



European Securities and
Markets Authority

Final report

**Guidelines on methodology, oversight function and record keeping
under the Benchmarks Regulation**





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I. Executive Summary

Reasons for publication

Regulation (EU) 2016/1011¹ (the 'Benchmarks Regulation') was published in the Official Journal of the European Union on 29 June 2016, entered into force the following day, and is fully applicable since 1 January 2018. On 5 November 2018 the Commission regulations, based on the draft regulatory and implementing technical standards submitted by ESMA, were published in the Official Journal of the European Union. As some of these regulations apply only to critical and significant benchmarks, ESMA published its Final Report on the guidelines for non-significant benchmarks² (Guidelines on non-significant benchmarks) on 20 December 2018.

These guidelines aim at providing guidance to financial market participants and competent authorities on the application of the requirements relating to the use of a methodology for calculating a benchmark and the related record keeping requirements as well as the requirements on the oversight function.

On 25 February 2021, ESMA published a Consultation Paper³ proposing draft guidelines on four areas of the Benchmarks Regulation, namely: i) the key elements of the methodology in the context of exceptional circumstances; ii) material changes to the methodology and the consultation process; (iii) the oversight function; and iv) the record keeping requirements. ESMA has adapted the proposals in this Final Report following the feedback received from stakeholders.

Contents

This Final Report is organised in an introduction and its annexes followed by the text of the guidelines. The introduction and its annexes summarise the guidelines and their objectives and provide an explanation of the policy areas requiring further clarification related to the requirements of the Benchmarks Regulation on the transparency of the methodology, the oversight function and the record keeping. Finally, an annex on the cost and benefit analysis is introduced.

Next Steps

The guidelines will be translated in all official EU languages and published on ESMA's website. The publication of the translations in all official EU languages will trigger a two-month period during which national competent authorities will have to notify ESMA whether they comply or intend to comply with the guidelines.

II. Introduction

Background

1. The COVID-19 pandemic has resulted in unprecedented and exceptional circumstances in financial markets, forcing administrators to act fast. A key decision for administrators was whether to apply the standard methodology or use an alternative methodology for a limited time frame. Under the market conditions caused by COVID-19, a rebalancing⁴ according to the standard methodology could have forced users, which track the performance of a benchmark, to adjust the underlying assets of their portfolio in order to continue tracking the benchmark in the context of market illiquidity and extreme volatility. Administrators have taken different approaches to rebalancing. Certain administrators decided to stick to their methodology, while others decided to fully suspend or adjust the rebalancing for all benchmarks or to apply a partial suspension for some benchmarks.
2. In principle, the decision to suspend or adjust the rebalancing entails equally pros (i.e. protection of some benchmark users and avoidance of procyclicality in periods of liquidity shortage) and cons that administrators need to appropriately manage (i.e. the risk that the benchmark may no longer represent the underlying market and the risk of conflict of interest stemming from a possible discrimination between different types of investors, as some investors may benefit from the suspension while others may be harmed).
3. A convergent application of the Benchmarks Regulation's requirements and an enhanced transparency to users of benchmarks are key to ESMA's policy work. In that context, ESMA has identified the need to further clarify specific requirements of the Benchmarks Regulation and in particular those that concern the key elements of the methodology in exceptional circumstances and in case of material changes to the methodology. In addition, the guidelines also concern certain aspects of the oversight function and record keeping.
4. These guidelines are split into two sections: the first set of guidelines deals with the record keeping requirements for all benchmarks and the remaining aforementioned topics applicable to critical and significant benchmarks; the second set of guidelines amends the existing Guidelines for non-significant benchmarks with regard to only two topics namely, the key elements of the methodology in the context of exceptional circumstances and the oversight function.

The proposals in the Consultation Paper

5. Article 13 of the Benchmarks Regulation requires an administrator to develop, operate and administer the benchmark and methodology transparently. The administrator shall publish or make available the following information: *“(a) the key elements of the methodology that*

¹ 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, OJ L 171, 29.6.2016, p. 1

² Guidelines on non-significant benchmarks under the Benchmarks Regulation, ESMA70-145-1209.

³ https://www.esma.europa.eu/sites/default/files/library/esma80-187-807_consultation_paper_-_guidelines_on_use_of_alternative_methodology_.pdf

⁴ The rebalancing refers to the adjustment of the weights of the constituent securities in the benchmark on a regularly scheduled basis.

the administrator uses for each benchmark provided and published or, when applicable, for each family of benchmarks provided and published; (b) details of the internal review and the approval of a given methodology, as well as the frequency of such review; (c) the procedures for consulting on any proposed material change in the administrator's methodology and the rationale for such changes, including a definition of what constitutes a material change and the circumstances in which the administrator is to notify users of any such changes; [..].“

6. The procedures, required under point (c) above, shall provide for: (i) an advance notice, with a clear time frame, that gives the opportunity to analyse and comment upon the impact of such proposed material changes; and (ii) any comments together with the administrator's response, to be made accessible after any consultation, except for where the originator of the comments has requested confidentiality.

