59. With regard to Article 2(1)(b) of the draft RTS in the CP two respondents highlighted that it was not clear how to elaborate a methodology for the determination of expert judgement and that expert judgement is not always based on an algorithm as it could depend on market conditions, liquidity or technical failures. A proposal to use "criteria for the use of expert judgement" was suggested. ESMA has incorporated these changes to the draft RTS.

Methodology is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data

60. With regard to the back-testing criteria, while the majority of the respondents did not believe that back-testing requirements were appropriate as they are not proportionate to the benchmarks and would need further specification, others mentioned that the capability for back-testing and results obtained should form a part of the regular controls, stressing the usefulness of the back-test to identify possible failures of the application of the methodology, its appropriateness, whether the benchmark still accurately represent the underlying market and allows to extend the amount of available historical data.

61. In particular respondents requested a definition of back-testing, whether it refers to (i) the daily post-calculation validation of a calculated index level or (ii) to the periodic recalculation of historical index levels. According to one respondent, the back-testing should comprise of comparing the observed outcome of the level of the benchmark to other available transaction data that is not used in the calculation of the benchmark. ESMA has included a definition of back-testing in the content of the draft RTS section.

62. Some respondents stressed that, as mentioned in the Level 1, the concept of appropriateness of the back-testing should be maintained in particular, where transaction data is used to calculate the index. Respondents called for flexibility for administrators to assess whether back-testing is appropriate. In particular, the back-testing is subject to the availability of input data to create historical benchmark values and the availability of comparable rates or prices to provide means for interpreting the historical benchmark. ESMA acknowledges the availability of data issue and stresses that in accordance with the Level 1, the draft RTS only apply to these cases where the back-testing is appropriate. ESMA has provided additional clarification in the next section of the report focusing on some cases where the back-testing could be appropriate.

63. Some respondents requested clarification on the assessment of the adequacy and appropriateness of the historical values of the benchmark and the criteria to be used. ESMA has included further clarifications in the content of the draft RTS section.

64. With regard to the statistical tests mentioned in Article 3(2)(c) of the draft RTS in the CP, several respondents expressed their concerns as this assessment could lead to administrators assessing the suitability of a benchmark for an investment strategy which is not the role of an administrator and requested further flexibility. In particular, with regard to the type of statistical tests. ESMA acknowledges the concerns raised and agrees that it is not the administrator role to assess the suitability of a benchmark for an investment strategy. The statistical test's aim is to provide some assurance on the results of the back-testing, however ESMA agrees that more flexibility could be given to administrators with regard to the assessment of the results of the back-testing.

65. With regard to the time horizon, respondents highlighted that the actual time horizon depends on many factors (regions v/s countries, large caps v/s small caps, index objective etc.). The draft RTS refer now to "an appropriate" historical time horizon instead of the "most appropriate" time horizon, as stated by some respondents there are often several possible time periods that would be equally suitable. However, ESMA does not believe that this requirement could be subject to proportionality as requested by stakeholders because the time horizon is an essential element of the back-testing.

66. Two respondents highlighted the disproportionate and unnecessary burden on administrators with regard to the provision in Article 3(2)(d) of the draft RTS in the CP on the documentation of the actions to be taken following the assessment of the results of the back-testing. ESMA acknowledges this and has deleted this provision from the final report.

67. With regard to the frequency of back-testing, the majority of the respondents disagreed with the proposal to set the same frequency as the benchmark's calculation. The proposals for the frequency were (i) identical to the frequency of the calculation of the benchmark only to the degree that would affect the back-test results, (ii) when there is a material change to the methodology (iii) the frequency should depend on the type of

benchmark, for regulated data or readily available data prior to the launch of the index (iv) when the methodology is reviewed.

Methodology is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity

68. While some stakeholders mentioned the importance of hypothetical stress-testing of the methodology to test the resilience of the methodology, others suggested to have a requirement for unrealised stressed market conditions only where appropriate.

69. Some respondents expressed their concerns with regard to the applicability of the stress-testing without taking into account the nature of the input data, nor the risks that the benchmarks pose. For critical benchmarks, there may be a need to ensure that these systemically important benchmarks can continue under adverse conditions. These same risks do not apply to significant nor non-significant benchmarks. Further, administrators should have in place an effective governance framework that allows them to take decisions tailored to the nature of the exceptional and unforeseeable circumstances. ESMA has modified the draft RTS taking into account the feedback received in particular with regard to enhanced proportionality for regulated data benchmarks and specific requirements only applicable to critical benchmarks.

70. With regard to paragraph 44 of the CP, respondents indicated that certain types of benchmarks cease to exist in exceptional circumstances.

Methodology is traceable and verifiable

71. With regard to Article 5 of the draft RTS in the CP, all respondents suggested not to include additional requirements mentioning that the requirements in the draft RTS are sufficient. One respondent further stated that a definition of traceable and verifiable methodology would be welcomed, with traceable being that the historic values of the benchmark can be reconstructed and verifiable being that users of the benchmark agree with its published performance. ESMA believes that a definition of traceable and verifiable methodology is needed and it has been included in the next section however does not believe that verifiable should only be linked to users as Article 12 of the BMR is addressed to administrators that should have a verifiable methodology.

Additional topics raised

72. With regard to the applicability of the draft RTS to the outsourced service providers (e.g. calculation agent) not subject to the BMR (in particular whether the requirements linked to discretion would need to be included in the SLA), ESMA points out to Article 10(1) of the BMR that requires that the outsourced functions shall not impair materially the administrator's control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark. Therefore, it is ESMA’s understanding that the administrator is responsible for the outsourcing and should set the rules to be applicable by the calculation agent.

73. ESMA points out that these draft RTS further specify the requirements in Article 12 of the BMR and that transparency to users of benchmarks is addressed in Article 13 of the BMR. Further, the scope of these additional requirements and the need to insert transitional provisions or a phased approach to implementation would be assessed when the delegated regulation will be finalised as this is not in the mandate of the draft RTS.

74. To the request regarding the “opt out” process from certain provisions of the technical standards, ESMA highlights that this assessment is performed on a case by case basis using the minimum requirements set out in the draft RTS.

75. One respondent highlighted the need to incorporate in the draft RTS a reference to the changes of the methodology requested by a competent authority in particular in the light of the BMR review and the additional powers that competent authorities could have. ESMA acknowledges the issue raised by this respondent however does not have the mandate to introduce such provision as the current mandate covers only the requirements under Article 12(1) of the BMR and not under Article 23 of the BMR.

76. One respondent expressed its concern with regard to the definition of regulated data benchmarks whereby it is currently unclear whether the use of data from trading venues outside the EU can rely on exemptions according to Article 17. ESMA points out that according to the definition of regulated data benchmarks, only third country Trading Venues that are subject to equivalence decision in accordance with EMIR and MiFID are in the scope of this definition.

3.3 Content of the draft RTS

77. As outlined in the previous chapter on the governance arrangements and following the feedback received to the CP, ESMA has added a new article in the draft RTS that relates to the scope of the RTS and in particular the exemption applicable to commodity benchmarks that apply Annex II of the BMR in accordance with Article 19 of the BMR.

78. While the methodology used for calculating the benchmark is defined by each administrator, it is important that this methodology verifies certain conditions as set out in the BMR in order to preserve the integrity of the benchmark.

Methodology is robust and reliable

79. The first condition to be verified is for the methodology to be robust and reliable. ESMA considers that a methodology is robust when it is conceptually clear and cannot be manipulated. To that end and in order to ensure that the methodology complies with point a) of Article 12(1) of the BMR, the administrator should use a methodology that represents the underlying market or economic reality that it seeks to measure and incorporates factors including parameters and input data that are deemed relevant in order to continuously represent the underlying market that it is intended to measure.

80. Methodologies are generally based on assumptions that consist of assuming a behaviour for the sake of simplifications of the methodology while in reality behaviour is different. For example, a common assumption is not to allow a time lag before reinvestment of dividends while in reality a period of time exists between the receipt of the payment of dividends and its actual reinvestment. In order for the methodology to be robust and reliable, the relationship between the key assumptions used in the methodology and the sensitivity of the benchmark computed by that methodology should be assessed, for example, by assessing the impact of a change of an assumption on the end result of the benchmark.

81. A robust methodology is a methodology that uses, where available and appropriate, transaction data. This is appropriate because this data is less prone to manipulation. Therefore, the methodology should state the nature of the input data used in the methodology, for example transaction data, quotes, expert judgement etc. and should specify any criteria to be applicable in specific circumstances.

82. Further, the reliability of the methodology is closely linked to the governance arrangements around its setting and review. To that end, pursuant to Article 5 and Article 7 of the BMR the methodology and the underlying assumptions and criteria are subject to an internal review.

83. As requested by stakeholders, ESMA has enhanced proportionality in this final report and has included an exemption from the assessment of the sensitivity of the benchmark to the key assumptions of the methodology for non-significant and in addition the input data specification for regulated data benchmarks. This additional proportionality would allow to limit the burden on administrators and to take into account the different risks that different types of benchmarks raise.

Clear rules identifying how and when discretion may be exercised in the determination of that benchmark

84. Discretion may be exercised in the determination of the benchmark for example when the underlying market the benchmark seeks to measure does not embed enough transaction data or quotes. Also when discretion is used only in exceptional circumstances, a non-exhaustive list of these circumstances should be specified.

85. Following the feedback received to the CP, this provision has been extended to cover the different types of benchmarks and in particular benchmarks that are not based on transaction data. In this context, a non-exhaustive list of the circumstances in which the components of the methodology cannot be applied and discretion may be exercised in the determination of the benchmark should be provided.

86. In the case where discretion in the determination of the benchmark is used, the methodology of the benchmark should clearly state at which step of the calculation the discretion is performed. Further, the administrator should use a methodology that

clearly states whether discretion is based on an algorithm or a pre-defined methodology or the criteria used for the discretion.

87. The administrator should clearly specify which input data is allowed to be taken into account while using discretion. For interest rates benchmarks, the BMR introduces a priority for using transaction data in the underlying market that a benchmark intends to measure and when they are not sufficient, transactions in related market should be prioritised. The methodology should clearly state in which circumstances transaction data in the underlying market would be considered as not sufficient and therefore the use of transaction data in related markets is needed. Further, the methodology should also clearly specify in the latter case which type of related markets are to be considered appropriate. In general, the priority of use of input data should be as following: (i) eligible transactions in the underlying market that a benchmark intends to measure; (ii) not eligible transactions in the underlying market that the benchmark intends to measure; (iii) transaction data in related markets specifying which type of related markets are to be considered appropriate.

Methodology is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data

88. In order to ensure that the methodology complies with Article 12(1)(c) of the BMR, the administrator should use a methodology that is rigorous and continuous. To that end, the administrator should ensure that the methodology includes at least:

    a. an assessment of the adequacy and appropriateness of the historical values of the benchmark produced by means of that methodology;

    b. reliable inputs, including appropriate size of the data samples, if any.

89. The adequacy and appropriateness of the historical values of the benchmark should be assessed against the methodology of the benchmark. For example, whether the variations of the values observed are consistent with the methodology and the input data used.

90. A methodology is capable of validation when it is subject to appropriate governance arrangements. Pursuant to Article 5 of the BMR on the oversight function, the oversight function is responsible for the review of the methodology at least annually and overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes.

91. Pursuant to Article 12(1)(c) of the BMR, the methodology should be capable of validation including where appropriate back-testing against available transaction data. ESMA highlights that the BMR already sets out a priority of use of input data in the methodology according to Article 11 of the BMR that includes an obligation to use transaction data if available and appropriate. Therefore, the input data used to calculate

the benchmark should be transaction data if transaction data is available and appropriate.

92. The aim of the back-testing of the methodology is to validate the outcome of the calculation that results from the application of the methodology to the input data used. The back-testing against available transaction data should be an ex-post back-testing that could be meaningful in different scenarios:

    a. as this is an ex post calculation, additional data might be available after the calculation of the benchmark that were not used for its calculation but can be used for the back-testing;

    b. back-testing against other sources of transaction data can also give insights on whether the methodology is still appropriate;

    c. back-testing before launching an index to reconstruct the historical values of that benchmark can help verifying the robustness of the methodology.

93. The back-testing frequency should be at least at each review of the methodology of the benchmark and following a material change of the methodology. For regulated-data benchmarks, the frequency of the back-testing may only be at the launch of the benchmark, for critical benchmarks, a monthly back-testing should be performed. Furthermore, administrators should consider the most appropriate historical time horizon for their back-testing programme.

94. In order for the back-testing to be meaningful and the methodology to be reviewed, the administrator should assess the back-testing results. In particular, the administrator should have in place a process to ensure that systemic anomalies highlighted by back-testing are identified and are appropriately addressed.

95. Following the feedback received to the CP, the final report no longer refers to the documented process regarding the action the administrator would take depending on the results of the back-testing on a case by case basis.

