



European Securities and  
Markets Authority

# Final Report

**Draft technical standards under the Benchmarks Regulation**





European Securities and  
Markets Authority

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# 1 Executive Summary

## Reasons for publication

The European Commission proposed a draft Regulation on indices used as benchmarks in financial instruments and financial contracts<sup>1</sup> (Benchmarks Regulation, or: BMR) in September 2013 in the wake of the manipulation of various benchmarks.

On 24 November 2015, the European Parliament and the Council reached a preliminary political agreement<sup>2</sup> on a compromise text of the Benchmarks Regulation, an agreement that was confirmed on 9 December 2015 by the Permanent Representatives Committee of the Council of the European Union. The European Parliament voted and approved the text of the Benchmarks Regulation in its plenary session on the 28 April 2016. The Benchmarks Regulation<sup>3</sup> was published in the Official Journal of the European Union on the 29 June 2016, entered into force the following day, and will be fully applicable as of 1 January 2018.

The Benchmarks Regulation requests ESMA to develop a number of draft regulatory and implementing technical standards to be submitted to the Commission by 1 April 2017.

ESMA published a Discussion Paper<sup>4</sup> (DP) on the Benchmarks Regulation on the 15 February 2016. The DP included ESMA's policy orientations and initial proposals for the draft technical standards.

ESMA published a Consultation Paper<sup>5</sup> (CP) on the Benchmarks Regulation on the 29 September 2016. The CP included a first version of the draft technical standards.

This Final Report is the follow up of the CP with respect to ESMA's draft technical standards.

## Contents

This Final Report is organised in eleven chapters, each dedicated to one of the areas for which the Benchmarks Regulation requested ESMA to develop draft technical standards, namely: (i) procedures, characteristics and positioning of oversight function, (ii) appropriateness and verifiability of input data, (iii) transparency of methodology, (iv) specification of elements of the code of conduct of contributors, (v) governance and control requirements for supervised contributors, (vi) specification of qualitative criteria for significant benchmarks, (vii) template for compliance statement for significant/non-significant benchmarks, (viii) contents of benchmark statement, (ix) information to be provided in applications for authorisation and registration, (x) form and content for the application for recognition by third country administrators, and (xi) minimum content of the cooperation arrangements between ESMA and competent authorities. Each chapter summarises the relevant provisions and their objectives, provides an explanation of the related policy issues and references to the relevant responses received to the CP. The Final

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Report also includes the final version of each of the draft technical standards and a cost-benefit analysis.

## **Next Steps**

The draft technical standards have been submitted to the European Commission. The Commission has three months to decide whether to endorse the technical standards.

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<sup>1</sup> The press release of the European Commission on the proposal:

[http://europa.eu/rapid/press-release\\_IP-13-841\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-13-841_en.htm?locale=en)

<sup>2</sup> See Commission statement : [http://europa.eu/rapid/press-release\\_STATEMENT-15-6169\\_en.htm?locale=en](http://europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm?locale=en)

<sup>3</sup> Benchmarks Regulation published in the EU Official Journal:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011>

<sup>4</sup> The Discussion Paper is available here:

[https://www.esma.europa.eu/sites/default/files/library/2016-288\\_discussion\\_paper\\_benchmarks\\_regulation.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf)

<sup>5</sup> The Consultation Paper is available here:

<https://www.esma.europa.eu/sites/default/files/library/2016-1406.pdf>

## 2 Procedures and characteristics of the oversight function (Article 5 BMR)

### 2.1 Mandate

#### Article 5

5. ESMA shall develop draft regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition as well as its positioning within the organisational structure of the administrator, so as to ensure the integrity of the function and the absence of conflicts of interest. In particular, ESMA shall develop a non-exhaustive list of appropriate governance arrangements as laid down in paragraph 4.

*ESMA shall distinguish between the different types of benchmarks and sectors as set out in this Regulation and shall take into consideration the differences in the ownership and control structure of administrators, the nature, scale and complexity of the provision of the benchmark, and the risk and impact of the benchmark, also in light of international convergence of supervisory practice in relation to governance requirements of benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.*

*ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.*

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.*

### 2.2 Background

1. The BMR requires administrators of all benchmarks falling within the scope of Title II to establish a permanent and effective oversight function for all aspects of the provision of their benchmarks. The Regulation sets out the minimum responsibilities and characteristics of the oversight function to ensure oversight of all aspects of the provision of the administrator's benchmarks.
2. ESMA is mandated to develop draft regulatory technical standards (RTS) to specify the detailed procedures and characteristics of the oversight function, in particular its composition and its positioning within the organisation of the administrator, and ESMA shall develop a non-exhaustive list of governance arrangements. The RTS must ensure the integrity of the oversight function and the absence of conflicts of interest.
3. Administrators can choose not to apply certain provisions on robust procedures for and responsibilities of the oversight function for their non-significant benchmarks and ESMA is



asked to develop a proportionate approach distinguishing between types of benchmarks and sectors and taking into consideration the variety of administrators. On the composition of the oversight function, ESMA is asked to develop a non-exhaustive list of governance arrangements, which as such already allows for a great flexibility for administrators to select the structure most appropriate for their businesses.

#### Proposal in the Consultation Paper

4. On the composition of the oversight function, ESMA took the existing flexibility into account and developed a proportionate approach on the different levels of scrutiny that may be required for significant benchmarks as opposed to that required for critical benchmarks. It consequently proposed to require the oversight function to include at least two independent members for critical benchmarks. ESMA considered independent members to be natural persons that are not otherwise directly affiliated with the administrator and who do not have a vested interest in the level of the benchmark. They were proposed to be included in the oversight function to ensure the appropriate management of conflicts of interest at the level of the administrator – through its ownership structure or otherwise – and to maintain objectivity where a number of different stakeholders with competing interests are acting as members.
5. Consequently, ESMA proposed not to allow the oversight function to be carried out by a single natural person when the administrator provides critical benchmarks, but that this can be an option for non-critical benchmarks, particularly if the administrator only provides a small number of benchmarks that are not widely used, provided that the natural person is not directly involved in the provision of the benchmark or has no vested interest in its level. In ESMA's view, potential concerns of discontinuity in the change of the natural person can be met with record keeping and knowledge management requirements (as part of the procedures ESMA has proposed).
6. ESMA recognised that the IOSCO Principles on Financial Benchmarks of 2013 already include a principle on the establishment of an oversight function and that many administrators have already established a respective body in order to comply with these Principles, the EBA-ESMA Principles for Benchmark-Setting Processes in the EU or domestic legislation, where applicable. ESMA aimed at reducing the burden on administrators that would lie in adopting existing oversight structures to the new regulatory regime and has, inter alia, proposed to include in its non-exhaustive list of governance arrangements the possibility to have the oversight function carried out by multiple committees with each committee either responsible for different benchmarks or different tasks. Nonetheless, ESMA proposed a set of minimum requirements that should apply to all governance arrangements to ensure that the oversight function works with integrity and is not affected by conflicts of interest.
7. Members of the oversight function should have, in their entirety, the necessary skills, knowledge and expertise, and no member of the oversight function should have been convicted of financial services related offences. ESMA has adopted the view that although external parties, such as users and contributors, may bring conflicts of interest to the

oversight function, they can also provide vital expertise and ESMA proposed procedures to manage potential conflicts resulting from their membership. ESMA's proposal furthermore allowed for representatives of the management body to attend meetings of the oversight function, though not as permanent members, and it proposed to require a procedure to permit observers.