Key elements of the methodology

7. Commission Delegated Regulation (EU) 2018/1641 (the Methodology Delegated Regulation)⁵ and the Guidelines for non-significant benchmarks further specify the requirements of Article 13(1)(a) of the Benchmarks Regulation. Pursuant to Article 2(1)(l) of the Methodology Delegated Regulation, an administrator shall disclose the potential limitations of the methodology and details of any methodology to be used in exceptional circumstances, including in the case of an illiquid market or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable. In accordance with paragraph 27(i) of the Guidelines for non-significant benchmarks, an administrator of non-significant benchmarks is expected to disclose the potential limitations of the methodology and indications of any methodology to be used in exceptional circumstances, including in the case of an illiquid market or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable.
8. As mentioned in the CP, in order to enhance transparency to users of benchmarks when the administrator decides to use an alternative methodology to calculate a particular benchmark, ESMA suggested to further elaborate on the application of the requirement under Article 2(1)(l) of the Methodology Delegated Regulation and the guidance in paragraph 27(i) of the Guidelines for non-significant benchmarks.
9. First, as put forward in the CP, the methodology should specify the overarching principles for identifying exceptional circumstances that may lead to the use of an alternative methodology to calculate the benchmark. While ESMA acknowledged the difficulty in including an exhaustive list of the exceptional circumstances that may prevent administrators from using the standard methodology in the future, the expectation is to identify the principles of these exceptional circumstances. These principles should take

⁵Commission Delegated Regulation (EU) 2018/1641 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology, OJ L 274, 5.11.2018, p. 21.

into account market illiquidity; market volatility and any trading event such as trading interruptions or unexpected market closures.

10. Further, the methodology should, to the extent possible, include the alternative ways to calculate the benchmarks in case of exceptional circumstances or indicate any key element of the methodology that will not be performed. For example, in the case of methodologies considering rebalancing at specific frequency, it is expected to include in which instances, for example illiquidity of the market, the rebalancing according to the normal schedule may not be performed.
11. The methodology should also include the scope of application of the alternative methodology (for example if the use of the alternative methodology applies only to a subset of the benchmarks within the same asset class) and the expected period of time during which the alternative methodology will be used (for example if it applies up until the next rebalancing schedule).
12. ESMA further believes that, for transparency reasons and in order to provide users of benchmarks with the most accurate information in these exceptional circumstances, the administrator should notify whether the use of the alternative methodology will have an impact on the value of the benchmark.
13. In order to ensure proportionality between the different types of benchmarks provided and in order to align these guidelines with the Guidelines on non-significant benchmarks (without prejudice that an indication of any methodology to be used in exceptional circumstances should be provided), ESMA has reduced the guidance for non-significant benchmarks with regard to the impact on the value of the benchmark and the expected period during which the alternative methodology will be used to calculate the benchmark.

Material changes to the methodology

14. In the event of any proposed material changes to the methodology, including where an alternative methodology is envisaged in the key elements of the methodology, an administrator has to comply with Article 13(1)(c) of the Benchmarks Regulation on the procedures for consulting on any proposed material change in the administrator's methodology. The Methodology Delegated Regulation further specifies this provision by indicating the information that administrators of a critical or significant benchmark have to provide in case a consultation takes place within a shorter time frame.
15. Pursuant to Article 4(1)(c) of the Methodology Delegated Regulation, the information that administrators must disclose in case of material changes to the methodology include the circumstances in which a consultation may take place within a shorter time frame and a description of the procedures to be followed when undertaking a consultation within a shorter time frame.
16. In order to enhance transparency to users and potential users of benchmarks, ESMA suggested in the CP to introduce guidance to ensure a common and consistent application of the above-mentioned requirement.

17. In the specific circumstances specified in Article 4(1)(c) of the Methodology Delegated Regulation, ESMA believes that the shorter period of time for the consultation should in any case be adequate to permit users and potential users to consider the subject matter of the consultation. This timeframe should consider the complexity of the changes proposed and their impact on the benchmark. While ESMA acknowledges the need for a swift action from administrators in some specific circumstances of stressed market conditions, it remains important to give users and potential users the opportunity to analyse and comment upon the impact of the proposed material changes.
18. Furthermore, the procedure to be followed when undertaking a consultation within a shorter time frame should be clear to enable users and potential users to understand the steps of the consultation process, including the assessment by the administrator of the responses received and whether a feedback statement summarising the responses will be provided together with the rationale behind the outcome of the consultation.

Benchmark Statement

19. ESMA put forward in the CP the view that the information provided in Commission Delegated Regulation (EU) 2018/1643⁶ setting out requirements on the benchmark statement already includes a clear description of the circumstances in which the input data is no longer available, or the accuracy and reliability of the methodology is no longer ensured. Therefore, ESMA did not suggest introducing specific guidance in this respect.

Oversight function

20. The oversight function should ensure oversight of all aspects of the provision of the benchmark. Pursuant to Article 5(3) of the Benchmarks Regulation, the oversight function is responsible for, inter-alia, (i) reviewing the benchmark's definition and methodology at least annually and (ii) overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes. Pursuant to Annex I of the Benchmarks Regulation the independence of the oversight committee is only required in case of interest rate benchmarks. In addition, in accordance with Article 4(3) of the Benchmarks Regulation applicable to all types of benchmarks, the oversight function must be independent only when conflicts of interests linked to the group structure of the administrator cannot be mitigated.
21. The composition of the oversight function is further specified in Article 1(3) of the Oversight Function Delegated Regulation⁷. In particular, the oversight function shall be composed of members who combined have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities that the oversight function is required to fulfil. Members of the oversight function shall have appropriate knowledge of

⁶ Commission Delegated Regulation (EU) 2018/1643 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark. OJ L 274, 5.11.2018, p. 29.

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1637&rid=5>

the underlying market or economic reality that the benchmark seeks to measure. A similar guidance is set out in paragraph 12 of the Guidelines for non-significant benchmarks.