96. As requested by stakeholders, ESMA has enhanced proportionality in this final report with regard to the frequency of the back-testing that takes into account the type of the benchmark. This additional proportionality would allow to limit the burden on these administrators.

Methodology is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity

97. The availability of the benchmark in different market conditions is closely linked to the resilience of its methodology. In particular, users of critical benchmarks need to have a continued availability of the benchmarks they reference for use in financial instruments in order to avoid any contract frustration that may rise from a cessation of a benchmark. Therefore, it is of paramount importance that an administrator is able to construct a

methodology that is resilient to different market conditions and a methodology that enables the calculation of the benchmark in the widest set of possible market circumstances.

98. An administrator should assess the resilience of the benchmark's methodology to various market conditions using historical data from realised stressed market conditions and for critical benchmarks hypothetical data for unrealised stressed market conditions.

99. Depending on the type of benchmark the administrator should ensure that the methodology uses parameters and assumptions to capture a variety of historical conditions and for critical benchmarks hypothetical conditions, including the most volatile periods experienced by the markets and correlation between underlying assets.

100. The administrator should ensure that the methodology is resilient to adverse market conditions and therefore the benchmark would not loose representativeness or be ceased in such circumstances unless for benchmarks that are expected to cease to exist in some circumstances.

101. Following the feedback received to the CP, this final report no longer refers to the documentation of the actions the administrator would need to take depending on the results of the assessment relating to the resilience of the benchmark's methodology.

Methodology is traceable and verifiable

102. A methodology that is traceable and verifiable allows for a continuous check and control of each calculation of the benchmark. Traceability should be understood as an ex ante phase that would include the documentation of the different steps of the methodology. Traceability should be the basis for verifiability that would imply the ability to reconstruct the historical values of the benchmark.

103. An audit trail of each calculation of the benchmark is required including the input data used and also the data that were not selected for a particular calculation. Further the reasoning behind such exclusion should be clearly stated. Indeed, this audit trail ensures that the benchmark is calculated in a consistent way. These are sufficiently detailed in Article 8 of the BMR.

104. The assessment of the resilience and back-testing results ensure on an ex-post basis that the benchmark's methodology is still appropriate. These results should also be kept for consistency and comparability purposes between different values of the benchmark.

105. In some cases, input data are prone to manipulation, for example when discretion is used in the determination of the benchmark. In these circumstances, the input data used for the calculation should also include the reasoning behind its

determination. For example, contributors should provide the administrator with a detailed explanation on the determination of the expert judgement and, upon request, demonstrate the underlying calculations. The record keeping requirements under Article 8(1) of the BMR include provisions to that respect.

4 Reporting of infringements (Article 14 BMR)

4.1 Background and legal basis

Article 14 of the BMR

106. Article 14 of the BMR "Reporting of Infringements" provides for different obligations that enables the administrator to identify infringements, especially with regard to benchmark manipulation, and report them to the competent authority.

107. Pursuant to Article 14(1) of the BMR administrators of all benchmarks falling within the scope of Title II are required to "establish adequate systems and effective controls to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark, under Regulation (EU) No 596/2014".

108. Article 14(2) of the BMR sets forth the obligation for the administrator to monitor input data and contributors to be able to notify and provide the relevant information to the competent authority in case of manipulation. Article 14(3) requires the establishment of a whistle blowing procedures regarding any possible infringement of the BMR obligations.

109. Article 14(4) of the BMR states that "ESMA shall develop draft regulatory technical standards to specify the characteristics of the systems and controls referred to in paragraph 1 [of Article 14 of the BMR]."

Other provisions relevant to data integrity in the BMR

110. Recital 30 of the BMR states "*the integrity and accuracy of benchmarks depends on the integrity and accuracy of the input data provided by contributors*". Consistently, different provisions of the BMR ensure systems and effective controls are in place on the side of the contributors and of the administrator alike to ensure the integrity of input data.

111. Article 11 of the BMR on input data lists the requirements input data used for the provision of a benchmark need to meet and Article 11(2)(c) of the BMR in particular, provides for administrators to perform controls which shall entail validation, against other indicators or data, to ensure the data integrity and accuracy. In addition, Article 11(3) of the BMR states that, where the input data of a benchmark is contributed from

a front office function, the administrator shall obtain data from other sources that can corroborate the input data.

112. Pursuant to Article 11(5) of the BMR, Commission Delegated Regulation 2018/1638 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council describes (i) how to ensure that input data is appropriate and verifiable, and (ii) the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark shall ensure are in place where the input data is contributed from a front office function. Pursuant to Article 11(6) of the BMR the same controls are prescribed for other types of benchmark through guidelines.

4.2 Feedback from stakeholders

113. The majority of the stakeholders responded positively to the general criteria set out in the CP, although also some suggestions for change have been proposed. Some of the suggestions were more general, applying also to other sections of the CP, whereas other comments were specifically aimed at this particular section.

114. Several stakeholders suggested that the additional requirements should only be required in case of contributed input data, and particularly input data that is directly submitted to the administrator, since in those cases the risk of actual or potential manipulation would be the most significant.

115. ESMA realises that indeed the risk of potential or actual manipulation is more prominent in case of the use of contributed data like interest rate benchmarks, however it cannot be excluded that this may occur also with other kinds of benchmarks. For that reason the 'appropriate and 'proportionate' elements in relation to the nature and complexity of the benchmark provision' element were inserted that allows that benchmark administrators that may be less prone to any actual or potential manipulation to take the measures that are suitable for that particular benchmark. This will for example allow administrators providing benchmarks on the basis of readily available data to take less stringent measures than administrators providing interest rate benchmarks. On the other hand, it will also require administrators to explain upon request by the competent authority why the implemented measures are appropriately proportionate in respect to their benchmark production.

116. A few stakeholders also mentioned that for the installation of automated systems, administrators would need to incur significant costs which may be disproportionate to the level of risk posed by the majority of benchmarks. It was therefore suggested to restrict this to benchmarks that are critical under the BMR and/or pose the greatest risk of manipulation.

117. ESMA is aware that the implementation of automated system may require some efforts from benchmark administrators, however Article 14 of the BMR does not restrict this requirement only to critical benchmark administrators.

118. Stakeholders furthermore indicated that the reporting obligations should extend only to input data itself and not at a level below as long as the conduct or activity in such underlying financial instrument(s), whether considered alone or collectively with other financial instruments, cannot affect the benchmark level unless it is clear, from the conduct or activity observed, that the behaviour of the financial instrument at a level below input data, represents manipulation or attempted manipulation.

119. Some stakeholders in particular also mentioned that a benchmark administrator cannot monitor all events (including manipulation or attempted manipulation) on the markets, e. g. exchanges, which could ultimately and indirectly have an influence on the value of a benchmark, as such it may not always be possible for index administrators using regulated data to monitor potential input data manipulation, taking into account the information accessible to a benchmark administrator. A benchmark administrator may only have access to data from vendors or publicly available data and for that reason it was suggested that this responsibility should rest with the source data provider or exchange operator.

120. Stakeholders also mentioned that benchmark administrator can only perceive a manipulation or attempted manipulation in the sphere that it controls and that therefore it could be more reasonable to expect benchmark administrators, as part of the verification and validation processes, to establish (and maintain over time) tolerances and/or threshold checks and other such procedures that are targeted to help it determine implausible and potentially suspicious instances of input data to the extent they may result in benchmark manipulation. It was suggested to supplement existing Article 11 of the BMR to determine what additional checks might be appropriate.

121. In addition, it was also mentioned that the reception of anomalous or deviating data is not necessarily due to a manipulation attempt can be caused by a human error or an IT failure and that administrators should enter into a dialog with the contributor first and only if the administrator is not satisfied with the contributor's answers that a suspicion can appear.

122. ESMA understands that benchmark administrators may have some limitations with regard to the level of control of input data and that they may not always have direct access to the underlying data from external pricing providers, sources, venues or operators, however they should as far as appropriate and proportionate, still be able to identify possible or attempted manipulation of any underlying market, if it becomes clear that this may also affect the level of the benchmark. To this end the benchmark administrator will need to implement adequate systems which should be complemented with human analyses, systems and procedures that will assist the automatic systems in the prevention and detection of any benchmark manipulation. As such automated systems and human analyses should co- exist, which will also decrease the possibility of human errors of IT failures and reduce the impact on the resources of the administrator personnel as well of the NCAs. Also, where transaction data are accompanied by expert judgment, e.g. in the case of a waterfall methodology it is crucial that automated systems and human analyses are both being applied.

123. Although the contributor may already have its own controls in place, the administrator will also be responsible for determining if any input data is suspicious regardless of any particular expressed views of the contributor on the contributed input data, which does not mean that any communication between the administrator and the contributor should not take place. This ongoing communication between the administrator and the contributor should also avoid that contributors may become discouraged from contributing to the benchmark, due to the implementation of a too rigid and restrictive manipulation detection system by the administrator.

124. Some stakeholders also preferred that administrators of non-significant benchmarks similar to other provisions of the BMR, should be able to opt out from complying with these additional requirements. It was also suggested that ESMA applies a Risk Based Approach with regard to non-significant benchmarks.

125. Article 26 of the BMR, however only refers to the possibility to opt out of Article 14(2) of the BMR. Since the additional requirements are only based on Article 14(1) of the BMR, applying the opt-out mechanism for non-significant benchmarks is not possible here. Furthermore, the inclusion or the 'appropriate and 'proportionate' elements in the RTS, will already allow for the administrator to implement the set requirements on the basis of the particular benchmarks it administrates, a Risk Based Approach is therefore not necessary in the opinion of ESMA.

126. Some stakeholders also noted that the current definition in Article 3(1)(24) of the BMR should be amended by defining "regulated data" instead of "regulated-data benchmarks" so to expand the scope of application to all regulated data regardless of whether they are used in conjunction with non-regulated data in specific benchmarks as well as equity benchmarks using different kind of non-EU stock prices. However, the 'regulated-date benchmark' definition is a Level 1 BMR definition and it cannot be amended by ESMA. The same definition restriction applies to third country benchmarks that derive from third country trading venues that are not deemed equivalent, and thus not qualified as regulated data benchmarks under the BMR, including EU based benchmarks that use input data from trading venues and exchanges based outside of the EU.

127. A stakeholder also noted that the size of the administrator may not be the best criterium to determine what system is appropriate and proportionate for an administrator, since also small administrators may be capable of producing a complex benchmark which measures volatile, concentrated markets. ESMA indeed recognises this point and will therefore apply the criteria of the nature and complexity of a benchmark instead.

128. A stakeholder has also noticed that some terminology used in the text was somewhat unclear as this terminology is more used in the sphere of the General Data Protection Regulation (Regulation (EU) 2016/679). ESMA acknowledges this and has updated some of the terminology.

129. A stakeholder also mentioned that there was an overlap between Article 4 of the draft RTS in the CP 'adequate systems' and Article 2 of the draft RTS in the CP. For that reason, ESMA has integrated the main elements in Article 2 of the draft RTS, currently called 'adequate systems and effective controls'.

130. Stakeholders also proposed that the Benchmark Manipulation Assessment could be carried out at the benchmark-family level or for several benchmark families sharing similar characteristics and input data at the same time. ESMA see merit in this proposal, nevertheless the BMR does not allow for such an option.

131. Finally, several stakeholders noted that there might be various aspects that would make the oversight function not the most suitable function to act as the main reporting function to the competent authority regarding manipulation or attempted manipulation. It was argued that the monitoring of market abuse is more an operational function and that only the management is held accountable for taking operational decisions. Furthermore, it was mentioned that if the Oversight Committee ought to be the main reporting function, this should have been reflected in the Level 1 BMR text. Furthermore, it was also indicated that the Oversight Committee's role is to challenge and provide oversight to the decisions made by the management committee in respect to the benchmark. The practical aspects include the issues that the administrator may be confronted with in relation to the specific function of the Oversight Committee and the operational processes of the administrator. For the reporting itself the, practical concerns are the immediate reporting requirement, the risk of 'tipping off' and potential conflicts of interest. A conflict of interest may occur if the oversight function including the external members of this oversight function is in its entirely and in full detail informed and made responsible for the reporting of manipulation or attempted manipulation to the competent authority.

132. ESMA has decided to withdraw the article detailing the arrangement for the reporting to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark, since ESMA's empowerment under Article 14(4) of the BMR is to specify the characteristics of the systems and controls.

4.3 Content of the draft RTS

RTS scope

133. Article 14(1)(2) of the BMR on Reporting of infringements does not apply to regulated data benchmark (see Article 17(1) of the BMR).