8. For benchmarks that are based on contributions, ESMA proposed that contributors, users and other stakeholders who could be conflicted should not be a majority on the oversight function. ESMA also proposed for regulated-data benchmarks that the administrator should consider including representatives of the contributing entities as members as they may be able to contribute particularly valid input resulting from their role as an entity that is subject to another form of supervision outside the BMR already.
9. On the positioning of the oversight function, ESMA's proposal was to embed the oversight function within the administrator's organisational structure to allow it to effectively challenge the management body's decision. ESMA stressed that in its view the oversight function is not simply a consultative body and that it should be able to act independently of the administrator in certain instances to fulfil its obligations, for example when it reports misconduct at the administrator to the competent authority, and to provide effective scrutiny of the administrator, which in ESMA's view was not possible without the ability to not only overview but challenge the decisions of the administrator with regards to the benchmarks provision process.
10. ESMA proposed that the oversight function should act independently of the administrator where the Regulation requires it to report to the relevant competent authority any misconduct by contributors or administrators and any anomalous or suspicious input data according to point (i) of Article 5(3) of the BMR. In all other cases ESMA expected the oversight function to make recommendations to the management body and to be able to record, but not to take action on, any diversion of the administrator from those recommendations. ESMA therefore proposed that the oversight function be separate from the management body.
11. On the procedures regarding the oversight function, ESMA proposed a detailed list of procedures that it expected to apply to all benchmarks to ensure consistency across the market in the application of the BMR – with the exception of those procedures that related to a group of members of an oversight function and that would consequently be inapplicable to those carried out by a single natural person. With ESMA's expectation as a minimum list, administrators were thought free to adopt additional procedures where they think fit.
12. The minimum catalogue of procedures ESMA proposed included criteria to select members and observers including the evaluation of their expertise and skills (but without publicly disclosing their identity), rules for the meetings of the oversight function and on the participation of staff members therein, the selection of the contact person for the management body and on the interaction with it and arrangements to ensure confidentiality.

13. Additionally, ESMA proposed to require the oversight function to establish procedures to manage the conflicts of interests which may arise due to competing interests of members. This list of suggested procedures was non-exhaustive and covered the disclosure of conflicts of interest of members of the oversight function, limitations and removal of voting rights from conflicted members, the exclusion of members from discussions where they could be conflicted. Furthermore, ESMA suggested that these procedures should forbid members to sit on oversight functions of more than one administrator.

## 2.3 Feedback from stakeholders

14. On the list of governance arrangements that ESMA proposed in the Consultation Paper, there was wide agreement among stakeholders, particularly because it was non-exhaustive and left room for the administrators to adopt alternative constructions. However, some respondents suggested that the inclusion of external stakeholders on the oversight function should be optional, not mandatory, among which some questioned if a mandatory inclusion of externals was covered by the mandate. Two respondents suggested that legal and compliance staff should be considered external and that they would be sufficiently independent. Some respondents favoured voting rights also for staff involved in the benchmark setting process, as they could bring expertise and their potential conflict could be mitigated by limiting them in number. Others suggested that such staff should not have a majority of voting rights. A few respondents asked that regulated venues should not be considered contributors and consequently ESMA's suggested governance arrangements for administrators that are owned by a contributor should not apply. Some stakeholders demanded clarification on how the limitation on voting rights would apply to outsourced functions, others asked to clarify the role of observers, particularly as ESMA's proposal seemed to suggest that their consideration was mandatory and no specific skills or expertise was required.
15. To ESMA's question on the suitability of a single natural person as the oversight function, respondents mostly agreed and thought it suitable for smaller administrators but not for critical benchmarks. Some said the natural person should be an employee of the administrator albeit independent and without a conflict of interest, and particularly that it should not be involved in the benchmark provision. It was suggested that staff of the administrator's legal or compliance department would be most suitable. Few respondents opposed the possibility of a natural person oversight function, raising concerns that continuity of the function could not be ensured, e.g. in the case of sick leave or holidays, external persons would not have the necessary insight or, if they had, would be equipped with commercially sensitive information. At last, there may be simply not enough independent but skilled persons available to take on the role.
16. Regarding the role of observers, the stakeholders' responses were diverse. Some suggested clarifying that the inclusion of observers should be optional only, while some said the potential conflict resulting from their participation could adequately be dealt with through the respective procedures that ESMA had proposed. It was suggested to specify that it should be for the administrators to choose observers, that the oversight function

should not be required to invite representatives of public authorities, and that observers should have appropriate expertise.

17. When ESMA asked for the amount of proportionality its draft had provided respondents mostly considered it sufficient. Some respondents suggested that administrators should have more discretion in the choice of members of the oversight function as long as the members were free from conflicts of interest. The inclusion of external parties, administrator staff and observers was suggested to be dealt with more liberally. On regulated-data benchmarks, one respondent asked that it should not be mandatory to consider the inclusion of data providers on the oversight function. Another respondent said it was disproportionate to require the publication of minutes. One stakeholder requested more proportionality for non-significant benchmarks.
18. More generally, respondents had a variety of suggestions on ESMA's proposal. Representatives of the asset management sector said that users should be required to be represented on the oversight function to represent the interest of end users and add value to issues like transparency, methodology and fees. One respondent suggested that proportionality could be improved by allowing existing bodies to fulfil the tasks of the oversight function. The absence of a requirement to publish the names of the members of the oversight function was met with both support and opposition. One stakeholder suggested to allow representatives of parent or affiliated companies on the oversight function. A few respondents said that the proposal was not in line with the composition of existing oversight bodies which would often include members of the board or be a subcommittee thereof. ESMA's proposal to allow the oversight function to challenge decisions of the management body would be problematic precisely because members of the management would sit on oversight functions. For smaller administrators, the proposal to include staff not involved in the benchmark provision would be impracticable, according to some respondents. For critical benchmarks, one independent member should be sufficient. Three respondents said that membership should not be restricted to one oversight function. Other respondents suggested that staff should have voting rights while some said that no member or group on the oversight function should have a majority. On publication and reporting, respondents said that only a summary of the meeting minutes should be published and that the administrator, not its oversight function, should report misconduct to the competent authorities.

## **2.4 Content of the draft RTS**

19. ESMA has upheld the general structure as proposed in the Consultation Paper, the draft RTS contain Articles on the composition of the oversight function, on its positioning and on procedures that should govern the oversight function, as well as an Annex containing a non-exhaustive list of governance arrangements. ESMA has however decided upon further reflection of its mandate not to require administrators to establish express procedures that address the management of conflicts of interest on the oversight function as initially proposed. The draft RTS should, according to Article 5(5) of the BMR, ensure the integrity of the oversight function and the absence of conflicts of interest. ESMA therefore thinks it

is preferable to design the provisions on composition, positioning and procedures of the oversight function in a way that avoids conflicts of interest in the first place and has amended the Articles accordingly.