22. Further, Article 1(5) of Commission Delegated Regulation (EU) 2018/1637⁸ (the Oversight function Delegated Regulation) includes a reference to contributors and users of benchmarks being members of the oversight function and the management of the related conflicts of interest: “Where a benchmark is based on contributions and representatives of its contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator shall ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority.[...]”. Similarly, paragraph 14 of the Guidelines for non-significant benchmarks provides: “Where a benchmark is based on contributions and representatives of its contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator should ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority”.
23. ESMA suggested in the CP to introduce specific guidance to ensure a common and consistent application of the above-mentioned requirement. In this context, an administrator should ensure that the members of the oversight function combined have a comprehensive overview and knowledge of the different types of users of the benchmark as well as its contributors and are able to adapt accordingly the oversight of the provision of the benchmark. This would allow to ensure that the decisions of the oversight function are suitable for the majority of users of and contributors to the benchmark.
24. Further, as specified in the Oversight function Delegated Regulation, for significant and non-significant benchmarks, it may be possible for a single natural person to act as the oversight function, when the natural person can commit an appropriate amount of time to the oversight of the relevant benchmarks. Therefore, where the oversight function is a natural person, such oversight function is exempted from these guidelines as the proposed guidance is only appropriate to a committee.

Record keeping

25. Article 8(1)(e) of the Benchmarks Regulation on the record keeping requirements requires an administrator to keep records of “other changes in or deviations from standard procedures and methodologies, including those made during periods of market stress or disruption”.
26. These record keeping requirements are not subject to any further specification in the form of Level 2 or Level 3 measures.

⁸ 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. OJ L 274, 5.11.2018, p. 1.

27. In order to ensure the audit trail of such decisions and that the historical values of the benchmark could be reconstructed for traceability purposes, ESMA believes that the administrator should ensure to keep records of:

- the details of the methodology and input data used in exceptional circumstances;
- the period of the deviation from the standard methodology;
- the rationale behind the decision to deviate from the standard methodology;
- the approval of the decision to deviate from the standard methodology.

III. Annexes

Annex I: Feedback from stakeholders

28. ESMA received 11 responses to its consultation published on 25th February 2021⁹. The 11 respondents include two associations representing administrators and the remaining nine are administrators providing critical, significant and non-significant benchmarks. In particular, two respondents are exchanges, which reported in their response to provide the perspectives of both administrators and users of benchmarks.

Methodology to be used to determine a critical or significant benchmark in exceptional circumstances

29. The first question of the CP related to the content of the draft guidelines on the key elements of the methodology and the second focused on the identification of the overarching principles of the exceptional circumstances.

30. Eight respondents out of the 11 replied to the first question and nine out of the 11 responded to the second. Half of the respondents supported the guidelines with one highlighting they are sufficient and appropriate and another stressing that ESMA has struck a balance between appropriate governance and the urgency for users to adapt to market changes while noting the need to ensure a flexible framework for administrators to react swiftly to unforeseen exceptional circumstances.

31. The other half of the respondents expressed concerns on the scope and potential unintended consequences of the proposed guidelines. They argued that the existing requirements under the Benchmarks Regulation were clearly drafted and did not require further guidance as they proved effective and allowed administrators to respond swiftly to the recent period of market stress using the discretion permitted by the Regulation. In this respect, a couple of legal provisions were flagged as already requiring administrators to set out how a benchmark should be calculated when the usual source of input data is inadequate, namely Article 12(1)(d) of the BMR and Article 12(3) of the Benchmarks

⁹ The Consultation was open from 25 February 2021 to 30 April 2021. Consultation paper available at the following link: <https://www.esma.europa.eu/press-news/consultations/consultation-draft-guidelines-use-alternative-methodology>

Regulation. However, it is worth mentioning that another respondent had the opposite view and suggested to include in the guidelines further clarifications with regard to the waterfall methodology that might have the best potential to address market liquidity issues.

32. ESMA acknowledges that Article 12 of the Benchmarks Regulation already provides for a waterfall approach that administrators need to take into account when elaborating the methodology of benchmarks. However, these guidelines focus on enhanced transparency to benchmark's users in exceptional circumstances as stated in their scope, which concerns Article 2(1)(l) of the Methodology Delegated Regulation. While Article 12 of the Benchmarks Regulation requires an administrator to take into account a waterfall approach in its methodology, these guidelines focus on the information on the methodology that administrators should make available.
33. In addition, three respondents highlighted that exceptional circumstances were by nature rare, and most often, unforeseen and while providing a framework for these exceptional circumstances would increase transparency to users of benchmarks, such a framework should not be overly prescriptive to allow the flexibility needed in period of market stress and to avoid discussions between users and the administrator as to whether the given circumstances qualify as extraordinary or not against a potential need for rapid action. ESMA acknowledges the need for a balanced approach between increased transparency to users and providing administrators with flexibility to react to unforeseen circumstances. As such, the guidelines state that the overarching principles of the exceptional circumstances are considered key elements of the methodology (and as such should be disclosed), whereas the disclosure of additional elements is left to the discretion of the administrator "*to the extent possible*". Moreover, although the final decision of any changes to the methodology lies with the administrator, ESMA is of the view that discussions between administrators and users are beneficial in order to inform administrators of the impact of the proposed changes to the methodology and prevent any unintended consequences on the markets. Furthermore, in ESMA's view, the additional transparency promoted by these guidelines would reduce the risk of controversial discussions between administrators and users since the latter would already be informed about the high-level principles underpinning the administrator's decisions and actions in exceptional circumstances.
34. These respondents also flagged that the disclosure of unexpected circumstances and potential remedies should not constitute an obligation to take the same actions in all cases which materialise at different points in time as the ultimate decision to act is to be taken by the benchmark's administrators. ESMA supports that the ultimate decision on when and how to act should lay with the administrator who is responsible for the methodologies of the benchmarks provided and their implementation. Nonetheless, administrators should make sure that the principles underpinning their decisions are clear to users in order to ensure transparency, rigorousness and predictability.
35. One respondent provided some examples of events with a market impact that by their nature could reasonably not be foreseen or events whose impact on a benchmark, or the economic reality the benchmark intends to represent, cannot be determined in advance: events of natural, social, political, economic nature that may negatively impact regional or