134. In addition to this, according to Article 19 of the BMR, for commodity benchmarks, the requirements of Annex II of the BMR apply instead of the requirements of Title II of the BMR on Benchmark Integrity and Reliability (including Article 14 on Reporting of infringements). Only commodity benchmarks which are (i) regulated data benchmarks; (ii) based on submissions by contributors the majority of which are supervised entities, and (iii) critical benchmarks and the underlying asset is

gold, silver or platinum are not subject to this rule. The specific rule contained in the BMR for commodity benchmarks is due to the sector specific characteristics of such benchmarks which make necessary the application of the specific provisions contained in Annex II instead. Annex II also provides for some specific obligations to ensure commodity benchmark integrity.

135. As a result, the obligations set forth in Article 14 on Reporting of infringements contained in title II of the BMR are not applicable to commodity benchmarks, which are instead subject to the specific provisions set forth in Annex II of the BMR in respect to data integrity.

Adequate systems and effective controls

136. The "adequate systems" and "efficient controls" described under Article 14 of the BMR are the arrangements, comprising hardware, programmes and procedures, that the administrator is required to have in place in its organisation to ensure data integrity and manipulation detection.

137. For the concept of "manipulation" Article 14 of the BMR refers to the definition of manipulation or attempted manipulation of a benchmark under Regulation (EU) No 596/2014[4] ('MAR'). Pursuant to Article 12(1)(d) of MAR, Market manipulation of benchmarks relates to "*transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark*."

138. Recital 44 of the MAR cites that attempts to engage in market manipulation occur when the activity aimed at committing market manipulation has started but has not been completed, for example as a result of failed technology or an instruction which is not acted upon.

139. Considering the direct reference to market manipulation, ESMA reads the provision contained in Article 14 of the BMR as providing for specific controls aimed at detecting behaviours able to jeopardise data integrity through data manipulation. As a result, the provision at matter on reporting of infringements provides an additional obligation for the administrator, in respect to the data integrity controls described under Article 11 of the BMR, to establish and maintain appropriate systems and controls addressed specifically to detect any manipulation or attempted manipulation which may compromise data integrity.

140. The systems and controls required under Article 14(1) of the BMR, required to identify conduct that may involve manipulation or attempted manipulation of a

[4] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, p. 1.

benchmark, have synergies with the controls implemented to ensure data integrity, as benchmark manipulation affects the integrity of input data.

141. The actual reporting of any manipulation or attempted manipulation of a benchmark to the competent authority is not in scope of the RTS but should be done in accordance of Article 14(1) of the BMR. Also, the internal reporting within the benchmark administrator is not in scope of these RTS.

142. In order to ensure a benchmark administrator has adequate systems and controls to satisfy the requirements under Article 14(1) of the BMR, an administrator should undertake an assessment to evaluate the risks related to data integrity that its benchmark may be subject to. Such assessment should take into account the nature of the benchmark, such as the vulnerability of the input data and the nature of the contributors. Taking into consideration the particular features of the benchmark, the assessment should be aimed at evaluating, the origin, nature, particularity and severity of the risk of manipulation. The outcome of the assessment can then be taken into account to (i) determine which are the appropriate technical measures to reduce the risk (prevention) and (ii) determine the controls that need to be carried out on the risk sources which have been identified.

143. For example, where a benchmark is based on input data from contributors, part of the process entails the transmission of data from contributors to the administrator and also feedback from the administrator to the contributors for notification purposes.

144. Administrators should consider the extent to which communication channels used for the transmission of input data are vulnerable in terms of allowing for data alteration. Enhanced supervision of these channels, or other additional security measures, may be necessary to reduce these risks and to allow for the identification of potential misconduct.

145. When the transmission of input data is performed manually, additional checks should also be ensured, such as four-eye controls.

146. Adequate systems and effective controls are at the core of the RTS and it is the obligation for the benchmark administrators to establish and maintain adequate and effective, systems and controls aimed at preventing and detecting market manipulation and attempted market manipulation.

147. ESMA acknowledges that such obligation applies to a very broad range of entities and that the adequacy and proportionality of the systems and controls are likely to depend on the nature and complexity of the benchmark. The scale of the administrator may be less relevant here, since also smaller benchmark administrators may be able to produce complex benchmarks which measures volatile, concentrated markets.

148. The appropriateness and proportionality, and also the nature and complexity of the benchmark, will determine the complexity of the automation administrator will need to have in place to detect potential manipulation. For complex and more risk exposed benchmark activities, the automated system for detecting may need to be more sophisticated than for simple less risk exposed benchmarks. Administrators should also be able to explain upon request why the level of automation chosen is appropriate in respect to their benchmark production.

149. Regardless of the type of system used, the controls should cover the full range of operations undertaken by the administrator to produce the benchmark which involve data management. In addition, controls should enable alerts anytime there is the suspicion that false or misleading information in relation to the benchmark may jeopardize the benchmark's integrity.

150. Human analysis will also play an important role in the detection of manipulation. The most effective form of identification will likely be a combination of automated and human controls. Human controls, in particular, may be deployed to discern whether suspect input data may be linked to manipulative behaviour with human intervention.

151. ESMA clarifies that regardless of the presence of an automated system, part of the staff involved in the protection of data integrity pursuant to Article 6 of the BMR on the control framework shall be in charge of the controls aimed at detecting any conduct that may involve manipulation or attempted manipulation.

152. The administrator also has the option to outsource the performance of the systems and controls aimed at protecting data integrity and detecting manipulation to dedicated service providers. In such case, the administrator should comply at all times with the requirements on outsourcing under Article 10 of the BMR and should remain fully responsible for discharging the relevant obligations, as mentioned in the RTS.

Training

153. Effective detecting is not limited to an automated system being in place but also includes comprehensive training and a culture within an entity dedicated to identifying suspicions of manipulation. Training, in particular, plays a key role in staff's ability to detect suspicious behaviours.

154. Entities should ensure that staff involved in securing integrity of input data should undergo specific training. Such training programmes should reflect the need to ensure that dedicated staff are aware of the features of proper input data submission and of discrepancies in data potentially caused by manipulation or attempted manipulation. As a result, staff involved in the protection of data integrity should be confident in their ability to identify suspicious input data behaviour and it is recommended that this result is achieved also through specific training for staff newly responsible for data management.

155. In order to increase awareness of manipulation risk and importance of market integrity, administrators may consider providing more general market abuse training to a wider staff population than those directly involved in detecting, where it appears appropriate to the nature and complexity of the benchmark.

156. ESMA also considers it would be inappropriate to be specific with regards to training and adopt a one size fits all approach due to the variety of business structures. ESMA confirms that it does not deem appropriate to provide granular details of training programmes content or structure, as effective training will need to be tailored to the administrator's nature, complexity and risk of manipulation.

Input Data integrity policy

157. The production of a input data integrity policy, describing the adequate and effective, systems and controls adopted by the administrator to ensure input data integrity and detect potential manipulation appears to be a useful tool for the administrator to demonstrate its compliance with the requirements set forth by Article 14 of the BMR.

158. To achieve this the minimum content of the policy should entail: (i) the assessment of manipulation risk based on the benchmark's features; (ii) the description of the safeguards adopted by the administrator to prevent and detect risk; (iii) the explanation of why systems and controls adopted are deemed to be adequate and effective in respect to the risk assessed; (iv) the indication of training activities performed; (v) an organigram of the administrator's detecting function, setting out who will be conducting detecting activities. Administrators should ensure that staff undertaking detecting activities have the appropriate skills to undertake the work.

5 Mandatory administration of a critical benchmark (Article 21 BMR)

5.1 Background and legal basis

159. Article 21(5) of the BMR adds to Article 21 of the BMR, Mandatory administration of a critical benchmark, a new paragraph 5 stating that: "*ESMA shall develop draft regulatory technical standards to specify the criteria on which the assessment referred to in point (b) of paragraph 2 [of Article 21 of BMR] is to be based*."

160. The BMR considers the cessation of the administration of a critical benchmark as a matter of financial stability. For this reason, Article 21 of the BMR on "Mandatory administration of a critical benchmark" provides competent authorities of critical benchmarks with a specific power that can be used when an administrator of a critical benchmark intends to cease providing such benchmark. In this scenario, the relevant competent authority can compel the administrator of the critical benchmark to continue publishing the benchmark until one of the conditions in Article 21(3) of the BMR occurs

and for a maximum period of five years (this five-year period was introduced by the amendments to BMR made by Regulation (EU) 2019/2089[5]). The authority should take the decision following two sequential assessments analysing either how the benchmark is to be transitioned to a new administrator or ceased to be provided.

161. The first assessment must be produced and submitted by the administrator of the critical benchmark within four weeks of it having notified its competent authority about the intention to cease the provision of the critical benchmark. The second assessment must be produced by the authority itself, within four weeks following the receipt of the first assessment. Both assessments must analyse either how the benchmark is to be transitioned to a new administrator or how the benchmark should ceased to be provided. For the cessation of the provision of the critical benchmark the assessments of both the administrator and the competent authority must take into account the procedure published by the administrator according to Article 28(1) of the BMR. This procedure must include the actions to be taken by the administrator in the event of changes to or the cessation of the benchmark(s) provided by the same[6].

162. Following completion of its assessment, in accordance with Article 21(3) of the BMR the competent authority has the power to compel the administrator to continue publishing the benchmark until such time as:

a. the provision of the benchmark has been transitioned to a new administrator;

b. the benchmark can cease to be provided in an orderly fashion; or

c. the benchmark is no longer critical.

163. The initial period for which the competent authority may compel the administrator to continue to publish the benchmark cannot exceed 12 months. By the end of that period, the competent authority should review its decision to compel the administrator to continue to publish the benchmark. The competent authority may, where necessary, extend that period for an additional 12 months. The maximum period of mandatory administration shall not exceed five years (following the amendments to BMR made by Regulation (EU) 2019/2089).

164. Article 21(1) of the BMR indicates that, when an administrator intends to cease providing a critical benchmark, there are two alternative options to be assessed. In the first option, the administrator assesses the transition of the critical benchmark to a new administrator which is already identified by the current administrator, and produces an

[5] Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (Text with EEA relevance):
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2089

[6] BMR Article 28(1): *An administrator shall publish, together with the benchmark statement referred to in Article 27, a procedure concerning the actions to be taken by the administrator in the event of changes to or the cessation of a benchmark which may be used in the Union in accordance with Article 29(1). The procedure may be drafted, where applicable, for families of benchmarks and shall be updated and published whenever a material change occurs*.

analysis explaining how this would happen. In the second option, the administrator assesses how the benchmark ceases to be provided. According to Article 28(1) of the BMR, each administrator of benchmarks must produce and publish a procedure concerning the actions it would take in the event of changes to or the cessation of a benchmark which may be used in the EU in accordance with Article 29(1) of the BMR. The assessment by the administrator under the second option must take into account the aforementioned procedure that the administrator has already published but should also consider additional factors.

165. In both scenarios, it is likely that the competent authority's assessment would take into account the content of the assessment sent by the administrator to the authority.

5.2 Feedback from stakeholders

166. All respondents in principle agreed on the criteria included in the CP, albeit some have raised further points to ESMA's attention – either asking for more clarity or putting forward some additional proposals to be considered.

167. In relation to the transition of the critical benchmark to a new administrator, some respondents suggested that a public consultation is held prior to assigning a new administrator to the critical benchmark. Article 2(1)(b) of the draft RTS of the CP already required competent authorities to consider whether the current administrator of the critical benchmark engaged or informed contributors (if any), users and other stakeholders about the possible transition of the critical benchmark to a new administrator.

168. It should be noted that Article 21 of the BMR does not require administrators of critical benchmarks to consult upon their plan to move the benchmark to another administrator. This step is not formally foreseen by the procedure described in Article 21 of the BMR: administrators of critical benchmarks are only required to notify their competent authority and produce an assessment on the future of the critical benchmark to be shared with the relevant authority. A consultation with the public can take place even if not required by BMR, but the requirement to consult on the plan to move to the critical benchmark to a new administrator cannot be provided in the draft RTS. What the draft RTS can provide is to require the NCAs to take into account whether a consultation took place. On the basis of the feedback received, ESMA modified Article 2(1)(b) of the draft RTS to include also reference to a public consultation.

169. One respondent suggested including the following criteria in Article 2 of the draft RTS on transition to a new administrator: methodological continuity be assured in the transition phase; requirements of transfer of historical data accumulated by the present administrator are specified; the ability of the new administrator to gather and process the data is taken into account; requirement for testing the correct functioning of IT infrastructures of the new administrator be envisaged.

170. While ESMA considers this suggestion as a fair comment, it should be noted that the draft RTS cannot impose new requirements not already present in the BMR. The draft RTS can only include criteria to be considered by the relevant competent authority. It should be noted that points (c) and (d) in Article 2 of the draft RTS in the CP already made reference to possible methodology changes, and access to the same input data: (c) the way in which the new administrator intends to calculate the benchmarks, and whether any of the following procedures of the critical benchmark are intended to be amended by the new administrator and, if so, how they would comply with BMR: the methodology (including quality of input data), contingency computation methodology, policies for handling data errors, republication policy, transparency policy, review of methodology, code of conduct; (d) whether the new administrator will have access to the same input data as the previous administrator. Following this comment, point (d) has been amended to reflect the suggestion made.