20. The proposed non-exhaustive list of governance arrangements has been maintained and ESMA believes that it leaves the administrators necessary and sufficient discretion to design their governance arrangements most appropriately. For the reasons set out in the Consultation Paper, ESMA thinks that the draft RTS should require a minimum number of independent members for oversight functions of administrators of critical benchmarks and that this number should be two. ESMA did not take on board the proposal of respondents to the Consultation Paper that the number should be increased to be three or that the draft RTS should set a quota expressed in a minimum percentage, because it believes that two independent members are sufficient to form an adequately representative counterweight to any other group of stakeholders that might be present on the oversight function. Moreover, although the number of critical benchmarks is likely to be low ESMA thinks that there may be also only a limited number of candidates for independent members of oversight functions for these benchmarks. While ESMA is convinced that external stakeholders can provide valuable expertise to the oversight function, it has decided not to make their membership mandatory for non-critical benchmarks but has instead left it with the administrators to decide on the composition most fit for the benchmarks they produce, as long as any conflict of interest of external members of the oversight function is adequately mitigated through the general procedures proposed in Article 3 of the draft RTS or otherwise.
21. As far as the role of staff on the oversight function is concerned, ESMA has reflected on the comments on the Consultation Paper and has decided for the draft RTS to allow their membership but to propose that they shall have no voting rights if they are directly involved in the provision of the respective benchmark. This will also allow staff from the legal or compliance departments to sit on the oversight functions as suggested by some stakeholders, also in a voting capacity as the case may be. For external members, including those that represent entities to which some aspects of the benchmark provision process have been outsourced, ESMA has upheld its proposal to exclude these members from voting for decisions that would have a direct business impact on the organisation they represent and the draft RTS now demand that oversight functions adopt relevant procedures. ESMA has also clarified that observers may be permitted to join the oversight function but that this lies within the judgement of the administrator as long as the required procedures for their selection according to point (b) of Article 3(1) of the draft RTS apply.
22. ESMA has upheld the proposal to allow the oversight function to be carried out by a natural person for non-critical benchmarks as long as that person is not directly involved in the provision of any relevant benchmark and has no potential conflict of interest arising from the level of the benchmark. ESMA has also added a provision to the draft RTS (point (b) of Article 3(2)) to require an alternate appropriate body or natural person to ensure continuity of the oversight function when exercised by a single natural person.

23. The respondents to the Consultation Paper have appreciated ESMA's flexible approach and ESMA has decided to uphold it and not to introduce further strict requirements for critical benchmarks or benchmarks in a particular sector. As explained above, administrators are free in their decision to include external parties and observers, but ESMA has decided to include in Article 3 of the draft RTS that specifies procedures of the oversight function that these adequately address potential conflicts of interest. The provision requires that the relevant procedures limit the voting rights of members who are staff of the administrator and directly involved in the provision of benchmarks. Representatives of the management body, service providers to which functions have been outsourced or anyone else may be invited to attend meetings of the oversight function from time to time (in a non-voting capacity) only. ESMA has upheld the proposal for administrators of regulated-data benchmarks to consider representatives of the input data contributors on their oversight function as they may still decide not to do so.
24. ESMA agrees with comments by stakeholders that it would be disproportionate not only to require the publication of names of members of the oversight function but also the publication of the minutes of the meetings of the oversight function and has dropped its respective proposal. Where more proportionality for non-significant benchmarks was requested, ESMA would like to point out that the co-legislators have decided that the draft RTS should not apply to these in general. Where stakeholders pointed to existing arrangements that included representatives of the administrator's management body and suggested to allow this under the draft RTS, ESMA has considered this proposal but is of the opinion that members of the board or other decision making bodies of the administrator should not be allowed to be permanent members of the oversight function and should be allowed to be invited to attend meetings from time to time (in non-voting capacity) only. In ESMA's view it is crucial for the oversight function to be able to adequately oversee and address decisions of the management when they are related to the provision of the relevant benchmarks and that this is also a reason for the BMR to require that the oversight function shall be carried out by a separate committee (as the option of choice) or another governance arrangement that should be as appropriate (Article 5 (4) BMR). ESMA is convinced that the positioning within the administrator's organisation and the attendance of meetings of the oversight function by representatives of the management where appropriate is sufficient and appropriate to address the need for relevant input in the work of the oversight function.

## 3 Input data (Article 11 BMR)

### 3.1 Mandate

#### Article 11

*5. ESMA shall develop draft regulatory technical standards to specify further how to ensure that input data is appropriate and verifiable, as required under points (a) and (b) of paragraph 1, as well as the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place, in compliance with point (b) of paragraph 3, in order to ensure the integrity and accuracy of input data. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.*

*ESMA shall take into account the different types of benchmarks and sectors as set out in this Regulation, the nature of input data, the characteristics of the underlying market or economic reality and the principle of proportionality, the vulnerability of the benchmarks to manipulation as well as the international convergence of supervisory practice in relation to benchmarks.*

*ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.*

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.*

### 3.2 Background

25. ESMA is required to specify further how the administrator must ensure that the input data used to determine the benchmark is appropriate and verifiable. ESMA is also mandated to specify further the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where the input data is contributed from a front office function. While drafting the RTS ESMA is required to take into account the different types of benchmarks and the principle of proportionality along with the vulnerability of the benchmarks to manipulation.

26. Further, the Regulation (EU) 2016/1011 (BMR), defines the front office function in paragraph 3 of Article 11 as “ [...] any department, division, group, or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities [...] ”.

27. The draft RTS shall apply to critical and significant benchmarks except for the latest that have acquired according to Article 25 of the BMR the exemption from the requirement in paragraph 3 of Article 11 of BMR. In addition, and as mentioned in the mandate to ESMA, the draft RTS do not apply to administrators of non-significant benchmarks and of commodity benchmarks subject to Annex II instead of Title II of BMR. Also, regulated data

benchmarks are not be subject to Article 11(3) of BMR due to the exemption under Article 17(1) of BMR.

28. In the consultation paper (CP), ESMA suggested that input data is appropriate if it is capable, in conjunction with a benchmark's methodology, to provide an accurate and reliable representation of the underlying market or economic reality the benchmark intends to measure. Therefore, an administrator's primary responsibility with respect to input data is to ensure that it is appropriate with respect to the established methodology.
29. The draft RTS established a list of elements to ensure that input data is appropriate that depended on the type of input data. Therefore, this list of elements must be covered as applicable to the relevant type of input data and benchmark.
30. The fact that input data is appropriate in the view of the methodology does not guarantee that it will neither be vulnerable for manipulation nor be manipulated. For this reason, BMR imposes that input data must, in addition, be verifiable.
31. Input data is verifiable if the input data can be checked for accuracy. Moreover, verifiability is closely linked to the availability of sufficient information supporting the input data. As suggested both in the Discussion Paper and the CP, verifiability is highly dependent on the type of input data, e.g. non-transaction data are less easily verifiable than regulated data. Moreover, administrators of regulated data benchmarks are not subject to some requirements as the monitoring of input data must be more appropriately understood as checking the provenance and transmission of the input data used.
32. In the CP, ESMA also suggested that appropriateness and verifiability of input data must be monitored by the administrator on an ongoing basis through dedicated checks prior to or after the publication of the benchmark. ESMA emphasised that the appropriateness checks do not equate to a one shot screening of input data received in the view of the methodology, but that the requirements established to ensure appropriateness are themselves also subject to a continuous monitoring. This monitoring must be more extensive for non-transaction data.
33. In the CP, ESMA further specified appropriate arrangements for oversight and verification within the front office function of the contributor that the administrator shall ensure are in place. These appropriate arrangements were the building of a transparent internal oversight architecture structured along three lines of defence.
34. To limit and manage the inherent risks and conflicts of interests related to the front office function, the first line of defence included in particular effective checking processes while the second line of defence was responsible for the establishment of a specific conflict of interest policy appropriate in the context of front office contributions. This policy objective was to address the risk of conflict of interests that arises when input data is contributed from a front office function and the staff has discretion regarding contributed data while at the same time have for example exposure against the relevant benchmark. This policy included different measures such as disclosure and reporting of conflicts of interest,



remuneration policies, and the physical separation between front office staff involved in contributing input data and other front office staff to limit improper or inadvertent communication of sensitive information between staff.