global societies or economies. Other examples of events that can be foreseen such as change to currency convertibility or restriction on capital flows announced by a country; market disruption (e.g. an event that materially negatively influences the aggregated liquidity, capitalisation or tradability of an entire market); exchange closure; government intervention; pandemic; natural catastrophe. ESMA has included additional examples in this final report to reflect this feedback and provide additional clarity to the market on the types of exceptional circumstances that could be included in the key elements of the methodology.

36. Specifically, for regulated-data benchmarks, a respondent highlighted that exceptional circumstances were mainly linked to the availability or volatility of underlying data. In these cases, the publication of the index could be delayed, suspended or declared indicative if the administrator believes that circumstances prevent the proper calculation of the index. ESMA acknowledges the relevance of these market events for regulated data benchmarks and notes that they are already captured in the guidelines in the examples on market illiquidity and volatility or transaction data sources being insufficient, inaccurate or unreliable.
37. One respondent provided insights of its reaction to the latest market stress period based on its internal policies. The administrator took different decisions depending on the benchmark: (i) rebalancing as planned of equity benchmarks, (ii) postponement of rebalancing of fixed income benchmarks from March until April 2020, or (iii) a one-off exceptional forward roll in April 2020 for commodity benchmarks. The respondent explained that the factors taken into account in the rebalancing decision for fixed income benchmarks were based on a market consultation that characterised global fixed income market conditions as severely stressed. The administrator determined this situation to be a market disruption event and exercised expert judgment to ensure that indexes continue to meet the needs of index users and meet their stated objectives in such extreme circumstances. The decision to forward roll was based on concerns by market participants that also led to changes in the benchmark methodology.
38. ESMA acknowledges the importance of the flexibility given to the administrator to adjust its methodology to the different markets or underlying assets when exceptional circumstances occur. For example, the type of underlying assets of the benchmark provided is taken into account in the guidelines on the scope of application of any methodology to be used in exceptional circumstances. ESMA notes that the guidelines would not have prevented the respondent to take action.
39. One respondent also flagged that the suggested guidelines contained in section V.1(1)(i) of the CP list the same criteria set out in Article 2(1)(l) of the Methodology Delegated Regulation. ESMA acknowledges that the criteria mentioned in the guidelines are linked to the Methodology Delegated Regulation, as the guidelines aim to ensure the consistent and common application of that provision as well as Article 13(1)(a) of the Benchmarks Regulation. ESMA has further elaborated these criteria in this report as detailed in the section on the final content of the guidelines.

40. Another respondent provided examples on how its policies already took into account exceptional circumstances, such as trading halts; unscheduled market closures; restrictions on the repatriation of capital; national stock market closures for an extended period; exceptional market disruptions; trading suspensions in depositary receipts. These examples are good practices and ESMA has added them in the guidelines.
41. In addition, two respondents provided drafting suggestions, as listed below:
- Regarding V1. iii) and iv), the limitation "*to the extent possible*" should also apply in both cases. ESMA has amended the guidelines according to this suggestion.
 - The requirement in V1 i) may benefit from a further specification of the (upper and lower) limits of such exceptional circumstances, e.g. thresholds of volatility or liquidity, as the description is very broad. ESMA has further elaborated the criteria as detailed in the next section.
42. Finally, one respondent highlighted that the reference in the CP to the different approaches taken by administrators that may have "*discriminated between different types of investors*" was unclear. ESMA has outlined in the background of its CP the pros and cons of the use of an alternative methodology in exceptional circumstances and the related risks that administrators should manage. ESMA has also further elaborated in this final report on the aim for issuing these guidelines linked to an enhanced transparency vis-à-vis users of benchmarks while ensuring administrators have the flexibility needed to adapt to different market conditions.

Material changes to the methodology used to determine a critical or significant benchmark

43. The third question of the CP aimed at gathering views on the information the administrator of a critical or significant benchmark has to provide in case a consultation takes place within a shorter time frame. Eight respondents out of the 11 replied to this question. Four respondents did not suggest including any additional elements to the guidelines with one respondent acknowledging that administrators should ensure users and potential users of the benchmark understand the steps of a shorter consultation process. The remaining four respondents emphasized that the current Benchmarks Regulation framework already provides sufficient dispositions that would not require further elaboration through additional guidelines as these would result in an unnecessary additional layer of rules. These respondents reiterated that the requirements of the Benchmarks Regulation already provide specific and detailed requirements for the information to be disclosed during a consultation exercise (Article 13 of the BMR; Article 4(1) of the Methodology Delegated Regulation). On the latter, ESMA points out that these guidelines do not aim at introducing additional requirements, instead they aim at providing clarity on how to implement the existing specific rules set out in the Benchmarks Regulation in order to ensure the common, uniform and consistent application of the requirements related to material changes to the methodology.
44. In addition, two respondents highlighted the need to be cautious as separate standards for periods of stress may result in inconsistencies with the level 1 text of the Benchmarks

Regulation that has specific requirements for material changes of the methodology that do not apply only in periods of stress. ESMA notes that Article 4(1)(c) of the Methodology Delegated Regulation already provides for a specific process of a shortened time frame consultation to be applied in specific circumstances. The guidelines further clarify this process and are therefore in line with the Benchmarks Regulation.