171. Another comment was made in relation to the transition of the critical benchmark to a new administrator. One respondent argued that criteria regulating the transitioning should not prevent an administrator from transferring administration of a benchmark in any way permitted under the BMR (e.g. no prejudice to new administrators in third countries). ESMA confirms that the criteria listed in the draft RTS should not be seen as elements modifying the underlying BMR framework, but only criteria limited to the production of a comprehensive assessment by the authority to analyse the use of mandatory administration powers on a case-by-case basis.

172. In relation to the cessation of the critical benchmarks, some respondents suggested to require a consultation by the administrator regarding the discontinuation of the benchmark. As already said, while the draft RTS cannot add requirements on top of the ones already existing in the BMR text, this suggestion is translated into a new criterion that the competent authority should consider in its assessment. The new criterion requires the authority to assess whether the administrator engaged, or informed contributors (if any), users and other stakeholders, or publicly consulted about the possible cessation of the critical benchmark.

173. One respondent called for more clarifications and details on Article 3(1)(b) of the draft RTS. In relation to point (iv), it was noted that Article 28(1) of the BMR does not require administrators to include alternative benchmarks in their written plan. This is noted, and the proposed criteria under point (iv) is deleted following this comment. Other comments on Article 3(1)(b) of the draft RTS concern the obligatory nature of the evidence-based assessment by the administrators and, more generally, whether the criteria listed under point (b) should be implemented by the administrators when complying with Article 28(1) of the BMR.

174. Finally, some comments received made direct reference to the on-going reform of interest rates and -IBORs worldwide. ESMA would like to clarify that the draft RTS should be applicable to all types of critical benchmarks, and not only to interest rates.

5.3 Content of the draft RTS

175. The competent authority should assess how the benchmark will be transitioned to a new administrator, or ceases to be provided, taking into account the procedure established by the administrator according to Article 28(1) of the BMR.

Assessment of how the benchmark will be transitioned to a new administrator

176. In relation to the transition of the provision of the critical benchmark to a new administrator, a number of criteria should be considered. Compared with the CP, some of them have been modified following the feedback received by the public.

177. The characteristics of the proposed new administrator should be checked against all the applicable requirements of the BMR. Most importantly, the new administrator should be able to ensure the continuity of the provision of the critical benchmark, in a way that EU supervised entities can continue to use such critical benchmark without interruption and in compliance with BMR. If it cannot do so, then either the competent authority should mandate continued publication by the current administrator until such continuity can be assured (up to the maximum period permitted), or the transition should be treated as an intention to cease the provision of the benchmark, as it will cease to be provided to users in the EU.

178. The capability of the administrator to provide a critical benchmark should be analysed. BMR applies additional obligations to administrators of critical benchmarks, compared to administrators of benchmarks that are significant and / or non-significant. For candidates that are already authorised under BMR, the authority should assess their ability to cope with the requirements that do not apply to significant and non-significant benchmarks. New authorisation would not be needed in the case of an authorisation already granted and reflected in the ESMA register, however the relevant authority should be satisfied that the administrator has all internal arrangements ready for the provision of a critical benchmark.

179. In cases in which the proposed administrator is not authorised, even if it is already registered, the proposed administrator must apply for an authorisation. BMR does not foresee any process for upgrading a registered administrator to an authorised administrator, so in this scenario the proposed administrator will have to submit an application to be authorised for the provision of the critical benchmark.

180. It is a pre-condition to the transition of the provision of a critical benchmark that the proposed new administrator is authorised under the BMR before the transition is completed. The only exception to this is the case in which candidate(s) are exempted from the BMR under Article 2(2) (e.g. central banks). In these cases, BMR authorisation is not required.

181. It is be noted that if the candidate administrator is located in a Member State that is not the one of the competent authority producing the assessment, a different

competent authority might be responsible for the supervision of the new administrator. The assessment should consider the effect of this situation on the supervision of the critical benchmark. In these cases, cooperation with the new competent authority will be necessary. Cooperation among the two authorities will also be needed in the preparation of the assessment, as the authority of the proposed new administrator would have access to relevant information for the production of the assessment, in particular if the administrator is already registered, authorised or supervised in that Member State.

182. Besides the analysis focusing on the candidate administrator, the assessment of the competent authority should analyse the operational way in which the provision of a critical benchmark moves from the current administrator to the new administrator. For this purpose, the following criteria should be considered:

a. whether the administrator engaged and or informed contributors (if any), users and other stakeholders, or publicly consulted about the possible transition of the critical benchmark to a new administrator;

b. The way in which the new administrator intends to calculate the benchmarks. Assessment on whether any of the following procedure of the critical benchmarks are intended to be amended by the new administrator, and in which way they would comply with BMR: the methodology (including quality of input data), contingency computation methodology, policies for handling data errors, redetermination of the benchmark policy and transparency of the methodology policy, the code of conduct.

c. Whether the new administrator will have access to the same input data as the previous administrator, including historical data held by the current administrator, and whether the IT infrastructures of the new administrator have been tested for the provision of the critical benchmark. If there is a panel, an additional criterion is how the new administrator will interact with panellists (will panellists accept to be part of a panel managed by a different administrator?) and more generally if the proposed administrator still fulfil article 11(1)(d) of BMR: "*Where a benchmark is based on input data from contributors, the administrator shall obtain, where appropriate, the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure".*

d. The way in which the new administrator will publish the critical benchmark: standard daily publication arrangements, frequency, website, accessibility (whether upon payment of a fee of free of charge).

e. Whether a detailed plan for the switch date has been produced, and if so whether it deals with all the possible issues stemming from the transition to a new administrator.

f. Legal risks involved in the transition, including the risk of contract frustration, and the accounting and tax implications of the critical benchmark being provided by a new administrator, if any.

g. The impact (if any) of the transition to a new administrator on market infrastructures, notably clearing houses

Assessment of how the benchmark ceases to be provided

183. In relation to the cessation of the provision of the critical benchmark, taking into account the procedure established by the administrator according to Article 28(1) of the BMR, the following criteria should be considered by the competent authority. Compared with the CP, some of them have been modified following the feedback received by the public.

a. The dynamics of the market or economic reality the critical benchmark intends to measure and whether the underlying market is inactive, or almost so. In relation to this, it should also be considered whether there exists input data of quality and quantity sufficient to represent the underlying economic reality with precision. This should be analysed having in mind the fact that, being a critical benchmark, it is one of the most used benchmarks in the EU.

b. The appropriateness and effectiveness of the procedure established by the administrator according to Article 28(1) of the BMR for the purposes of terminating the provision of the critical benchmark. The procedure can be tested against some pre-defined questions, such as: Does its content precisely define the actions and steps to be taken to cease the provision of the critical benchmark in an orderly fashion? Can that procedure still be considered feasible under the circumstances in which the use of the power of mandatory administration is being considered by the relevant authority? It is possible that the procedure has been drafted a considerable time before the application of Article 21 of the BMR: the surrounding landscape may have changed in a way that some steps of the procedure are no more viable. The appropriateness of the procedure established by the administrator according to Article 28(1) of the BMR in light of the prevailing circumstances and landscape at the time of the proposed cessation of publication may also be tested against various criteria, i.e.:

- the volume and value of financial instruments and financial contracts referencing the benchmark, and of investment funds using the benchmark for measuring their performance;

- the term, duration, maturity or expiry date of any financial instruments, financial contracts and other documents entered into for a purpose set out at Article 3(1)(7)(e) of the BMR and which refer to the relevant benchmark, and whether the benchmark will continue to be provided

for use by the existing users for an appropriate period of time and whether the plan provides for such changes to the benchmark (including but not limited to changes to its input data, contributors or methodology) as may be necessary to ensure it is appropriate and sufficiently robust as to be sustainable throughout this period; and

- the likelihood that any such financial instrument, financial contract or other document entered into for a purpose set out at Article 3(1)(7)(e) of the BMR, would be frustrated in the event of the cessation of the relevant benchmark.

c. The application of Article 28(2) of the BMR by supervised entities using the critical benchmark. Article 28(2) of the BMR requires supervised entities that use a benchmark to ensure that their written plans, where feasible and appropriate, identify one or several alternative benchmarks that could be referenced to substitute the benchmarks no longer provided. However, market participants can comply with Article 28(2) of the BMR in different ways. So even if the level of compliance with Article 28(2) of the BMR in the market is found to be high, it should not be assumed that the different written plans are consistent and work properly if applied at the same time. A crucial element in the fallback clauses that can be used to comply with Article 28(2) of the BMR is the trigger event(s) and these may not always be aligned across contracts.

d. Alternative / fallback benchmark. An important element to be considered is whether the supervised entities using the critical benchmarks have identified a fallback benchmark to the critical benchmark. Have the different supervised entities adopted the same fallback benchmark? Has the same fallback benchmark been adopted in different asset classes? This is particularly relevant in the case of related contracts (e.g., derivatives and cash products, or loans, securitisations and derivatives). Is this fallback benchmark BMR-compliant? i.e. is the administrator of the fallback rate authorised, registered, recognised or benefitting from an equivalence decision under the BMR? Cooperation with the competent authority of administrators of these benchmarks is envisaged. If the fallback benchmark is not BMR compliant, can the mandatory administrator provide for the necessary period of time to allow the fallback benchmark to become BMR compliant?

e. Analysis of whether the cessation of the benchmark or its provision on the basis of input data or of a panel of contributors no longer representative of the underlying market or economic reality would have an adverse impact on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the EU. For this end, reference can be made to points (a), (b) and (c) of Article 20(3) of the BMR.

f. Whether the administrator engaged with or informed contributors (if any), users and other stakeholders, or publicly consulted about the possible cessation of the critical benchmark;

g. Additional factors to be considered: legal risks involved in cessation, including contract frustration, and the accounting and tax implications for end-users of the critical benchmark no longer being provided.

h. Impact of the cessation of the critical benchmarks on market infrastructures, including clearing houses, should also be taken into account.

6 Non-significant benchmarks (Article 26 BMR)

6.1 Background and legal basis

184. The BMR includes a proportionate regime depending on the usage of a benchmark in the EU. Benchmarks are considered critical, significant or non-significant depending in particular on the total value of the financial contracts, instruments or investment funds referencing those benchmarks. Administrators of non-significant benchmarks are subject to a less demanding regime. In particular, Article 26(1) of the BMR lists the requirements that administrators of non-significant benchmarks may choose not to apply. In case an administrator of non-significant benchmarks chooses not to apply one or more of the provisions listed in that Article, then it must publish a compliance statement explaining why it is appropriate not to comply with those provisions.

185. Pursuant to Article 26(4) of the BMR, the relevant competent authority must review the compliance statement and may request additional information from the administrator in accordance with Article 41 of the BMR and may require changes to ensure compliance with the BMR.

186. Article 26(6) of the BMR states that “ESMA shall develop draft regulatory technical standards to specify the criteria under which competent authorities may require changes to the compliance statement as referred to in paragraph 4 [of Article 26 of the BMR].”