35. ESMA also specified that a process ensuring on-going cooperation between the lines of defence must be included to increase the efficiency of the internal oversight within the contributor organisation. This internal oversight at the level of the contributor should also be transparent to the administrator. This transparency included the communication of the organisational arrangements and roles and responsibilities for input data contribution.
36. The CP included a proportional approach of this oversight architecture which related mainly to a simplified internal oversight architecture for contributors taking into account their size. Also, administrators of significant benchmarks were able to exempt contributors from (i) establishing a clear segregation of duties between front office staff involved in input data contribution and other front office staff and (ii) from putting in place a physical separation between these persons, on the condition that the contributor demonstrates the existence of sound principles and procedures to manage conflicts of interests.
37. ESMA is including below a summary of the comments received from stakeholders in relation to this chapter of the CP and in the next section ESMA's responses to these comments.

### **3.3 Feedback from stakeholders**

38. Stakeholders generally welcomed the requirements included in the draft RTS of the CP. In particular, the link of the concept of appropriateness of input data to the benchmark's methodology and the dependence of the checks that the administrator should perform, for both appropriateness and verifiability of input data, mainly on the type of input data.
39. A broad concern raised by several respondents related to the derogations set in the BMR to the applicability of the draft RTS, i.e. respondents asked ESMA to clarify to which type of benchmarks the draft RTS apply.

#### *Appropriateness and verifiability of input data*

40. Several stakeholders' general concern in relation to both appropriateness and verifiability of input data related to the definition of input data in itself rather than the checks that the administrator should perform in order for input data to be appropriate and verifiable. These concerns were twofold: first, stakeholders questioned whether the input data to be considered should include all the data used to determine a benchmark e.g. the data used to determine the weightings of the constituents or conversion factors that could be used to adjust the value of the benchmark. Second, stakeholders raised the issue that the draft RTS included in the CP mainly focused on contributed input data. In this context, stakeholders called for a need to expand the current draft RTS to other types of input data, i.e. those that are not contributed and not regulated data benchmarks. Also, one

respondent suggested to include “where applicable” when the draft RTS refer to information that the administrator should be able to require from contributors.

41. In relation to the appropriateness of input data checks, one respondent disagreed with the proposal in the CP relating to the need to monitor appropriateness on an on-going basis. This respondent suggested that the performance of this check in the context of the review of the methodology should be sufficient. Further, some respondents questioned whether appropriateness related to transaction data only according to paragraph 1 of Article 11 of the BMR.
42. The majority of stakeholders generally agreed with the concept of verifiability of input data and the link suggested in the CP to the availability of information to the administrator. Nevertheless, some stakeholders were concerned about the concept introduced in the CP that input data should be verifiable if it stems from a reliable source. They encouraged ESMA to expand on this concept and requested the inclusion of a related specific check in the verifiability requirements.
43. ESMA introduced in the CP a series of evaluation checks to be performed on an on-going basis and prior to the publication of the benchmark. In addition, extensive validation checks were suggested to be performed after the publication of the benchmark. Some stakeholders encouraged ESMA to include – as is the case for evaluation checks - that the validation checks be performed prior to the publication of the benchmark if possible.
44. Regarding regulated data benchmarks, stakeholders highlighted that this type of benchmarks requires different checking processes as they are already subject to extensive checking processes from other European legislations such as MiFID. Therefore, they suggest that the only check that should apply to this type of input data is the verification that the correct data set is set up and used. In addition, respondents also questioned the application of the evaluation checks to regulated data benchmarks.
45. Several stakeholders further referred to the definition of regulated data benchmarks in the BMR, paragraph 1 (24) of Article 3 and the reference in point a) to trading venues in a third country for which the Commission “has adopted an implementing decision that the legal and supervisory framework of that country is considered to have equivalent effect within the meaning of Article 28(4) of Regulation (EU) No 600/2014 of the European Parliament and of the Council, [...]”; highlighting the importance of the implementing decision to be adopted by the Commission for the use of such benchmarks in the Union.
46. The concept of readily available was also subject to stakeholder’s concern. While some encouraged ESMA to define this concept, others suggested that the verification checks could be adjusted to include this concept, e.g. the comparisons checks could be performed on a sample and some of the quality assurance checks could be automated.
47. Many stakeholders expressed concerns regarding the list of items that ESMA included in Article 3, paragraph f, of the draft RTS in relation to the information that the administrator could require from contributors. The most criticised requirement was the one in relation to

the aggregate of substantial exposures data. These stakeholders found this requirement inappropriate because of the confidentiality of these data and the potential for competition concerns when other administrators have access to this information. They preferred instead to make relevant exposures available to relevant competent authorities upon request. Further, regarding the requirement to send to administrators the data considered and excluded, stakeholders highlighted that this is the expertise of the contributor and not the administrator. Also, the reference in the draft RTS to electronic communications was highlighted by stakeholders as too broad. Finally, it was also mentioned that whistleblowing disclosures were subject to strict accessibility policies.

#### *Internal oversight and verification procedures for front office contributions*

48. Respondents generally agreed with ESMA's proposals in relation to the three lines of defence principle as an ideal type of oversight architecture when contributions are made from a front office function. One respondent highlighted in relation to recital 4 of the draft RTS that non-transaction data should be differentiated regarding the different quality of data between non-transaction data from regulated markets and non-transaction data from front office functions. The first set of data is considered to be consistently monitored and supervised through other European legislations, while the second set of data is more likely to be labelled as "indicative quotes" and does not include any supervisory framework.
49. The mandate for ESMA to draft the RTS requests to specify further "the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place". ESMA included in its CP a proposal for an internal oversight structured along three lines of defence that the administrator has to ensure are in place. Several stakeholders encouraged ESMA to specify further how the administrator is requested to ensure that this structure is in place in the organisation of the contributor, i.e. is the obligation for the administrator to ensure that the procedures are in place or that they are continuously complied with. In the latter, they argued that the administrator would have to undergo regular audits on the structure of the contributor that would be disproportionate.
50. Further, some respondents considered that the monitoring of communication requirement embedded in the responsibilities of the second line of defence could also be interpreted as a constant vigilance of the second line of defence function in relation to the communication between front office staff and other internal or external bodies. These respondents encouraged ESMA to clarify the meaning of these requirements and suggested that spot checks should be sufficient. At the same time, one respondent highlighted the importance of conducting a constant vigilance on these communications.
51. Other requirements of the second line of defence were also subject to some concerns, mainly, that this function does not have the expertise to perform the control on the reasonableness and accuracy of the benchmark, that the fall back arrangements should also cover the inability of the administrator to publish the benchmark due to a lack of data or adequate data, the conflicts of interest at the level of the contributor should be disclosed to the administrator only for material existing or potential conflicts, and the reporting of

misconduct should only be disclosed when the determination has been made by the contributor.