45. Also, two respondents emphasized that material changes in the methodology should not be undertaken with a rush consultation, and if need arises to act swiftly in response to an unexpected development, then the procedures for such events should apply, enabling an exceptional deviating treatment or methodology. ESMA strongly supports the importance of an adequate time frame for a consultation, including when it is shortened; in that context, these guidelines clarify that, while shortened, the time frame needs to ensure that users have in any case the ability to assess the proposed material changes.
46. In addition, one respondent suggested that administrators should have the option to shorten or extend the consultation period in extreme or exceptional market conditions to reconcile the effective date of a proposed change with index maintenance requirements, for example an equity/bond index rebalancing, index review, and corporate action adjustment, or - any other similar cases applying the principle of proportionality. The same respondent argued further that administrators should be able to consider the feedback received and decide on the changes to be made. ESMA points out to the obligations under Article 4(1)(c) of the Methodology Delegated Regulation that explicitly require administrators to provide a description of the procedures to be followed when undertaking a consultation within a shorter time frame.

Oversight function for critical and significant benchmarks

47. The fourth question of the CP aimed at gathering views on the composition of the oversight function. Seven respondents out of the 11 replied to this question. While four deemed the current framework under the Benchmarks Regulation appropriate and sufficiently clear (Article 5 of Benchmarks Regulation and Delegated Regulation (EU) 2018/1637), the remaining three expressed support for the proposed guidelines being sufficient, appropriate and flexible.
48. At the same time, the latter flagged the need for enhanced proportionality within the guidelines to respect the key principle of proportionality mentioning the greater costs that such a disposition would induce for EU administrators, while similar requirements are not included under other frameworks such as IOSCO principles. ESMA acknowledges the difference of requirements set out in the EU compared to other jurisdictions, however this is a policy decision that goes beyond the scope of these guidelines.
49. In addition, three respondents expressed concerns with regard to the proportionality of the guidance as major benchmarks, such as EURIBOR, are used globally and for a wide variety of purposes and therefore a complete overview and understanding of the different types of users would not be feasible. One respondent suggested to refer to an “adequate” overview, instead of a “complete” one. ESMA has accepted this suggestion in its final guidelines.

50. Finally, one respondent stressed the need to adapt the proposal to the discretion provided to administrators in the Benchmarks Regulation with regard to the oversight function. ESMA highlights that the guidelines do not change the discretion provided to administrators with regard to the composition of the oversight function or its governance arrangements structure. Specifically, it is stated that these guidelines would not apply when the oversight function is composed of a natural person.

Record keeping requirements

51. The fifth question of the CP aimed at gathering views on the record keeping guidelines. six respondents out of the 11 replied to this question. five respondents deemed the current framework under the Benchmarks Regulation and its existing requirements adequate to deal with exceptional circumstances and mentioned the provisions in Article 8 of that Regulation and Article 5 of the Methodology Delegated Regulation. These current provisions already provide for record keeping of the calculation of the benchmark including assessment of the resilience of the methodology and the back-testing results. Three respondents further flagged that additional measures would be duplicative and confusing to users and potentially reducing the administrator's ability to apply discretion to ensure the accuracy and integrity of the benchmark.

52. Also, two respondents emphasized that the existing requirements are not only applicable to periods of stress.

53. ESMA acknowledges those comments and, in order to avoid confusion, has removed any possible duplications of Article 8(1) of the Benchmarks Regulation and adjusted the final text of the guidelines. In addition, ESMA confirms that the guideline on record keeping would apply in case of any deviation from the standard methodology.

Guidelines amending the guidelines on non-significant benchmarks

54. Nine out of the 11 respondents replied to this last question and provided their views on the content of the guidelines on non-significant benchmarks. Generally, respondents reiterated the previously outlined arguments highlighting the need to be cautious not to create an administrative burden, particularly for administrators of smaller benchmarks stressing that the guidelines should be proportionate to the risk posed by benchmarks. Two respondents further argued that, for practical reasons, the requirements for benchmarks should be fulfillable by more generic measures that apply to multiple benchmarks or families of benchmarks that are impacted in the same way, irrespective of whether such benchmarks are significant or not.

55. Two respondents expressed support for the proposed guidelines. One respondent – a provider of non-significant benchmarks – highlighted that the proposed amendment of the guidelines on non-significant benchmarks would contribute significantly to improving governance processes and transparency, and voiced support for the draft guideline on the oversight function, pointing out that the asset class-specific appropriate knowledge of the members of the oversight function is essential in order to reach balanced decisions that take the interests of all parties concerned into account, and that this would be an essential factor, especially when responding to extraordinary market situations.

56. The same respondent, while agreeing with subparagraph (i) of Guideline (27a) on the overarching principles to identify exceptional circumstances did not consider the additional elements of subparagraphs (ii) to (iv) to be suitable for further increasing transparency, flagging that it would prove very difficult to know what alternatives may actually be appropriate or which parts of the methodology may no longer be applied.
57. This respondent explained that administrators could take different measures depending on the market situation. The measures taken were determined after examination of the overall market situation at the time, possible alternatives and a market consultation, while making sure that they were always in the best interest of benchmark users in order to ensure a liquid and tradable benchmark that reflects the market situation at any certain moment. The respondent also noted that a description of alternative ways to calculate a benchmark is ultimately not foreseeable with sufficient accuracy and therefore cannot be described or summarized. The possible reactions to the occurrence of exceptional circumstances are influenced by a wide range of - often unforeseeable - factors.
58. ESMA acknowledges the unforeseeable factors that cannot be summarised with sufficient accuracy beforehand. This is why the guidelines include the reference “*to the extent possible*” that has been also extended to other parts of the guidelines in this final report. ESMA expects that this reference will give flexibility to administrators to specify the relevant elements only where feasible and accurate. However, as well described in the example above, depending on the market and the asset class, different decisions could be taken and, without necessarily going into the details of these decisions, specifying the principles and/or factors that will be taken into account in the analysis could provide users with additional transparency and enhanced understanding and predictability on how the benchmark will be calculated under exceptional circumstances.