187. The provisions that administrators of non-significant benchmarks may not apply are the following:

a. Article 4(2), Article 4(7)(c), (d) and (e) and Article 4(8) of the BMR relating to the governance and conflict of interest requirements: An administrator of a non-significant benchmark may choose not to apply the requirement that the provision of the benchmark must be operationally separated from any part of the

administrator's business that may create an actual or potential conflict of interest. In addition, it may choose not to apply certain requirements related to its employees and any other natural person whose services are placed at its disposal or under its control and who is directly involved in the provision of the benchmark. Those requirements are that the employees and natural persons concerned must (i) not have interests or business connections that compromise the administrator's activities, (ii) be prohibited from contributing to a benchmark determination by way of engaging in bids, offers and trades on a personal basis or on behalf of market participants, except where such way of contribution is explicitly required as part of the benchmark methodology and is subject to specific rules therein, and (iii) be subject to effective procedures to control the exchange of information with other employees involved in activities that may create a risk of conflict of interest or with third parties, where that information may affect the benchmark. Finally, an administrator of non-significant benchmarks may choose not to establish specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, including sign-off by management before the dissemination of the benchmark.

b. Article 5(2), (3) and (4) of the BMR relating to the oversight function requirements: While administrators of non-significant benchmarks must establish an oversight function, they may be exempted from (i) developing and maintaining robust procedures regarding the oversight function, (ii) ensuring that the oversight function complies with the responsibilities mentioned in Article 5(3) of the BMR, and (iii) complying with the requirements related to the appropriate governance arrangements of the oversight function.

c. Article 6(1), (3) and (5) of the BMR relating to the control framework requirements: Administrators of non-significant benchmarks may be exempted from putting in place a control framework that ensures that their benchmarks are provided and published or made available in accordance with the BMR. Furthermore, such administrators are not required to include in their control framework (a) management of operational risk; (b) adequate and effective business continuity and disaster recovery plans; (c) contingency procedures that are in place in the event of a disruption to the process of the provision of the benchmark. Finally, the control framework is not required to be documented, reviewed and updated.

d. Article 7(2) of the BMR relating to the accountability framework requirements: An administrator of non-significant benchmarks is not required to designate an internal function with the necessary capability to review and report on the administrator's compliance with the benchmark methodology and the BMR.

e. Article 11(1) (b), Article 11(2) (b) and (c) and Article 11(3) of the BMR relating to input data: The input data is not required to be verifiable. An administrator of non-significant benchmarks is not required to include in its controls in respect of input data (i) a process for evaluating a contributor's input data and for stopping the contributor from providing further input data or applying other penalties for non-

compliance against the contributor, and (ii) a process for validating input data. Finally, no obligation to obtain data from sources that corroborate the input data and no internal oversight or verification procedures are mandatory when input data is contributed from a front office function.

f. Article 13(2) of the BMR relating to the transparency of the methodology of the benchmark: While administrators of non-significant benchmarks are required to consult on any proposed material change of the methodology and establish corresponding procedures, they are not required to include in the procedures an advance notice of the consultation and make accessible after any consultation the responses to it.

g. Article 14(2) of the BMR relating to the reporting of infringements: While administrators of non-significant benchmarks are required to establish systems and effective controls to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark under MAR, they are not required to monitor the input data and contributors in order to be able to notify to the NCA any suspected misconduct.

h. Article 15(2) of the BMR relating to the code of conduct: While administrators of non-significant benchmarks which are based on input data from contributors are required to establish a code of conduct, they may be exempted from the minimum elements to be included in the code of conduct.

i. Article 16(2) and (3) of the BMR relating to the governance and control requirements for supervised contributors: Where an administrator of non-significant benchmarks chooses not to comply with those requirements, supervised contributors to its non-significant benchmarks do not have to have in place systems and controls for input data which include the elements listed in Article 16(2) of the BMR and policies guiding any use of judgement or exercise of discretion in case the input data relies on expert judgement.

6.2 Feedback from stakeholders

188. The feedback received on this section of the CP was broadly supportive of ESMA proposal. Besides, a number of respondents argued that the criteria proposed should not dilute the administrator's ability to opt out from the pre-determined requirements of BMR. If the draft RTS were to allow NCAs to impose additional requirements that limit the administrator's ability to use the exemption, respondents argued that this would go against the spirit of the Regulation.

189. ESMA would like to clarify that the criteria included in the draft RTS should be used only to review the compliance statement, and not the underlying requirements that the administrator of non-significant benchmarks decided not to apply. These draft RTS should not change the BMR framework thanks to which administrators of non-

significant benchmarks can decide to opt-out from a number of requirements and cannot be requested by NCAs to instead apply those requirements.

190. To be noted that this represents also a distinction within BMR between the regime applicable for administrator of non-significant benchmarks and the one applicable to administrators of significant benchmarks. For the latter, according to BMR Article 25(3), NCAs can decide that an administrator of a significant benchmark is nevertheless to apply one or more of the requirements opted out by the administrator if it considers that it would be appropriate taking into account the nature or the impact of the benchmarks or the size of the administrator.

191. Another recurring comment was about the difficulties incurred by administrators when gauging the use of the benchmarks they provide. While ESMA notes the challenge faced by administrators in precisely classifying their benchmarks either as significant or non-significant benchmarks, but this is an issue that goes beyond the scope of the draft RTS.

192. Finally, it was argued by multiple respondents that reference to business continuity (included in Article 1(4) of the draft RTS: the control framework for the provision and publication of benchmarks including the administrator's exposure to operational risk or business continuity risk) should be deleted as this principle is not relevant for non-significant benchmarks. This comment was based on the content of Recital 42 of the BMR stating that non-significant benchmarks are more easily substitutable. However, ESMA notes that the health crisis that unfolded in 2020 represents a clear example of why business continuity or the possibility of substituting benchmarks should be valid for all administrators of benchmarks, including the ones providing non-significant benchmarks and all administrators should be able to explain the reasons why it is suitable to opt out from this requirement.

6.3 Content of the draft RTS

193. Article 26(4) of the BMR states that NCAs: *"[..] may require changes to ensure compliance with this Regulation*". It is ESMA's understanding that 'changes (to the compliance statement)' does not mean that NCAs could require administrators of non-significant benchmarks to apply the requirements which they have chosen not to comply with. Indeed, the difference in wording vis-à-vis Article 25(3) of the BMR (as clarified in Recital 41), as opposed to Article 26 of the BMR, explicitly provides that "*a competent authority may decide that the administrator of a significant benchmark is nevertheless to apply one or more of the requirements laid down in Articles […] [i.e. the requirements that the administrator had opted out]*". It also sets out some criteria on the basis of which an administrator of significant benchmarks may choose not to apply certain requirements (i.e. proportionality, taking into account the nature or impact of the benchmark or size of the administrator).

Conflicts of interest

194. Benchmark administrator may be exempted from the conflicts of interest requirements. These requirements are related mainly to the conflicts of interest that may arise in relation to persons involved in the provision of the benchmark and the procedures to be established to control and manage them.

195. When an administrator decides to opt out from some of the requirements related to the conflict of interest requirement under Article 4 of the BMR, it should detail its organisational structure pursuant to Article 4(1) of the BMR and identify potential conflicts of interest that may arise between the persons involved in the provision of the benchmark and the other employees or parts of the organisation. In particular, if the activity of provision of benchmarks is not operationally separated from the other activities of the administrator, the administrator should describe in its compliance statement whether the activity of provision of benchmarks is linked in any way operationally to the other activities and whether conflicts of interest may rise between the different activities based on the conflicts of interest identified pursuant to Article 4(1) of the BMR.

Oversight function

196. When an administrator decides to opt out from some of the requirements related to the oversight function established under Article 5(1) of the BMR it should clearly specify the process of oversight of the provision of the benchmark in place and its adequacy to the vulnerability of the benchmark. In particular, the process for reviewing the methodology of the benchmark and its frequency, the process for overseeing the control framework of the administrator and any breaches of the code of conduct (if any), and validation of input data based on contributions (where applicable).

Control framework requirements

197. When an administrator decides to opt out from the control framework requirements, it should provide in the compliance statement an explanation on how it is appropriate to opt out to these requirements vis-à-vis the operational risk, the business continuity risk and the risk of disruption to the process of the provision of the benchmark.

Accountability framework requirements

198. When an administrator decides to opt out from the accountability framework requirement regarding the designation of an internal function to review and report on its compliance with the benchmark methodology, it should state why it is appropriate for the administrator to opt out from this provision taking into account the complexity of the benchmark's methodology and the size of the administrator. For example, the administrator could state that it has already put in place a process for reviewing the methodology by a person with no conflicts of interest and therefore do not need to establish an internal function.

Input data

199. When an administrator decides to opt out from some of the requirements on input data, it should state clearly the nature of the input data. In case the input data is provided by contributors, whether the input data is provided with a sufficient level of control.

200. In addition, the administrator should explain how the accuracy and integrity of input data is ensured and therefore that additional controls are not needed such as a process for validating the data. For example, if the input data is already subject to controls or to other regulations then this input data is accurate and does not require additional validation process.

201. An administrator that has decided to opt out from the requirement relating to the input data contributed from a front office function should clearly state whether the input data used is contributed from a front office function, and in this case whether appropriate verification procedures are in place to ensure the accuracy of the input data.

Transparency of the methodology

202. An administrator that decides to opt out from the advance notice to benchmark users of the consultation on any material change and the publication of the responses, should explain its procedure regarding the consultation on any material change of the methodology and whether the information of any material change could be transmitted to users in a timely manner and the reason why it is not appropriate to provide users with an advance notice. The explanation could be, for example, that the advance notice is not possible in all cases.

Contributors' requirements

203. When an administrator decides to opt out from some of the requirements on contributors pursuant to Article 15 and Article 16 of the BMR, it should state in the compliance statement whether the input data is based on contributions. When the input data is submitted by contributors, whether the code of conduct is sound and includes elements to safeguard the integrity of the input data provided. For example, any material conflicts of interest are identified and managed. When the contributors are supervised, a clear description of the level of control of the contributions to ensure the accuracy and integrity of input data.

7 Annexes

7.1 Annex I - Draft technical standards

7.1.1 Governance arrangements

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements to ensure that an administrator's governance arrangements are sufficiently robust

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[7], and in particular Article 4(9) thereof,

Whereas:

(1) Article 4(1) of Regulation (EU) 2016/1011 requires administrators of benchmarks to have in place robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark.This Regulation specifies further the requirements to ensure that an administrator's governance arrangements are sufficiently robust.

(2) Different organisational and ownership structures may influence an administrator's ability to provide benchmarks and to manage the risks inherent to this activity. Therefore, in order to be robust, the governance arrangements of an administrator should provide for an organisational structure which in a clear and documented manner specifies procedures for management decision-making, the allocation of functions and responsibilities of the persons involved in the provision of a benchmark and internal reporting lines .

[7] OJ L 171, 29.6.2016, p. 1

(3) Robust governance arrangements should enable to identify and manage the possible conflicts of interest that may arise within the organisational structure of an administrator. Therefore, the governance arrangements of an administrator should specify in particular the structure of the management body and its roles and responsibilities.

(4) The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a person from being involved in the provision of the benchmark. The administrator should nevertheless identify any circumstance which may give rise to a perceived or an actual conflict of interest, assess it and decide, where appropriate, on mitigating measures. An administrator that is part of a group, should duly assess any implications of the group's structure for its own governance arrangements including whether any conflict of interest may compromise the administrator's ability to meet its regulatory obligations and whether its independence could be compromised by the group structure or by any member of the administrator's management body also being a member of the board of other entities of the same group. Such an administrator should adopt specific procedures for preventing and managing conflicts of interest that may arise from this group structure.

(5) Administrators that operate under the umbrella of a parent company should remain capable to seek synergies at group level. However, this should not prevent outsourced functions within the group to comply with the principles for outsourcing set out in Article 10 of Regulation (EU) 2016/1011 and in full compliance with all other relevant provisions of that Regulation.

(6) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators with respect to their non-significant benchmarks their size and complexity, the different risks each benchmark poses, the materiality of the potential or actual conflicts of interest identified and the nature of the input data by allowing administrators to opt out from some requirements regarding their organisational structure.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010[8],

[8] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation shall not apply to administrators of commodity benchmarks as defined in Article 3(1)(23) of Regulation (EU) 2016/1011, unless the commodity benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities, or is a critical benchmark whose underlying asset is gold, silver or platinum.

Article 2

Definitions

For the purposes of this Regulation, 'person' means any manager and employee of an administrator and any other natural person whose services are placed at its disposal or under its control or who are directly involved in the provision of a benchmark.

Article 3

Decision-making procedures, allocation of functions and responsibilities and reporting lines

1. The governance arrangements of an administrator shall, as part of the organisational structure of the administrator, specify in a clear and well documented manner the procedures for the management decision-making and an organisational chart of the administrator allocating functions and responsibilities of the persons involved in the provision of a benchmark and specifying the reporting lines and be approved by the management body, if any.

2. The procedures referred to in paragraph 1 shall include at least the following key components as applicable:

(a) the composition, roles and responsibilities of the management body or the persons who effectively direct the business of the administrator and any related committees;

(b) the structure of the management body;

(c) the appointment of the management body and its members or the persons who effectively direct the business of the administrator.

3. The organisational chart referred to in paragraph 1 shall specify any outsourced functions and any shared staff within the administrator's group. Furthermore, in allocating functions and responsibilities, the governance arrangements of an administrator shall ensure that, where

persons perform multiple functions or are involved in various committees, they are able to commit sufficient time to the responsibilities allocated to them and they are not likely to be prevented from discharging their functions soundly, honestly and professionally.

For the purposes of the first subparagraph, an administrator may take into account the number of meetings that the relevant person has to attend, the nature of the specific position and the related responsibilities and whether the relevant person carries out any other function and activity.

4. The governance arrangements of an administrator shall also provide for a clear remuneration framework for all persons directly involved in the provision of the benchmark, taking into account the functions and responsibilities allocated to them.

5. An administrator may choose not to apply point (c) of paragraph 2 and paragraph 4 with respect to its non-significant benchmarks.

6. An administrator may choose not to apply point (c) of paragraph 2 and paragraph 4 where it is appropriate and proportionate having regard to the following matters:

(a) the nature, scale and complexity of the activities of the administrator;

(b) the likelihood of a conflict of interest arising between the provision of the benchmark and any other activities of the administrator;

(c) the level of discretion involved in the process of provision of the benchmark.