52. In addition, stakeholders encouraged ESMA to clarify some of the requirements of the second line of defence responsibilities. The first one related to the proposal in the CP to maintain a physical presence of the second line of defence function in the front office. In this context, market participants mentioned that depending on the size of the contributor this requirement can be difficult to comply with. The second requirement related to the conflict of interest that covers the exchange of information between front office staff and contributor staff. Market participants suggested that this requirement only applies to submission staff at the level of the contributor. One respondent suggested that written supervisory policies and procedures and education of the relevant staff should be sufficient to fulfil the requirement.
53. Further, regarding the conflict of interest requirements, some stakeholders considered that the CP proposal on the clear segregation of duties between staff involved in contributing input data and other front-office staff should only refer to submitters' duties and related responsibilities. In this context, stakeholders expressed concerns in relation to the use of the word "segregation" that should not be interpreted as prohibiting staff involved in contributing input data from carrying out activities other than input data contribution and that, in this case, the potential conflict of interests should be adequately mitigated.
54. Finally, regarding the remuneration requirement, one respondent suggested to clarify the difference with other draft RTS dealing with remuneration at the level of the contributor i.e. the RTS on the governance and control of supervised contributors.

### **3.4 Content of the draft RTS**

55. On the basis of the feedback received from stakeholders to the CP, the draft RTS specify further how administrators have to ensure the appropriateness and verifiability of the input data and the internal oversight and verification procedures that the administrators should ensure are in place at the level of contributors when input data is contributed from a front office function as stated in paragraph 3 of Article 11 of BMR.
56. Regarding the definition of input data, ESMA would like to refer to paragraph 1(14) Article 3 of BMR that defines input data as "the data in respect of the value of one or more underlying assets, or prices, [...]" and ESMA indicates that the interpretation of this definition is outside of the mandate of the draft RTS. The same holds for the clarification of the concept of readily available input data for which ESMA refers to the definition of contribution of input data in paragraph 1(8) of Article 3 of BMR. Further, ESMA considers that the mandate as outlined in paragraph 5 of Article 11 of BMR for appropriateness of input data does not solely refer to transaction data but to all types of input data.

*Appropriateness and verifiability of input data*

57. ESMA considers, as outlined above, that the wide scope of the first chapter of the draft RTS stemming from BMR, requires a flexible approach linked to the various types of input data. In this context, stakeholders rightly pointed out that the draft RTS in the CP focused on contributed data. ESMA has reviewed the draft RTS to expand it to other types of input data.
58. The close link established by ESMA between the appropriateness of input data and the methodology of the benchmark has been acknowledged by the respondents to the CP. ESMA has kept this link in the draft RTS and has added additional checks mainly related to transaction data that the administrators should perform to ensure that input data is appropriate. Further, ESMA would be concerned if the appropriateness checks were to be performed on a one-off basis or only during the review of the methodology as this could undermine the reliability and accuracy of the benchmark. ESMA is of the view to keep the flexible approach outlined in the CP to allow the administrator to determine the frequency of the appropriateness checks depending on the type of input data, the characteristics of the benchmark, and of the market and economic reality that the benchmark intends to measure.
59. ESMA considers that the availability of information for administrators to perform checks on input data is a key concept to ensure the verifiability of input data. Further, ESMA included in the CP that the verifiability of input data can also be ensured when the input data stems from a reliable source. Following the comments received from stakeholders to further specify the meaning of a reliable source, ESMA is of the view that a reliable source relates to criteria to be fulfilled by the source of data such as regular dissemination of the data.
60. As outlined in the CP, ESMA considers that it is important to monitor input data on a regular basis and that the checks should be dependent on the type of input data considered. ESMA has kept the same approach in the draft RTS while reviewing the structure of the draft RTS that now only includes one article regarding how to ensure that input data is appropriate and verifiable.
61. As stated in recital 32 of the BMR, regulated data benchmarks are subject to existing regulation and supervision that ensure the integrity and transparency of the input data. These benchmarks are therefore less vulnerable to manipulation and are subject to less checks in the draft RTS. ESMA has included in the draft RTS a specific monitoring check to make sure that the input data used in the benchmark determination is the one stemming from one of the sources in point (24), paragraph 1 of Article 3 of the BMR. ESMA considers that in order to achieve investor protection and reduce the risk of manipulation of the data, this monitoring check should be performed on a regular basis as defined by the administrator.
62. Finally, ESMA has reduced significantly the checks to be performed in the context of its mandate for specifying that input data is appropriate and verifiable and has come to the conclusion that many of the checks included in the CP would relate to the process for validating input data referred to in point 2(c) of Article 11 of BMR and has therefore deleted them from the draft RTS. ESMA also considers that the requirements to perform further

checks would depend on the type of input data and the available information to the administrator, e.g. drawn from the records that contributors are required to keep in compliance with the Code of Conduct.

63. In line with the principle of proportionality, and in order to reduce the burden on administrators of significant benchmarks, these administrators are permitted to perform the checks required in the draft RTS after the publication of the benchmark.

*Internal oversight and verification procedures for front office contributions*

64. The internal oversight and verification procedures that ESMA suggested in the CP were widely welcomed by market participants. The draft RTS refer now to this internal oversight structure along three levels of controls. The mandate requests ESMA to specify further the internal oversight and verification procedures that the administrator has to ensure are in place. ESMA acknowledges the concerns raised by stakeholders regarding the means to ensure that these procedures are in place and considers that flexibility should be given to administrators to be satisfied that the necessary steps have been taken by the contributors.
65. ESMA has aligned the draft RTS on front office contributions to other RTS related to contributors i.e. code of conduct and governance and control requirements for supervised contributors where necessary, e.g. the provisions on the remuneration.
66. ESMA establishes in the draft RTS that the first level of control should be responsible for effective checking processes in line with those that are required under the code of conduct Article 15 paragraph 2(d)(iii) of BMR and the related draft RTS. Further, the draft does no longer refer to specific training requirements in relation to front office staff involved in input data contribution as ESMA considers that the general training requirements for staff involved in the contribution process are specified in the RTS on the code of conduct and these requirements should be sufficient for front office staff's awareness.
67. ESMA has also reviewed the responsibilities of the second level of control function, in particular the surveillance of communication with front office staff involved in the submission of data rather than the constant monitoring in order to reduce the burden on contributors. Further, the disclosure of the conflicts of interest to the administrator now only applies to the actual or potential conflicts of interest.
68. Finally, in line with the principle of proportionality and in order to reduce the burden on administrators of significant benchmarks, the draft RTS allow these administrators to apply the conflicts of interest requirements only for the potential or actual material conflicts of interest. Further, ESMA has given consideration to proportionality at the contributor level, dependent on its nature, size and activities and the risk of conflict of interest, and the use of discretion in the contribution to the benchmark. The requirement regarding the physical presence of a second level control function staff in the front office function is now subject to this type of proportionality.

## 4 Transparency of methodology (Article 13 BMR)

### 4.1 Mandate

#### Article 13

1. An administrator shall develop, operate and administer the benchmark and methodology transparently. To that end, the administrator shall publish or make available the following information:

(a) the key elements of the methodology that 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.

2. The procedures required under point (c) of paragraph 1 shall provide for:

(a) advance notice, with a clear time frame, that gives the opportunity to analyse and comment upon the impact of such proposed material changes; and

(b) the comments referred to in point (a) of this paragraph, and the administrator's response to those comments, to be made accessible after any consultation, except where confidentiality has been requested by the originator of the comments.

3. ESMA shall develop draft regulatory technical standards to specify further the information to be provided by an administrator in compliance with the requirements laid down in paragraphs 1 and 2, distinguishing for different types of benchmarks and sectors as set out in this Regulation. ESMA shall take into account the need to disclose those elements of the methodology that provide for sufficient detail to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts and the principle of proportionality. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

### 4.2 Background

69. ESMA is required to further specify the key elements of the methodology to be disclosed in order for users to understand how the benchmark is provided and to assess the appropriateness of the benchmark to their intended use. In the consultation paper (CP), ESMA mentioned in the draft RTS that the key elements should be disclosed as applicable to the relevant benchmark and input data used. For example, the disclosure of the panel

composition and eligibility criteria for panel membership would only apply to benchmarks based on contributions.