Annex II : Final content of the guidelines

Transparency of the methodology

Key elements of the methodology

59. Following the feedback received from stakeholders on the overarching principles of the exceptional circumstances that may inhibit an administrator from using the standard methodology, ESMA would like to stress in this final report the aim of these guidelines. The guidelines focus on providing more transparency to users of benchmarks on the circumstances that would lead to a deviation from the standard methodology. The objective is twofold: first, to provide users with a clearer view on the actions that administrators might take in case of exceptional circumstances and allow them to adapt their internal process accordingly. Second, these guidelines support enhanced rigorousness and discipline for administrators that would have a clear process in place to address exceptional circumstances and would allow the temporary changes of the methodology in case of exceptional circumstances to be prepared efficiently while ensuring an informed and smooth process vis-à-vis the users of the benchmark.

60. For indicative purposes, the guidelines also provide some examples of events which could be deemed as exceptional circumstances. For instance, in addition to trading event such as trading interruptions or unexpected market closures included in the CP, other events were added based on stakeholders' suggestions, such as changes to currency convertibility or restrictions on capital flows announced by a country; an exchange closure; government interventions; pandemic or natural catastrophe.
61. The remaining guidelines provisions now include the reference "*to the extent possible*", in order to give flexibility to administrators to provide the additional information if available. This includes the alternative ways to calculate the benchmarks in case of exceptional circumstances or indicate any key element of the methodology that will not be performed, the scope of application of the alternative methodology and the expected period of its use and whether the use of the alternative methodology will have an impact on the value of the benchmark.
62. In order to ensure proportionality between the different types of benchmarks provided, ESMA has further reduced in this final report the guidance for non-significant benchmarks with regard to the overarching principles for identifying exceptional circumstances that are expected to be provided on a more high-level basis than for other types of benchmarks.

Material changes to the methodology

63. Following the feedback from stakeholders, ESMA reiterates that these guidelines apply to the specific circumstances specified in Article 4(1)(c) of the Methodology Delegated Regulation, which are designed to provide flexibility to administrators and to allow to conduct a consultation in a shorter time frame in specific circumstances. It is important to strike the right balance between providing users with more transparency on the decision taken by administrators, including in shorter time frame, and keeping the flexibility of the final decision to the administrators and the need for administrators to be able to act swiftly. Therefore, ESMA supports that the shorter period for consultation should be adequate to permit users and potential users to consider the subject matter of the consultation and that this timeframe should consider the complexity of the changes proposed and their impact on the benchmark.

Benchmark Statement

64. The feedback from stakeholders did not provide any additional need for guidelines on the benchmark statement that, as suggested in the CP, already provides a description of the circumstances in which the input data is no longer available or the accuracy and reliability of the methodology is no longer ensured.

Oversight function

65. Following the responses to the CP, ESMA acknowledges the need to ensure flexibility to administrators to establish an oversight function that is proportionate to their business activity. As a result, ESMA revised the initial proposed guideline in the CP that members of the oversight function should cumulatively have a "complete" overview and



understanding of users and contributors of benchmarks. The final guideline requires that overview and understanding to be “adequate” instead of “complete”.

66. In addition, taking into account the different governance arrangements as provided for in the Benchmarks Regulation, ESMA confirms that these guidelines do not apply to the oversight function carried out by a natural person.

Record keeping requirements

67. The record keeping requirements as set out in the Benchmarks Regulation are not subject to any further specification in the form of Level 2 or Level 3 measures. ESMA believes that this requirement should be further clarified for the specific periods of deviation from the standard methodology to ensure its common and consistent application. Compared to the CP, the record keeping guideline has been revised to avoid the risk of confusion or duplication vis-à-vis the requirements in Article 8(1)(a) and (b) of the Benchmark Regulation. Therefore, the scope of the guideline has been reduced and include now:

- the period of the deviation from the standard methodology;
- the rationale behind the decision to deviate from the standard methodology;
- the approval of the decision to deviate from the standard methodology.

Annex III : Cost-benefit analysis

68. Considering the main objectives of these guidelines, we set out below the expected benefits and costs thereof.

Guidelines on the methodology to be used in exceptional circumstances for all benchmarks and material changes to the methodology of critical and significant benchmarks