Article 4

Accountability

1. The governance arrangements of an administrator shall, as part of the organisational structure of the administrator, specify in a clear and well documented manner the accountability of at least the following persons:

(a) the persons accountable for decisions that could have a significant impact on the provision of the benchmark in particular where tasks are subject to delegation;

(b) the persons accountable for the publication or disclosure of existing or potential conflicts of interest pursuant to Article 4(5) of Regulation (EU) 2016/1011;

(c) the persons accountable for the establishment of specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark pursuant to Article 4(8) of Regulation (EU) 2016/1011;

(d) the persons accountable for the internal reporting of any circumstance which may give rise to conflicts of interest.

2. An administrator may choose not to apply point (d) of paragraph 1 with respect to its non-significant benchmarks.

Article 5

Transparency requirements

1. The governance arrangements of an administrator shall ensure that any person within the administrator is aware of the responsibilities that are allocated to them and the procedures which must be followed for the proper discharge of those responsibilities.

2. Where an administrator is part of a group, the governance arrangements of that administrator shall indicate any functions related to any relevant services and activities in the provision of the benchmark which has been outsourced to other group entities in compliance with Article 10 of Regulation (EU) No 1011/2016.

Article 6

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[…]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[…]
[Position]

7.1.2 Methodology

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions to ensure that the benchmark methodology presents certain quality characteristics

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[9], and in particular Article 12(4) thereof,

Whereas:

(1) Article 12(1) of Regulation (EU) 2016/1011 requires administrators of benchmarks to use a methodology that is robust and reliable, has clear rules identifying how and when discretion may be exercised in the determination of that benchmark, is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data, is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity, is traceable and verifiable. This Regulation specifies further the conditions under which a methodology may be deemed to present these characteristics.

(2) For the methodology used by administrators of benchmarks to be reliable, administrators should make sure that it includes a specification of the nature of the input data used and clear criteria to be applicable in specific circumstances. For example, for regulated data benchmarks an explanation on how the free float is calculated, or the implications on the calculation of the benchmark following an initial public offering or a suspension of trading.

(3) A benchmark is calculated using a formula or other method of calculation on the basis of underlying values. There exists a degree of discretion in constructing the formula, performing the necessary calculation and determining the input data, which creates a

[9] OJ L 171, 29.6.2016, p. 1

risk of manipulation. This Regulation ensures that the methodology as defined by the administrator is sufficiently robust, reliable and when discretion is used an appropriate control system is in place.

(4) Regulation (EU) 2016/1011 recognises that the construction of a methodology may embed discretion that is to be defined by each administrator. It is important that the methodology includes clear rules identifying how and when this discretion may be exercised and in particular whether discretion is based on an algorithm or pre-defined methodology. Furthermore, in which circumstances transaction data in the underlying market would be considered as not sufficient.

(5) The availability of the benchmark in different market conditions is closely linked to the resilience of its methodology. It is important that an administrator is able to construct a methodology that is resilient to different market conditions and a methodology that enables the calculation of the benchmark in the widest set of possible market circumstances.

(6) A methodology that is rigorous and continuous should have adequate and appropriate historical values of the benchmark, for example, by assessing the variations of the different values of the benchmark and the consistency with the methodology and the input data used.

(7) The aim of the back-testing of the methodology is to validate the calculation of the benchmark. The back-testing against available transaction data should be an ex-post exercise which either uses additional available data that were not used for the calculation of the benchmark or other sources of transaction data, or reconstructs the historical values of the benchmark.

(8) In order to ensure that the methodology is capable of validation, it is important that the back-testing is conducted at each annual review of the methodology and following a material change of it or on an going or at the first provision of the benchmark having regard to the type of the benchmark.

(9) A methodology that is resilient should be able to be used for the calculation of the benchmark in the widest set of possible circumstances. This Regulation thus requires administrators to ensure that the methodology could be used in stressed markets as already experienced from historical data and, in the case of critical benchmarks, in unrealised stressed market conditions that could potentially occur in the future.

(10) A methodology that is traceable and verifiable allows for a continuous check and control of each calculation of the benchmark. Traceability includes the documentation of the different steps of the methodology and should be the basis for verifiability that would imply the ability to reconstruct the historical values of the benchmark.

(11) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators with respect to non-significant benchmarks by allowing administrators of non-significant benchmarks to opt out from certain requirements provided therein.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(13) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010[10] of the European Parliament and of the Council,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation shall not apply to administrators of commodity benchmarks as defined in Article 3(1)(23) of Regulation (EU) 2016/1011, unless the commodity benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities, or is a critical benchmark whose underlying asset is gold, silver or platinum.

Article 2

Conditions to ensure that the methodology is robust and reliable

1. In order to ensure that the methodology complies with point (a) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that:

(a) is capable of representing the underlying market or economic reality that it seeks to measure and incorporates factors including parameters and input data that are most relevant to measure the underlying market;

(b) is subject to an assessment of the relationship between the key assumptions used and the sensitivity of the benchmark computed by that methodology;

(c) states the nature of the input data used in the methodology;

(d) specifies any criteria to be applicable in specific circumstances.

2. An administrator may choose not to apply point (b) of paragraph 1 with respect to its non-significant benchmarks.

3. An administrator may choose not to apply point (b) and point (c) of paragraph 1 with respect to its regulated data benchmarks.

[10] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 3

Conditions to ensure that the methodology has clear rules identifying how and when discretion may be exercised in the determination of the benchmark

In order to ensure that the methodology complies with point (b) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that specifies at least the following elements:

(a) the step of the calculation of the benchmark at which discretion is performed;

(b) the criteria that shall be used for the exercise of discretion;

(c) the input data that shall be taken into account;

(d) where applicable, a non-exhaustive list of the conditions where:

(i) transaction data in the underlying market would be considered as not sufficient and the use of transaction data in related markets is needed;

(ii) the components of the methodology cannot be applied and discretion may be exercised in the determination of the benchmark.

(e) the type of related markets that are to be considered appropriate for the purposes of point (d)(i) of this Article.

Article 4

Conditions to ensure that the methodology is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data

1. In order to ensure that the methodology complies with point (c) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that includes at least the following:

   (a) an assessment of the adequacy and appropriateness of the historical values of the benchmark produced by means of that methodology;

   (b) reliable inputs, including appropriate size of the data samples, if any;

2. In order to ensure in particular that the methodology is capable of validation including, where appropriate, back-testing against available transaction data, an administrator shall ensure that the back-testing to which the methodology is subject takes place ex post and refers to an appropriate time horizon.

   Back-testing should take place at least at each review of the methodology and following a material change of it. For regulated-data benchmarks, back-testing should take place at the first provision of the benchmark, whereas for critical benchmarks a monthly back-testing should be performed.

An administrator shall ensure that the methodology includes an assessment of the back-testing results including processes to ensure that systemic anomalies highlighted by back-testing are identified and properly addressed.

Article 5

Conditions to ensure that the methodology is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity

1. In order to ensure that the methodology complies with point d) of Article 12(1) of Regulation (EU) 2016/1011, administrators shall assess the impact of various market conditions on the methodology using historical data from realised stressed market conditions.

   Administrators of critical benchmarks shall use hypothetical data for unrealised stressed market conditions.

2. Administrators shall use in the methodology parameters and assumptions to capture a variety of historical or, in the case of administrators of critical benchmarks, hypothetical conditions, including the most volatile periods experienced by the markets and correlation between underlying assets.

3. An administrator may choose not to apply paragraph 2 with respect to its non-significant benchmarks and regulated data benchmarks.

4. Administrators may choose not to apply any of the requirements specified in paragraphs 1 and 2, having regard to the following matters:

   (a) the nature, scale and complexity of the provision of the benchmarks;

   (b) the likelihood of a conflict of interest arising in the provision of the benchmarks;

   (c) the level of discretion involved in the process of provision of benchmarks.

Article 6

Conditions to ensure that the methodology is traceable and verifiable

In order to ensure that the methodology complies with point (e) of Article 12(1) of Regulation (EU) 2016/1011, administrators shall use a medium that allows the storage of information to be accessible for future reference. Such medium shall include a documented audit trail of the calculation of the benchmark including any assessment of the resilience of the methodology and the back-testing results.

Article 7

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[…]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[…]
[Position]

7.1.3 Reporting of infringements

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the characteristics of the systems and controls for the identification and reporting of any conduct that may involve manipulation or attempted manipulation of a benchmark

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[11], and in particular Article 14(4) thereof,

Whereas:

(1) It is necessary to specify appropriate requirements for the systems and controls that administrators of benchmarks are required to have in place to ensure the integrity of input data in order to be able to identify and report to their competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark pursuant to Article 14(1) of Regulation (EU) 2016/1011.

(2) Regulated-data benchmarks are already subject to regulation and supervision ensuring the integrity and transparency of the input data. In reason of the more verifiable character of the input data used, administrators of regulated-data benchmark are not subject to this Regulation. Similarly, commodity benchmarks which are not regulated-data benchmark, or based on submission by contributors the majority of which are supervised entities, or critical benchmark whose underlying asset is gold, silver or platinum, are subject to specific provisions provided for in Annex II of Regulation (EU) 2016/1011, which apply to such type of benchmarks instead

[11] OJ L 171, 29.6.2016, p. 1

of the requirements in Title II of Regulation (EU) 2016/1011, including Article 14 of that Regulation.

(3) In order to ensure that the detection of benchmark manipulation is effective and appropriate, the systems and controls of an administrator should be proportionate to the nature, the complexity and the risk of manipulation of the benchmark provided. The risk of manipulation should be evaluated on the basis of an objective assessment, which takes into account the origin, nature, peculiarity and severity of the risk.

(4) In order to ensure that the detection of any conduct that may involve manipulation or attempted manipulation of a benchmark is effective, it is necessary to provide for appropriate automated systems to monitor input data. However, automated systems alone are not sufficient to ensure that manipulative behaviour is effectively detected. Therefore, this Regulation requires that automated systems are complemented by an appropriate level of human analysis to be carried out by appropriately trained staff.

(5) The analysis as to whether or not a given input data is to be considered suspicious should be based on facts, not speculation or presumption and should be carried out as quickly as practicable. The practice of delaying the submission of a report in order to incorporate further suspicious input data should be regarded as irreconcilable with the need to act without delay where a reasonable suspicion has already been formed.

(6) Training of the employees of an administrator in charge of operating the administrator's systems and controls is necessary to ensure that the employees are able to analyse whether or not a given data input is to be considered suspicious. The training should reflect the need to ensure that dedicated employees are aware of the features of proper input data submission and of discrepancies in input data potentially caused by manipulation or attempted manipulation. Effective training will need to be tailored to the nature, complexity and risk of manipulation of the benchmark provided.

(7) Administrators may prefer to outsource any functions related to the systems and controls, such as the performance of data analysis and the generation of alerts necessary to a third party, depending on for example their particular benchmark and internal structure. Such outsourcing is only possible as long as this would not impair materially the administrator's control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark. As such, the requirements of Article 10 of Regulation (EU) 2016/1011 also apply and should be complied with.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(13) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits

and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010[12],

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation shall not apply to administrators of:

(a) regulated-data benchmarks as defined in Article 3(1)(24) of Regulation (EU) 2016/1011;

(b) commodity benchmarks as defined in Article 3(1)(23) of Regulation (EU) 2016/1011, unless the commodity benchmark in question is based on submissions by contributors the majority of which are supervised entities, or is a critical benchmark whose underlying asset is gold, silver or platinum.

Article 2

Adequate systems and effective control

1. An administrator shall have in place adequate systems and effective controls ensuring the integrity of input data in order to detect, identify and report any conduct that may involve manipulation or attempted manipulation of a benchmark under Regulation (EU) No 596/2014 of the European Parliament and of the Council[13], which are:

(a) appropriate and proportionate in relation to the nature, complexity and risk of manipulation of the benchmark provided.

An administrator shall, on a regular basis and at least annually, assess the risk of manipulation of the benchmark provided, taking into account at least the following elements:

(i) the envisaged operations required to provide the benchmark;

(ii) the potential origin, nature, peculiarity and severity of the manipulation risk;

(iii) the measures envisaged to address the risk of manipulation, including safeguards, security measures and internal procedures.

(b) regularly reviewed, at least annually, and updated when necessary to ensure that they remain appropriate and proportionate;

(c) clearly documented in writing, including any changes or updates to them.

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[12] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

[13] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

2. The systems and controls referred to in paragraph 1 shall include, to the level appropriate in view of the nature, complexity and risk of manipulation of the benchmark provided, the following elements:

(a) software capable of deferred automated reading, replaying and analysis of input data;

(b) human analysis in the detection and identification of behaviour that may involve manipulation or attempted manipulation of a benchmark.

3. An administrators shall , upon request, provide the competent authority with the information referred to in point (a), (b) and (c) of paragraph 1 of this Article and shall be able to explain upon request of the competent authority why the level of automation and human analysis chosen, as referred to in paragraph 2, is appropriate.