70. ESMA also suggested that the administrator should disclose various elements to allow users to understand the objective of the index and the underlying market it intends to measure. If the administrator has discretion in the selection and composition of inputs, the administrator should also disclose the criteria applied to select input data. When relevant to the methodology used, the priority given to different types of input data and the minimum quantity and quality of input data required should also be published.
71. In contrast with the discussion paper, ESMA also found it useful to enlarge the list of key elements in the CP and to include in the draft RTS the limitations of the methodology during conditions of market stress, or in illiquid markets. These elements would allow users to understand the limits of the methodology of the benchmark in adverse conditions of the market.
72. In line with the principle of proportionality and to reduce the burden on administrators of significant benchmarks, the draft RTS allow these administrators to opt out from the disclosure of certain elements of the methodology.
73. Once the methodology is established and internally approved by the benchmark's administrator, it may be subject to changes to ensure the continued accuracy of the benchmark. According to point (b) of paragraph (1) of Article 13 of BMR, the definition of the frequency of the review of the methodology lies with the administrator. ESMA is required to specify further the details of the internal review and approval of the methodology to be made available to the public.
74. In the CP, ESMA proposed to disclose the bodies or functions and the role of the persons involved in the review and approval of the methodology and the general characteristics of the procedures for their nomination and removal.
75. ESMA also found it appropriate to leave some discretion to administrators to set the frequency of the internal review of the methodology, which is dependent on the characteristics of the benchmark and on the changes that could affect the related market or of the characteristics of the underlying market or economic reality the benchmark intends to measure. However, this discretion is limited by the mandatory review of the methodology by the oversight function according to point (a) of paragraph (3) of Article 5 of the BMR, which should be conducted at least annually.
76. Any changes to the methodology have an impact on users of the benchmark. It is therefore necessary for the administrator to follow procedures that ESMA is required to further specify when changing the methodology of the benchmark. In particular, when the changes are deemed material, a consultation is needed in order to allow users to take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes



77. The BMR requires administrators to publish the procedure for the consultation on proposed material changes in their methodology along with the rationale for such changes, including a definition of what constitutes a material change and ESMA is mandated to further specify this information to be published or made available. ESMA specified, in particular, in the CP, that the key elements of the methodology that will be subject to the material changes should be included in the procedure to be disclosed.
78. According to the BMR, the comments along with the administrator's responses to those comments should be made accessible after any consultation except when confidentiality has been requested. ESMA suggested, in the CP, that administrators of significant benchmarks include their response to the comments received in a feedback statement.
79. ESMA is including below a summary of the comments received from stakeholders in relation to this chapter of the CP and in the next section ESMA's responses to these comments.

### 4.3 Feedback from stakeholders

80. Stakeholders generally welcomed the requirements included in the draft RTS of the CP. In particular, the list of the key elements to be disclosed and the procedure for the internal review of the methodology for which ESMA considers that the administrator should set the frequency according to the characteristics of the benchmark.
81. A broad concern raised by several respondents related to the derogations set in the BMR to the applicability of the draft RTS, e.g. the draft RTS should not apply to administrators of non-significant benchmarks.
82. While a large majority of respondents supported ESMA's proposal in the CP for the disclosure of a minimum list of key elements of the methodology, some respondents asked to enhance clarity of some of these key elements such as the "unit of measurement of the benchmark" and the description of the constituents. However, as stated in the comments received for the discussion paper, while some respondents acknowledged that this minimum list is sufficient and additional elements of the benchmark's methodology should not be disclosed, others further argued that some transparency requirements in the UCITS framework<sup>6</sup>, i.e. the full disclosure of the methodology by the administrators, should be included as key elements of the benchmark's methodology. These last respondents highlighted that fund managers need to have access to a number of data related to benchmarks, the collection of which can be difficult and highly dependent on the administrators of benchmarks. Further, stakeholders stressed the inconsistency of the draft RTS with ESMA guidelines for ETFs and other UCITS and encouraged ESMA to align the

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<sup>6</sup> ESMA Guidelines for competent authorities and UCITS management companies, 1 August 2014. [https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00\\_en\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf)

benchmarks methodology transparency requirements under the BMR with the UCITS guidelines requirements on the transparency of methodology.

83. In addition, some stakeholders expressed concerns about the second key element of Article 1 “estimate of the size of the underlying market” stating the difficulty to define and estimate the size of the underlying market the benchmark intends to measure because of a lack of available data which may not be publicly available and suggested to have an obligation of means only.
84. In relation to the internal review of the methodology, the respondents were generally in favour of ESMA’s proposal in the CP and mainly the flexibility for administrators to define the frequency of the internal review depending on the characteristics of the methodology. Nevertheless, some respondents requested to further specify the requirement on the disclosure of the functions and the roles of persons involved in the internal review highlighting that the BMR already assigns the review of the methodology to the oversight function.
85. The majority of the respondents agreed with the information to be included in the procedure for a proposed material change to an administrator’s methodology outlined in the CP. However, several respondents pointed out that in certain circumstances, an administrator should be able to implement material changes to the methodology rapidly and that a long and cumbersome consultation process may be an impediment in this regard. Although ESMA considered in the CP that the consultation cannot be waived as this is a Level 1 requirement, several market participants disagreed with ESMA’s position and stressed that in case of urgent changes to the methodology in response to, e.g. sudden market events, the usual consultation procedure should be mitigated. The SMSG also supported this view and stressed that *“ESMA should further assess how administrators should consult on material changes to the benchmark’s methodology in case of sudden market events. ESMA currently states that no exceptions can be made regarding the obligation to consult, not even in sudden market conditions, but this approach risk resulting in benchmarks not correctly measuring the related market reality. The SMSG would support a simplified procedure or an emergency procedure that could be used when ‘sudden market events’ have been demonstrated.”*
86. Further, while respondents agreed with ESMA’s approach in relation to the publication of the key elements of the methodology subject to the material changes, some of them disagreed with the publication in full of the comments received arguing that: the volume and technicality of comments may be such that it would not be useful to stakeholders, it could lead to unacceptable levels of lobbying, the information contained in responses might be sensitive or confidential, and where comments reach the administrator otherwise than in writing, summary publication should be allowed.
87. Further, some market participants highlighted that the administrator should be able to disregard irrelevant or inexplicable comments and select some comments before publication, while the relevant competent authority should have access to all comments

and requested ESMA to specify in the draft RTS the period during which the comments should remain accessible.

88. Finally, some market participants urged ESMA to define when a change to a methodology should be considered as a material change to the methodology.

#### **4.4 Content of the draft RTS**

89. On the basis of the feedback received from stakeholders to the CP, ESMA is submitting for endorsement a draft RTS to specify further the key elements of the methodology, the details of the internal review and the approval of a methodology and the procedures for consulting on any material change in the administrator's methodology that the administrator should publish or make available.

90. The draft RTS shall apply to critical and significant benchmarks. In addition, and as mentioned in the mandate to ESMA, the draft RTS do not apply to administrators of non-significant benchmarks and of commodity benchmarks subject to Annex II instead of Title II of BMR.