<i>Benefits</i>	<p>The guidelines specifying the details of any methodology to be used in exceptional circumstances are expected to promote transparency, mainly to the benefit of users and potential users of benchmarks.</p> <p>The details of the methodology to be used in exceptional circumstances would be available to all market participants providing an enhanced overview of the potential changes that could impact the benchmark to the benefits of the users.</p> <p>Furthermore, the guidelines on proposed material changes to an administrator’s methodology will further enhance transparency across different administrators of significant and critical benchmarks and will be beneficial to users and potential users of benchmarks. This will provide additional transparency to the market on the procedure that administrators</p>
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	<p>will apply to any material change to the methodology used to determine the benchmark.</p> <p>In addition, the guidelines will reduce the risks of arbitrage through enhanced regulatory and supervisory convergence across competent authorities.</p>
<p><i>Costs</i></p>	<p>Potential costs arising from these guidelines will be borne by administrators. It is also reasonable to expect that those administrators that already have a complete set of arrangements in place will incur fewer overall costs when implementing these guidelines. Several respondents to the public consultation reported that they were already broadly aligned with the guidelines.</p> <p>ESMA considers that the incremental costs stemming from the enhanced transparency of the methodology might be of a one-off and/or ongoing nature. These costs are linked to the update of the existing document on the transparency of the methodology and relevant organisational costs linked to the implementation of the guidelines. ESMA believes that the overall (compliance) costs associated with the implementation of the guidelines will be balanced out by the benefits arising from the enhanced regulatory certainty. ESMA also considers that the guidelines support greater harmonisation in the consistent application of the requirements already included in the Benchmarks Regulation and the Methodology Delegated Regulation regarding the publication of the key elements of the methodology and the shorter consultations on material changes to the methodology.</p> <p>Additionally, the guidelines have been designed in a way to minimise the administrative burden on administrators of non-significant benchmarks, in accordance with the principle of proportionality. Only the necessary information which should be disclosed has been included in these guidelines, which are less burdensome for administrators of non-significant benchmarks.</p>

Guidelines on the oversight function for all benchmarks

<p><i>Benefits</i></p>	<p>The main benefit of the guidelines on the oversight function is to further specify a key aspect of the composition of the oversight function so as to provide administrators with further guidance on how to implement Article 1(3) of the Oversight function Delegated Regulation.</p> <p>For this reason, administrators would be the ones who will benefit the most from the guidelines. Also investors, consumers and other users of benchmarks would indirectly benefit from the guidelines, because the</p>
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	<p>guidelines focus on the avoidance of potential conflicts of interest. This should allow benchmarks provided under the control of an appropriate oversight function as clarified in these guidelines to be more robust against potential conflicts of interest enhancing the integrity of the benchmark.</p>
<i>Costs</i>	<p>Potential additional costs will be borne by administrators.</p> <p>The guidelines support greater harmonisation in the common and consistent application of the requirements included in the Benchmarks Regulation and the Oversight function Delegated Regulation. When the oversight function already includes as members users and contributors, administrators would need to ensure that these members together have an adequate overview and knowledge of the different types of users of the benchmark and its contributors. ESMA has softened this guideline compared to the Consultation Paper (i.e. “adequate overview” instead of “complete overview” which was referred to in the Consultation Paper), taking into account the implications in terms of feasibility and costs that this may have on administrators.</p>

Guidelines on the record keeping requirements

<i>Benefits</i>	<p>These guidelines are intended to promote the common and consistent application of the record keeping requirements set out in the Benchmarks Regulation across different administrators, to the principal benefit of users and potential users.</p> <p>The guidelines focus on the record to be kept by administrators in circumstances of deviation from the standard methodology. This should facilitate the ex-post analysis and evidence to be conducted in particular where the input data or methodology are changed.</p> <p>Such ex-post analysis on input data and the methodology aims at strengthening the reliability of benchmarks through ensuring the integrity and accuracy of the input data and reliability of the methodology used.</p>
<i>Costs</i>	<p>Potential additional costs will be borne by administrators. It is also reasonable to expect that those administrators that already have a complete set of arrangements in place will incur fewer overall costs when implementing these guidelines. Several respondents to the public consultation reported that they were already broadly aligned with the guidelines.</p> <p>The incremental costs stemming from the guidelines on the record keeping requirements might be of a one-off and/or ongoing nature. These costs are linked to the update of the existing record keeping</p>

	<p>procedures and relevant organisational costs linked to the implementation of the guidelines. ESMA believes that the overall (compliance) costs associated with the implementation of the guidelines will be balanced out by the benefits arising from the enhanced regulatory certainty. ESMA has amended the guideline related to the record keeping compared to the Consultation Paper to avoid possible duplication with elements already included in the Benchmarks Regulation.</p>
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Annex IV : Guidelines

1. Scope

Who?

69. These guidelines apply to the competent authorities designated under Article 40(2) and (3) of the Benchmarks Regulation and administrators as defined in Article 3(1)(6) of the Benchmarks Regulation.

What?

70. The guidelines set out in Section 5 apply in relation to Articles 5, 8(1)(e), 13(1)(a), 13(1)(c) and (2) of the Benchmarks Regulation, Articles 2(1)(l) and 4(1)(c) of the Methodology Delegated Regulation and Article 1(3) of the Oversight function Delegated Regulation.

71. The guidelines set out in Section 6 amend paragraphs 12 and 27(i) of the ESMA's guidelines on non-significant benchmarks¹⁰ ('Guidelines on non-significant benchmarks').

When?

72. These guidelines will apply from 31 May 2022.

¹⁰ Guidelines on non-significant benchmarks under the Benchmarks Regulation, published on 20 December 2018, ESMA70-145-1209.

2. Legislative references

<i>Benchmarks Regulation</i>	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
<i>ESMA Regulation</i>	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 ¹²
<i>Oversight function Delegated Regulation</i>	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 ¹³
<i>Methodology Delegated Regulation</i>	Commission Delegated Regulation (EU) 2018/1641 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology ¹⁴

¹¹ OJ L 171, 29.6.2016, p. 1.

¹² OJ L 331, 15.12.2010, p. 84.

¹³ OJ L 274, 5.11.2018, p. 1.

¹⁴ OJ L 274, 5.11.2018, p. 21.