4. Any outsourcing to a third party of functions related to the systems and controls referred to in this Article, such as the performance of data analysis and the generation of alerts necessary to conduct the detection and identification of conducts that may constitute manipulation or attempted manipulation of a benchmark should comply with Article 10 of Regulation (EU) 2016/1011).

Article 3

Training

1. The systems and controls referred to in Article 2(1) shall be operated by employees of the administrator who are adequately and regularly trained to:

(a) detect and identify any suspicious input data that could be the result of benchmark manipulation or attempted manipulation;

(b) promptly report any such findings to their relevant internal reporting line.

2. For the purposes of paragraph 1, an administrator shall take into account the nature, complexity and risk of manipulation of the benchmark provided as referred to in Article 2(1), point (a).

Article 4

Input data integrity policy

The systems and controls referred to in Article 2(1) shall be documented in an input data integrity policy indicating:

(a) the risk of benchmark manipulation, as referred to in Article 2(1)(a);

(b) a general description of the systems and controls, including their compliance with the requirements set out in Article 2;

(c) a general description of the training of the employees of the administrator involved in the operation of the systems and controls, as referred to in Article 3;

(d) the name and contact details of the persons within the administrator responsible for the systems and controls.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[…]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[…]
[Position]

7.1.4 Mandatory administration of a critical benchmark

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[14], and in particular Article 21(5) thereof,

Whereas:

(1) In view of the general nature of the assessment referred to in Article 21(2)(b) of Regulation (EU) 2016/1011 and the need to ensure a consistent application by competent authorities of such provision, it is appropriate to specify on which criteria competent authorities should base their assessments under Article 21(2)(b) of Regulation (EU) 2016/1011.

(2) As the competent authorities' assessment referred to in Article 21(2)(b) of Regulation (EU) 2016/1011 may concern how a critical benchmark is to be transitioned to a new administrator or be ceased to be provided, it is appropriate for these technical standards to define two sets of criteria to be considered by competent authorities, depending on which scenario they are assessing.

(3) Where a competent authority is assessing how a critical benchmark is to be transitioned to a new administrator, it should be satisfied that the new administrator is able to ensure the continuity of the provision of the critical benchmark in a way that Union supervised entities can continue to use it without interruption and in compliance with Regulation

[14] OJ L 171, 29.6.2016, p. 1

(EU) 2016/1011. Therefore, these regulatory technical standards specify the minimum criteria which a competent authority should consider to determine if this is the case.

(4) It is important that the supervision of a critical benchmark can be maintained throughout the transition of the benchmark to a new administrator. Where the new administrator is located in a different Member State from the one of the competent authority making the assessment, the risk of a discontinuation of the supervision of the benchmark during the transition is higher. Therefore, the relevant competent authorities should cooperate to ensure that the competent authority making the assessment is provided with all the necessary information to determine whether the continuation of the supervision of the benchmark would be ensured throughout the transition.

(5) When assessing how a critical benchmark is to be transitioned to a new administrator, in addition to the analysis focusing on the new administrator's location and the status of its authorisation, a competent authority should analyse from an operational perspective how the provision of the critical benchmark will be transferred from the current administrator to the new administrator. In particular, the smooth publication of the benchmark, the availability of input data, the methodology for the calculation of the benchmark and any necessary engagement with any contributors, users and other stakeholders should be considered.

(6) Where a competent authority is assessing how a critical benchmark is to be ceased to be provided, it should be satisfied that the benchmark can be ceased to be provided in an orderly fashion, having regard to, inter alia, the procedure for the cessation of the benchmark established by its administrator in accordance with Article 28(1) of Regulation (EU) 2016/1011. Therefore, these regulatory technical standards specify the minimum criteria which a competent authority should consider to determine if this is the case.

(7) When assessing how a critical benchmark is to be ceased to be provided, a competent authority should consider the written plans for the cessation of the benchmark produced and maintained by the supervised entities using the benchmark pursuant to Article 28(2) of Regulation (EU) 2016/1011. Those plans may not always be aligned and may not be consistent if applied at the same time. Therefore, it is important that competent authorities consider to what extent the written plans of the supervised entities using the benchmark are compatible, including in respect of the trigger events for the cessation of the benchmark which they envisage, and can be used to ensure the cessation of the critical benchmark in an orderly fashion.

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(9) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010[15],

[15] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Criteria for assessing the transition to a new administrator

A competent authority shall base its assessment of how a critical benchmark is to be transitioned to a new administrator on at least all of the following criteria:

(a) whether the new administrator proposed in the assessment submitted by the current administrator pursuant to Article 21(1)(b)(i) of Regulation (EU) 2016/1011:

(i) is located in the same Member State of or in a different Member State from the Member State of the current administrator. In the latter case, the competent authority shall cooperate with the competent authority of the Member State of the new administrator as needed to assess whether the supervision of the critical benchmark would be ensured throughout the transition to the new administrator;

(ii) is a supervised entity and, if so, for which activities it is supervised, and if there are any actual or potential conflict of interest with its existing activities;

(iii) is a user of the benchmark and, if so, whether the conflicts of interest which could arise are adequately mitigated ;

(iv) is already authorised under Article 34 of Regulation (EU) 2016/1011. In case the new administrator is already authorised, the competent authority shall be satisfied that it has all the internal arrangements ready for the provision of the critical benchmark before the transition takes place. In case the new administrator is not yet authorised, the competent authority shall assess the conditions of its authorisation under Article 34 of Regulation (EU) 2016/1011;

(v) already provides benchmarks, and whether these benchmarks are critical, significant, non-significant, commodity or interest rate benchmarks.

(b) whether the current administrator of the critical benchmark engaged with or informed any contributors, users and other stakeholders or publicly consulted about the possible transition of the critical benchmark to the new administrator;

(c) the way in which the new administrator intends to calculate the critical benchmark and whether it intends to amend any of the following elements related to the critical benchmark and, if so, how it would ensure their compliance with Regulation (EU) 2016/1011: the methodology (including the quality of the input data) and its review, contingency policy for the calculation of the benchmark, the procedures for handling errors in input data or in the redetermination of the benchmark and the code of conduct;

(d) whether the new administrator will have access to the same input data as the current administrator, including historical input data held by the current administrator, and whether the IT infrastructures of the new administrator have been tested for the provision of the critical benchmark;

(e) where the critical benchmark is based on input data contributed by a panel, how the new administrator intends to fulfil the requirement set out in point (d) of Article 11(1) of Regulation (EU) 2016/1011 and whether the current panellists will accept to be part of the new panel ;

(f) the way in which the new administrator intends to publish the critical benchmark: standard daily publication arrangements, frequency, website, accessibility (whether upon payment of a fee or free of charge);

(g) whether a detailed plan for the transition date has been produced, and if so whether it deals with all the possible issues, including contractual issues, stemming from the transition to a new administrator;

(h) legal risks involved in the transition, including the risk of contract frustration, and the accounting and tax implications of the critical benchmark being provided by a new administrator, if any;

(i) the impact of the transition on financial market infrastructures, including clearing houses.

Article 2

Assessment on cessation of provision

1. A competent authority shall base its assessment of how a critical benchmark is to be ceased to be provided on at least all of the following criteria:

(a) the effectiveness of the procedure established in accordance with Article 28(1) of Regulation (EU) 2016/1011, and in particular:

(i) whether its content precisely defines the actions to be taken by the administrator to cease the provision of the critical benchmark in an orderly fashion;

(ii) whether, considering the circumstances of the specific case, those actions would be adequate to ensure the cessation of the critical benchmark in an orderly fashion, having also regard to the criterion referred to in point (b) of this paragraph;

(iii) when the procedure was produced and last updated.

(b) the written plans produced and maintained by the supervised entities using the critical benchmark pursuant to Article 28(2) of Regulation (EU) 2016/1011 and in particular:

(i) whether those plans nominate suitable alternative benchmarks that could be referenced to substitute the critical benchmark and, if so, whether they nominate the same or different alternative benchmarks;

(ii) where they nominate the same alternative benchmark, whether this benchmark has been adopted in different asset classes;

(iii) whether the trigger events for the cessation of the benchmark included in the written plans are the same among the plans produced by the supervised entities using the critical benchmark, where feasible.

(c) whether the administrators of the benchmarks referred to in point (b)(i) above are already authorised. If this is not the case, the competent authority shall assess the conditions of their authorisation under Article 34 of Regulation (EU) 2016/1011 and whether a period of mandatory administration is necessary to allow for authorisation;

(d) where feasible, an analysis of whether the cessation of the critical benchmark would have an adverse impact on the market integrity, financial stability, consumers, the real economy, or the financing of households and businesses. For this end reference shall be made to points (a), (b) and (c) of Article 20(3) of Regulation (EU) 2016/1011, as well as the criteria specified in Commission Delegated (EU) 2018/64 for the impact of cessation on market integrity, financial stability, consumers, the real economy, or the financing of households;

(e) an analysis of whether the cessation of the critical benchmark would result in a force majeure event;

(f) the dynamics of the market or economic reality that the critical benchmark intends to measure and whether there exists input data of quality and quantity sufficient to represent that underlying market or economic reality with precision;

(g) whether the administrator engaged with or informed any contributors, users and other stakeholders, or publicly consulted about the possible cessation of the critical benchmark;

(h). legal risks involved in the cessation and the accounting and tax implications of the critical benchmark no longer being provided;

(i) Impact of the cessation of the critical benchmarks on market infrastructures, including clearing houses.

2. In addition to the criteria referred to in point (a) of paragraph 1, a competent authority may assess whether the procedure established by the administrator according to Article 28(1) of Regulation (EU) 2016/1011 is appropriate having regard to the following elements concerning the financial instruments, financial contracts or investment funds which reference the critical benchmark:

(a) their volume and value;

(b) the term, duration, maturity or expiry date of the financial instruments, financial contracts and any other document entered into for the purpose set out in Article 3(1)(7)(e) of Regulation (EU) 2016/1011. A competent authority shall also take into account whether the critical benchmark will continue to be provided for use by the supervised entities which are using it for an appropriate period of time and whether the procedure referred to in Article 28(1) of Regulation (EU) 2016/1011 provides for such changes to the benchmark as may be necessary to ensure that the benchmark remains reliable and representative of the underlying market or economic reality which it intends to measure throughout this period;

(c) the likelihood that any such financial instrument, financial contract or other document entered into for the purpose set out in Article 3(1)(7)(e) of Regulation (EU) 2016/1011 would be frustrated or that its terms would be breached in the event of the cessation of the critical benchmark.

Article 3

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date]

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[…]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[…]
[Position]

7.1.5 Non-significant benchmarks

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria to be taken into account by competent authorities to require changes to the compliance statement of non-significant benchmarks

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[16], and in particular Article 26(6) thereof,

Whereas:

(1) Article 26(4) of Regulation (EU) 2016/1011 requires the relevant competent authority to review the compliance statement published by an administrator of non-significant benchmarks and enables the competent authority to request additional information from the administrator and to require changes to ensure compliance with Regulation (EU) 2016/1011. This Regulation further specifies the criteria to be taken into account by competent authorities to require changes to such compliance statement.

(2) The criteria for a competent authority to require changes to a non-significant benchmark compliance statement should take into account the nature of the provisions under Regulation (EU) 2016/1011 that administrators of non-significant benchmarks may choose not to apply. The requirements set out in those provisions could be either considered at the level of the administrator, for example with reference to its organisational structure, or at the level of the benchmark or family of benchmarks, with reference to the methodology and input data requirements. Therefore, two distinct sets of criteria should be introduced: one at the level of the administrator and the other at the level of the benchmark or family of benchmarks.

(3) A competent authority should be able to require changes to the compliance statement of a non-significant benchmark, if it considers that the statement does not clearly state why it is appropriate for the administrator not to comply with the conflicts of interests

[16] OJ L 171, 29.6.2016, p. 1

requirements under Regulation (EU) 2016/1011. For example, when the administrator decides to opt out from these requirements, the compliance statement should detail the organisational structure of the administrator and identify potential conflicts of interest that may arise between the persons involved in the provision of the benchmark and the other employees or parts of the administrator's organisation. In particular, if the activity of provision of benchmarks is not operationally separated from the other activities of the administrator, the compliance statement should explain whether the activity of provision of benchmarks is linked in any way operationally to the other activities and whether conflicts of interest may arise between the different activities.

(4) A competent authority should be able to require changes to the compliance statement of a non-significant benchmark, if it considers that the statement does not clearly state why it is appropriate for the relevant administrator not to comply with the contributors requirements under Article 15(2), Article 16(2) and Article 16(3) of Regulation (EU) 2016/1011. For example, when the administrator decides to opt out from these requirements, the compliance statement should state whether the input data is based on contributions. In the latter case, whether the code of conduct is sound and includes elements to safeguard the integrity of the input data provided. When the contributors are supervised, the compliance statement should include a clear description of the level of control of the contributions to ensure the accuracy and integrity of input data.