91. In relation to Article 13 of the BMR, BMR states in Recital 27 that the transparency of the methodology should not be meant as the publication of the formula applied for the determination of a benchmark, but rather the disclosure of the elements sufficient to allow stakeholders to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use. On the way to compromise between opposite views, ESMA included in the CP a description of the constituents of the benchmark's index in order for market participants to be informed about the universe of the benchmark's constituents and to have a better understanding of the methodology of the benchmark to allow them to assess the consistency of the benchmark with their intended use. However, ESMA considered that in order to be aligned with the Level 1 text the full transparency of the methodology, i.e. the publication of the formula used should not be included in the list of the key elements.

92. Further, some respondents to the CP encouraged ESMA to align the UCITS guidelines requirements on the transparency of the methodology to the BMR. However, ESMA does not consider it appropriate to align its UCITS guidelines to the BMR as the scope is different, i.e. the UCITS guidelines have been drafted exclusively for UCITS fund managers whereas the scope of the BMR is broader and do not apply only to fund managers and moreover to UCITS fund managers.

93. ESMA has reviewed some of the key elements proposed in the CP to enhance clarity of some of them as requested by market participants, in particular, the reference to the unit of measurement of the benchmark refers now to the currency or other unit of measurement of the benchmark. Further, ESMA has reviewed its position on the key element related to the "estimate of the underlying market or economic reality the benchmark intends to measure" and considers that the definition and description of the underlying market or

economic reality the benchmark intends to measure should be sufficient as a key element of the methodology.

94. ESMA has also tried to ensure consistency between these draft RTS and the draft RTS on the benchmark statement. According to Recital 43 of the BMR “ [...] *ensure uniform application and that benchmark statements are of reasonable length but at the same time focus on providing the key information needed to users in an easily accessible manner [...]*”, ESMA considers that the benchmark statement should include the key information whereas the methodology document should be more detailed. So, ESMA has removed, where feasible, some of the key elements that were considered as duplicative with the benchmark statement and not directly linked to the methodology itself.
95. The second part of the mandate to ESMA relates to the elements of the internal review of the methodology that the administrator has to publish or make available. ESMA has received mainly some comments on the clarification of the bodies or functions and the roles of the persons that are involved in the review or approval of the methodology. As stated above, ESMA considers that according to Article 5 of the BMR, the oversight function is the body or function that will be responsible to review the methodology at least annually. However, ESMA refers in the draft RTS to the oversight function and to other functions within the administrator’s organisational structure that would be responsible for the internal review of the methodology under the final remit of the oversight function. Further, ESMA considers that the roles of the persons within these functions that are involved in this process together with the procedure for their removal or nomination should also be published for critical benchmarks.
96. The last part of the mandate to ESMA to draft the RTS relates to the procedures for consulting on any proposed material change in the administrator’s methodology and the rationale for such changes. ESMA considers that the key elements to the methodology that will be impacted by the material change should be published or made available as it would allow users to understand which part of the methodology is impacted by the material change. Further, ESMA considers that the rationale for the changes should be specified by including the assessment that in its current form, i.e. before the proposed material change is implemented, the benchmark does or will no longer represent the underlying market or the economic reality it is supposed to measure.
97. Several market participants commented that an urgent change of the methodology should be allowed. ESMA still considers, as mentioned in the CP, that the BMR requires the administrator to consult on the proposed material change deemed that material change urgent or not. However, the draft RTS do not prevent a shortened procedure to be implemented in certain circumstances, e.g. a sudden market event.
98. Point (b) of paragraph 2 of Article 13, of the BMR states that the administrator should publish the comments received from the consultation unless confidentiality has been requested. So, ESMA considers that, according to the Level 1 text, the only exception for the publication of the comments should be the confidentiality requested from respondents. Further, as outlined in point (c) of paragraph 1 of Article 13 of the same regulation, the

administrator should include in the procedures for the consultation on any proposed material change a “ [...] *definition of what constitutes a material change.*”

99. Finally, in line with the principle of proportionality and in order to reduce the burden on administrators of significant benchmarks, the draft RTS allow these administrators not to publish or make available some of the key elements of the methodology, e.g. the methodology used for the interpolation and extrapolation of data, some of the elements of the internal review, e.g. the description for the nomination and removal of the persons involved in the internal review and approval of the methodology.

## 5 Code of conduct for contributors (Article 15 BMR)

### 5.1 Mandate

#### Article 15

6. ESMA shall develop draft regulatory technical standards to further specify the elements of the code of conduct referred to in paragraph 2 for different types of benchmarks, and in order to take account of developments in benchmarks and financial markets.

ESMA shall take into account the different characteristics of benchmarks and contributors, notably in terms of differences in input data and methodologies, the risks of input data being manipulated and international convergence of supervisory practices in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

### 5.2 Background

100. The Benchmarks Regulation (BMR) requires administrators, for each of the benchmarks or families of benchmarks they provide, to produce a code of conduct to specify the responsibilities for contributors with respect to aspects indicated in Article 15(2) of the BMR (among which: input data, record keeping, suspicious input data reporting and conflict management requirements). The integrity and accuracy of a benchmark depends on the integrity and accuracy of the input data provided by all contributors. Such obligations should be relied on, and should be consistent with, the benchmark administrator's methodology and the controls the administrator performs on the input data received, as well as with the characteristics of the benchmark's underlying market or economic reality and of the relevant input data.

101. A code of conduct is only necessary where a benchmark is based on contributions from contributors, as defined in Articles 3(8) and 15(1) of the BMR. Contribution of input data means providing any input data not readily available to the administrator (see definition in Article 3(8) of the BMR). Benchmarks based on regulated data will not be subject to Article 15 due to the exemption under Article 17(1). According to Article 19(1) administrators of commodity benchmarks, where the majority of contributors are non-supervised entities, will not be required to maintain a code of conduct for those benchmarks, as they are subject to Annex II.

102. The mandate for these draft RTS requires the further specification of the details of Art 15(2) only. Subject to Article 25 and Article 26, administrators of significant and non-significant benchmarks can take the decision not to apply Article 15(2) which lays out the specific elements to be included in a code of conduct. Where Article 15(2) is not applied, as stated above, those administrators of significant or non-significant benchmarks will be required to maintain a code of conduct for each benchmark or family of benchmarks but are free to determine the details to be included in the code.

103. Under Article 15(1) administrators are required to be continuously satisfied, or at least annually, that the contributors adhere to the code. For third country contributors, the administrator should do so to the extent possible (Recital 30 of the BMR). In case of indications of non-adherence of one or more contributors, the administrator should not use input data from those contributors and in such a case should obtain representative publicly available data (Article 11(1), point (e) of the BMR).
104. Administrators are required to ensure that their code(s) complies with the content of the Regulation. NCAs, in case they find elements of the code of conduct which do not comply with the requirements of the BMR, can require the administrator to make adjustments to the Code of Conduct. Additionally, in case the NCA considers that the representativeness of a critical benchmark is put at risk, after the assessment conducted according to Article 23 of the BMR, it may ask the administrator to change the relative code of conduct.
105. The mandate under Article 15 of the BMR requires ESMA to specify the terms of the code of conduct for different types of benchmarks and to take into account developments in benchmarks and financial markets. It is also necessary for ESMA to consider the different characteristics of benchmarks and contributors.
106. Although it is the administrator's prerogative to decide how they will be satisfied that contributors adhere to the code of conduct, it is expected that the contributors undertake internal checks to ensure that they achieve compliance with the administrator's code of conduct.
107. The scope of the draft RTS includes that the code of conduct provides for a clear description of input data to be provided and the requirements necessary to ensure that input data is provided in accordance with Article 11 on Input Data. The scope also mandates that the code of conduct states the policies to ensure that a contributor provides all relevant input data. The mandate of Code of Conduct RTS is linked to the mandate of the Input Data RTS which requires ESMA to specify how to ensure that input data is appropriate and verifiable.
108. In the Consultation Paper (CP), the draft RTS contained 9 Articles (plus the Article "Entry into force") specifying the elements included in Article 15(2) of the BMR.
109. Three Articles related to input data, one focusing on the description of the input data and another focusing on the policies to ensure that a contributor provides all relevant input data. These policies include also reference on the procedure on the transmission of data to the administrator and policies regarding which data a submitter can consider when determining a benchmark contribution. A third Article dealt with the consistency of the process of contribution of input data, referring to quality, quantity of input data and timing of submission.
110. The draft RTS in the CP included also an Article focusing on submitters, which provided the minimum standards that the contributor is expected to adopt when allowing a person to be a submitter on their behalf. The method of identification of the submitters by the