3. Purpose

73. The guidelines set out in Section 5 are based on Article 16(1) of the ESMA Regulation. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision (ESFS) and to ensure the common, uniform and consistent application of the requirements related to material changes to the methodology, the use of an alternative methodology in exceptional circumstances and the oversight function. In particular, these guidelines achieve those objectives by setting out a transparent framework for administrators of critical and significant benchmarks when consulting on material changes to the methodology or using an alternative methodology in exceptional circumstances, together with an adequate oversight function. Furthermore, the guidelines aim at ensuring the common and consistent application of the record-keeping requirements related to the use of an alternative methodology for all benchmark administrators.
74. The guidelines set out in Section 6 are based on Articles 5(6) and 13(4) of the Benchmarks Regulation. The purpose of these guidelines is to amend the existing Guidelines on non-significant benchmarks, in line with the new guidelines introduced for administrators of critical and significant benchmarks, with regard to the oversight function and the use of an alternative methodology in exceptional circumstances.



4. Compliance and reporting obligations

Status of the guidelines

75. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with these guidelines.
76. Competent authorities to which these guidelines apply should comply by incorporating them into their supervisory frameworks, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

Reporting requirements

77. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
78. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

79. Administrators are not required to report whether they comply with these guidelines.

5. Guidelines on methodology, oversight function and record keeping

5.1 Guidelines on the details of any methodology to be used to determine a critical or significant benchmark in exceptional circumstances pursuant to Article 13(1)(a) of the Benchmarks Regulation and Article 2(1)(l) of the Methodology Delegated Regulation

1. An administrator of critical or significant benchmarks or, where applicable, family of benchmarks should specify, as part of the details of any methodology to be used in exceptional circumstances, at least the following elements, insofar as they are relevant to that benchmark or family of benchmarks or to the input data used to determine it:
 - (i) the overarching principles for identifying the exceptional circumstances, if possible complemented by examples of those circumstances. Non-exhaustive examples of exceptional circumstances could be: trading events, such as trading interruptions or unexpected market closures, resulting in unusual market illiquidity or market volatility; changes to currency convertibility that may lead to transaction data sources being insufficient, inaccurate or unreliable; restrictions on capital flows announced by a country, exchange closures, government interventions, a pandemic or a natural catastrophe resulting in exceptional periods of stress;
 - (ii) to the extent possible, the alternative ways to calculate the benchmark in exceptional circumstances or any key element of the methodology which may not be performed in those circumstances;
 - (iii) to the extent possible, the scope of application of any methodology to be used in exceptional circumstances, taking into account the type of underlying assets of the benchmark provided;
 - (iv) to the extent possible, the rationale behind the use of any methodology referred to in point (iii) above, taking into account the scope of application of such methodology;
 - (v) to the extent possible, the time period during which any methodology referred to in point (iii) above is expected to be used to calculate the benchmark;
 - (vi) whether the use of any methodology referred to in point (iii) above is expected to have an impact on the value of the benchmark.

5.2 Guidelines on material changes to the methodology used to determine a critical or significant benchmark pursuant to Article 13(1)(c) and (2) of the Benchmarks Regulation and Article 4(1)(c) of the Methodology Delegated Regulation

2. An administrator of critical or significant benchmarks or, where applicable, family of benchmarks should ensure, to the extent possible, that the shorter time frame in which a

consultation on proposed material changes in the administrator's methodology may take place is nonetheless adequate to enable users and potential users of the benchmark to assess the proposed material changes.

3. For the purposes of determining the adequacy of the shorter time frame referred to in paragraph 2, an administrator should have regard to the complexity and nature of the proposed changes, the impact which they would have on the benchmark and the urgency of their implementation.
4. The procedures for a consultation within a shorter time frame should be set out in a sufficiently clear manner to enable users and potential users of the benchmark to understand what are the steps of the consultation process.

5.3 Guidelines on the oversight function for critical and significant benchmarks pursuant to Article 5 of the Benchmarks Regulation and Article 1(3) of the Oversight Function Delegated Regulation

5. In order to ensure that the oversight function is composed of members who together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities that the oversight function is required to fulfil, an administrator of critical and significant benchmarks should ensure that, to the extent possible depending on the governance of the oversight function, the members of the oversight function together have an adequate overview and understanding of the different types of users of the benchmark and its contributors and are able to exercise accordingly the responsibilities of the oversight function.
6. Where the oversight function is carried out by a natural person, paragraph 5 does not apply.

5.4 Guidelines on the record keeping requirements pursuant to Article 8(1)(e) of the Benchmarks Regulation

7. For any deviation from the standard methodology, an administrator of critical, significant and non-significant benchmarks should keep records of:
 - (i) the time period of the deviation;
 - (ii) the rationale behind the decision to deviate;
 - (iii) the approval process of the decision to deviate.

6. Amendments to Guidelines on non-significant benchmarks

8. The Guidelines on non-significant benchmarks are amended as follows:

(1) The following guideline is added:

(27a) For the purposes of point (i) of guideline 27, an administrator of a non-significant benchmark or family of non-significant benchmarks should specify the following, where applicable:

(i) the overarching principles for identifying the exceptional circumstances;

(ii) to the extent possible, a summary of the alternative ways to calculate the benchmark in exceptional circumstances or any key element of the methodology which may not be performed in those circumstances;

(iii) to the extent possible, the scope of application of any methodology to be used in exceptional circumstances, taking into account the underlying assets of the benchmark provided;

(iv) to the extent possible, the rationale behind the use of any methodology referred to in point (iii) above, taking into account the scope of application of such methodology.

(2) Guideline 12 is replaced by the following:

The oversight function should be composed of one or more members who together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities the oversight function is required to fulfil. Members of the oversight function should have appropriate knowledge of the underlying market or economic reality that the benchmark seeks to measure and, to the extent possible, also of the different types of users of the benchmark and its contributors.