(5) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(6) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010[17],

HAS ADOPTED THIS REGULATION:

Article 1

Criteria at the level of the administrator

A competent authority may require changes to a non-significant benchmark compliance statement, if it considers that the statement does not clearly state why it is appropriate for the relevant administrator not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011, having regard to, as relevant:

(a) the organisational structure of the administrator and the conflicts of interest that may arise as a result of its structure;

[17] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(b) the identification and management of the conflicts of interest related to the employees of the administrator, the persons whose services are placed at its disposal or under its control and the persons directly involved in the provision of the non-significant benchmark;

(c) the process of oversight of the provision of the non-significant benchmark, taking into account the vulnerability of the benchmark concerned and the size of the administrator;

(d) the control framework for the provision or publication of the non-significant benchmark or for making it available, including the administrator's exposure to operational risk, business continuity risk or to the risk of disruption of the benchmark provision process.

Article 2

Criteria at the level of the benchmark or family of benchmarks

A competent authority may require changes to a non-significant benchmark compliance statement if it considers that the statement does not clearly state why it is appropriate for the relevant administrator not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011, having regard to, as relevant:

(a) the level of control related to the provision of the input data and whether, taking into account the nature of the input data, this is sufficient to ensure the accuracy, integrity and reliability of the input data;

(b) the transparency of the procedures for consulting on any material change to the methodology, taking into account the complexity of the methodology and the nature of the input data used;

(c) the process of reporting conducts of manipulation or attempted manipulation of the benchmark, particularly in relation to the monitoring of input data and any contributor;

(d) where the non-significant benchmark is based on input data from contributors, the code of conduct and whether, taking into account the nature of the input data, it includes elements to safeguard the integrity of the input data used;

(e) the capacity of the administrator to review and report on its compliance with the non-significant benchmark methodology and Regulation (EU) 2016/1011;

(f) where a supervised contributor contributes input data to the administrator, whether this is done with appropriate controls to ensure the accuracy, integrity and reliability of the input data.

Article 3

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
[…]

[Choose between the two options, depending on the person who signs.]

On behalf of the President
[…]
[Position]

7.2 Annex II - Cost Benefit Analysis

Section 1: Draft regulatory technical standards for the robust governance arrangements

ESMA is mandated by Article 4(9) of the BMR to develop draft regulatory technical standards to specify the requirements to ensure that the governance arrangements referred to in Article 4(1) of the BMR are sufficiently robust. ESMA proposes requirements for the clear organisational structure and with well-defined and transparent roles and responsibilities for all persons involved in the provision of a benchmark. The procedures proposed are the minimum expected, allowing for proportionality depending on the size and nature of the benchmark.

	Qualitative description
Benefits	The main benefit of the proposed draft regulatory technical standards is to further specify aspects of the governance arrangements of the administrator, such as the organisational structure and the roles and responsibilities for persons involved in the provision of a benchmark. In this way the draft standards expand the governance arrangements to provide administrators with a practical indication on how to implement Article 4(1) of the BMR in their organisations. Administrators would be the market participants who will benefit most from the proposed draft regulatory technical standards. Also investors and consumers would benefit from the draft standards, because the standards focus on the conflicts of interest and enhance the integrity of a benchmark provided under the scrutiny of appropriate governance arrangements that are established in compliance with the draft standards. In general, the proposed standards have the advantage to further define the content of Article 4(1) of the BMR while, at the same time, leaving administrators with a balanced level of flexibility so as to adapt the governance arrangements to their individual situation. The standards set out a minimum expectation with regards to the procedures of the organisational structure in particular relating to the management body. Administrators will be able to adjust them to their size and the nature of the benchmark(s) they provide. As requested by the mandate, the draft standards include requirements related to the transparent and well defined roles and responsibilities for all persons involved in the provision of a benchmark and that these persons are aware of these responsibilities and related procedures. The requirements are not defining any specific governance arrangement or allocating roles and responsibilities, therefore it should represent a very

	useful tool for administrators in order to define the governance structure appropriate to their benchmarks. Thereby administrators should be able to gain direct benefit from the implementation of the proposed draft standards. Without these draft standards of appropriate governance arrangements there is a risk that administrators would apply Article 4(1) of the BMR in significantly diverging ways. Investors and consumers should also benefit from the proposed draft standards, because they allow administrators to establish appropriate governance arrangements which will enhance the integrity of the benchmarks and will therefore directly benefit the ultimate users.
Costs	Potential additional costs will be borne by administrators only. Specific costs for administrators could arise from the proposed draft standards that set out procedures governing the organisational structure. The draft standards specify further Article 4(1) BMR that requires administrators to develop and maintain robust governance arrangements, and the proposed standards identifies some elements to be included. In particular, those relating to the management body structure and composition and the ones requiring the administrator to create new policies could incur costs at the administrator level as they may have to adapt existing structures to the new requirements, although these would likely be one-off costs and are not expected to be material. There can be detrimental effects on benchmarks users as administrators would likely pass on costs to the users through increased license fees. ESMA has introduced proportionality in these RTS in order to reduce administrative burden on administrators with respect to their non-significant benchmarks their size and complexity, the different risks each benchmark poses, the materiality of the potential or actual conflicts of interest identified and the nature of the input data by allowing administrators to opt out from some requirements regarding their organisational structure.

Section 2: Draft regulatory technical standards for the methodology

ESMA is mandated by Article 12(4) of the BMR to develop draft regulatory technical standards to specify the conditions to ensure that the methodology referred to in Article 12(1) of the BMR complies with points (a) to (e) of that paragraph. ESMA proposes conditions to ensure that the methodology (i) is robust and reliable, (ii) includes clear rules identifying how and when discretion may be exercised, (iii) is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data, (iv) is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity and (v) is traceable and verifiable.

	Qualitative description
Benefits	The proposed approach for ensuring that the methodology complies with the requirements of Article 12(1) of the BMR would promote a consistent methodological framework across different administrators of benchmarks to the benefit of users. The different conditions that the methodology would need to comply with aim at strengthening the reliability of the benchmark through ensuring the robustness and reliability of the methodology used to calculate the benchmark and thus reducing the opportunity to its manipulation. Further, other conditions aim at ensuring the continuous calculation of the benchmark in the widest set of possible circumstances limiting the risk of discontinuation or cessation of a benchmark and also mitigates the specific risk of conflicts of interest that arises when discretion is used.
Costs	Potential costs arising from these draft technical standards will be borne by administrators. The incremental costs stemming from the proposed approach in relation to the methodology are not expected to be significant. Indeed, the draft regulatory technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the methodology that an administrator should use for determining a benchmark. Moreover, the draft technical standards have been designed in a way to minimise the burden on administrators, in accordance with the principle of proportionality which is a general requirement under Regulation (EU) 2016/1011. Where possible, the requirements in these draft technical standards have been reduced depending on the classification of the benchmark as significant, non-significant or regulated-data benchmarks. Further, a proportionality with respect to the size and complexity of the activity of the administrator, the different risks each benchmark poses, the materiality of the potential or actual conflicts of interest identified and

	the nature of the input data has been introduced in these RTS to reduce administrative burden on administrators. This risk based approach allows administrators not to apply some of the requirements on the resilience of the methodology.

Section 3: Draft regulatory technical standards for the reporting of infringements

ESMA is mandated by Article 14(4) of the BMR to develop draft regulatory technical standards to specify the characteristics of the systems and controls referred to in Article 14(1) of the BMR. ESMA proposes certain characteristics for the systems and controls to ensure the integrity of input data in order to be able to identify to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark under Regulation (EU) No 596/2014.

	Qualitative description
Benefits	The proposed approach for the characteristics for the systems and controls is to ensure the integrity of input data in order to be able to report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark. The automated systems and controls are to ensure the integrity of input data and aim at strengthening the reliability of the input data and as such the entire benchmark through improving the detecting of manipulation or attempted manipulation of input data. The risk assessment guarantees that the most suitable automated systems and controls for the benchmark in question are being implemented and will continue to be implemented by the administrator. Also, the required training for the staff operating the systems and controls ensures that the systems and controls are used as effective as possible. Furthermore, the use of a data integrity policy, allows the competent authority to be well informed about the arrangements the administrator has implemented to ensure input data integrity.
Costs	Potential costs arising from these draft technical standards will be borne by administrators. The incremental costs of these draft RTS are minimal for two main reasons. First, the draft RTS just specifies the elements already included in Article 14 of the BMR, and therefore the main source of costs is the text of the BMR. Second, administrators already have established systems in relation to the integrity 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 RTS. In addition, the risk assessment allows

	administrators to implement suitable systems and controls mitigating the manipulation or attempted manipulation risks for their particular benchmark. Finally, the training of the staff operating the systems and controls may require an investment by administrators, but will in the end allow them to apply the systems and controls as effective as possible, which may save costs in the long term.

Section 4: Draft regulatory technical standards for the mandatory administration of a critical benchmark

Article 21(5) of the BMR adds to Article 21 of BMR, Mandatory administration of a critical benchmark, a new paragraph 5 stating that: "*ESMA shall develop draft regulatory technical standards to specify the criteria on which the assessment referred to in point (b) of paragraph 2 (of Article 21 of BMR) is to be based*."

In the draft RTS, ESMA proposes certain criteria that competent authorities should consider when producing either an assessment on how the critical benchmark is to be transitioned to a new administrator or how the critical benchmark is to be ceased to be provided. These draft RTS do not imply additional costs for market participants as they apply to competent authorities only.

	Qualitative description
Benefits	Both administrators of critical benchmarks and national competent authorities would benefit from the application of the proposed RTS. The draft RTS contain a set of criteria to be taken into account by competent authorities: the application of these elements by competent authorities in their assessment would ensure that Article 21(2)(b) of BMR is applied consistently throughout the Union. Without such further specification, competent authorities would have no indicaton on which elements they should consider in their assessment. Thanks to the draft RTS, the competent authorities will have a pre-defined detailed framework based on which they can develop their assessment more easily, more rapidly and in a consistent manner. Also administrators of crticial benchmarks would indirectly benefit from the application of RTS, as the draft RTS provide administrators (and the public in general) with a better understanding of the elements on which a competent authority will ground its assessment. This, in turn, could help administrators of critical benchmarks to prepare their own assessment to be shared with the competent authority.
Costs	The draft RTS concern activities to be performed by competent authorities only, so they would not create additional costs for administrators of critical benchmarks or other market participants. From the perspective of a competent authority, the incremental costs stemming from the proposed set of elements are not material. BMR requires competent authorities to prepare an assessment under Article 21(2)(b). The draft RTS merely further specify the criteria that competent authorities should consider, but do not enlarge the scope of the

	assessment. The draft RTS further include flexibility for competent authorities to assess some critera where feasible within the timeframe specified in the BMR.

Section 5: Draft regulatory technical standards for the non-significant benchmarks

ESMA is mandated by Article 26(6) of the BMR to develop draft regulatory technical standards to specify the criteria under which competent authorities may require changes to the compliance statement as referred to in Article 26(4) of the BMR. Competent authorities should take into account the criteria set in this draft RTS when assessing whether changes to the compliance statement should be required.

	Qualitative description
Benefits	Both administrators of non-significant benchmarks and national competent authorities would benefit from the application of the proposed RTS. The draft RTS contain a set of aspects to be taken into account by competent authorities when reviewing the compliance statement of an administrator of non-significant benchmarks. The application of these elements by competent authorities in their review would ensure that Article 26(4) of the Regulation (EU) 2016/1011 is applied consistently throughout the Union. Without such further clarification, each competent authority would have to base their review on different criteria. Through this further specification, the competent authorities will have a pre-defined detailed framework based on which they can develop their review, as they will not need to further specify the criteria by themselves. Also administrators of non-significant benchmarks would indirectly benefit from the application of RTS, as they provide administrators (and the public in general) with a better understanding of the elements on which a competent authority will ground its assessment. This, in turn, could help administrators of non-significant benchmarks to prepare a sound compliance statement to the competent authority, including all the relevant information. An additional benefit is a fairer competition among administrators located in different Member States through increased consistency of the approaches followed by competent authorities.
Costs	The draft RTS concern activities to be performed by competent authorities while reviewing the compliance statement. However, this review may create additional costs for administrators of non-significant benchmarks if the competent authority requires changes to the compliance statement. The information required under Article 26(4) of the Regulation (EU) 2016/1011 may result in additional information to be added to the compliance statement as set by administrators of non-

	significant benchmarks, however this additional cost burden or cost for administrators should be minimum as administrators should already have such information at their disposal. From the perspective of a competent authority, the incremental costs stemming from the proposed set of elements are not material. The Regulation (EU) 2016/1011 requires competent authorities to review the compliance statement under Article 26(4). The draft RTS merely further specify that provision.