contributor to the administrator and the method by which the submissions will be authenticated as coming from the submitter have been suggested to be the responsibility of the administrator to define. In this way it is up to the administrator to design a process that is fit for their individual benchmark or benchmark family.

111. The draft RTS in the CP contained also provisions related to the pre-contribution and post contribution checks for suspicious input data, and specified that suspicious input data should be reported, where appropriate: to the compliance function, to the administrator of the benchmark, and to the relevant competent authority.
112. Finally, the minimum information to be record kept by the contributor, the policies and procedures that a contributor should have in place to manage conflict of interest, and the required training to the staff of the contributor involved in the contribution process are obligations that were dealt with dedicated Articles in the draft RTS of the CP.

### 5.3 Feedback from stakeholders

113. Market participants generally welcomed the draft RTS included in the Consultation Paper (CP). They raised a number of questions and proposals of changes of the text that are summarised in this section.
114. Some respondents asked for clarification on whether the draft RTS would apply to benchmarks subject to Annex II of the BMR. Article 19(1) “Commodity benchmarks” of the BMR states that *“The specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities”*. ESMA clarifies that Article 15 “code of conduct” is included in Title II and therefore does not apply for benchmarks covered by Annex II. The draft RTS further specifies the element included in paragraph 2 of Article 15, and because such paragraph does not apply in the considered cases, also the draft RTS on code of conduct do not apply.
115. A second clarification asked by market participants related to whether the contribution of regulated data to a benchmark is an activity covered by the draft RTS on code of conduct. The answer could be found in Article 17(1) of the BMR, on regulated-data benchmarks, that states: *“Article 11(1)(d) and (e), Article 11(2) and (3), Article 14(1) and (2), and Articles 15 and 16 shall not apply to the provision of and the contribution to regulated-data benchmarks. Article 8(1)(a) shall not apply to the provision of regulated-data benchmarks with reference to input data that are contributed entirely and directly as specified in point (24) of Article 3(1).”* This paragraph explicitly mentions the contribution to regulated-data benchmarks. It is therefore clear that Article 15 of the BMR does not apply to the contribution to regulated-data benchmarks and, in turn, not even the draft RTS on code of conduct apply to this activity.
116. One response to the CP observed that the drafting appeared to assume that the contributors were EU financial services firms providing pricing data, while in many



circumstances concepts like "compliance function" or "exposures of individual traders or trading desks" might not work. In light of this comment, the new draft RTS text has been improved so that it does not imply that every contributor has a compliance function or trading desks. If references to these are still included in the new text, they are accompanied by additional wording, such as "if any".

117. In relation to the obligation to include in the code of conduct a requirement for the record keeping of "*substantial exposure of individual traders or trading desk to a benchmark related instruments*", included in the Article dedicated to "*Record keeping policies*" of the draft TS in the CP, market participants raised a number of questions. Almost half of the respondents to the question were opposed to any recording of exposures, or expressed serious concerns. Some said that it was impractical for large banks or extremely burdensome. Others said that the requirement would need to be specified as it was unclear what it required. In particular, ESMA has been asked to clarify the records were to be kept only in relation to a benchmark to which the contributor contributed and not all benchmarks. Also the term "substantial" raised doubts, as it is not clear what that term means in practice.
118. One respondent requested to delete the requirement to make "reference checks" in the Article on submitter of the draft RTS in the CP, because this would be very difficult to carry out and would dissuade potential submitters from applying.
119. In relation to the Article on "*Record keeping policies*" of the draft TS in the CP, another issue was raised by the respondents. It was argued that point (c) of paragraph 1 requires the same information to be stored as Article 8(1)(h) of the BMR, and that this duplication is not necessary.
120. The Article on suspicious transaction data raised also some comments by the market participants. Several wanted it to be clear that all suspicions should be reported to the compliance function, but that the contributor should only report them to the administrator or NCA if the compliance function on investigation confirmed that there were grounds for suspicion.
121. In relation to the Article on training, some respondents asked who is ultimately responsible for the training.

## 5.4 Content of the draft RTS

122. The structure of the revised draft RTS on code of conduct in this Final Report remains the same of the draft RTS included in the CP. Some changes were made following comments received by market participants, plus the wording and the organisation of the provisions has been in some cases amended in order to improve clarity or legal certainty.
123. Article 1 is named "Description of input data" in order to make the link with point (a) in Article 15(2) of the BMR explicit. The Article now only refers to features of the input data to be provided by the contributor that were before included either in Article 1 or Article 4 of

the draft RTS of the CP. A new item was included in this Article, following a comment from a market participant: “format of the input data”.

124. Article 2 is about the submitters within the contributors and specifies the content of point (b) of Article 15 of the draft RTS. The content of the Article is very similar to the same Article included in the draft RTS of the CP, but the provisions have been re-organised to eliminate duplication and makes the content clearer. The code of conduct should require contributors to be satisfied that their submitters have the person has the necessary skills, knowledge, training and experience for the role. The code should therefore require due diligence process for the contributors when assessing their submitters, and such process should include checks on the identity, qualifications of the submitters, as well as their reputation, including whether the potential submitter has previously been excluded by any party from submitting input data to a benchmark for reasons of misconduct. Following the feedback received to the CP, ESMA has changed the text of this Article deleting the term “reference checks”, as it was not clear enough.
125. In the same Article 2 the RTS require the code of conduct to state the method by which a contributor is to notify the identity of any individual authorised to submit input data on its behalf to the administrator. This should be read in conjunction with draft RTS on input data where the administrator is required to check the identity of the submitters of input data.
126. Article 3 is very similar to the one presented in the CP, and refers to the Policies to ensure that a contributor provides all relevant input data (point (c) of Article 15(2) of the BMR). Under point (a) of paragraph 1 the draft RTS require a code of conduct to input data policy that includes the description of which data are to be considered for defining the input data contribution, and also the description of the data that a contributor may exclude from a contribution of input data and any reason that might justify such an exclusion. The content of this point (a) is the same of the proposal in the CP. Point (b) of Article 1(3) refers instead to policy on the transmission of data to the administrator, that should include: method to be used for the secure transfer of data and contingency plans for submitting input data that address: technical and operational difficulties, the absence of a submitter, and a lack of input data of the quality required by the methodology. In the CP, under point (b) it was also included “frequency of the transmission”. This item is now part of Article 1, that includes the description of the “frequency of submission of input data”.
127. Article 3 now contains a new paragraph (2) that requires the code of conduct to define procedures that contributors must have in place to address errors in the contributed input data. This item was first included in Article 1 of the draft RTS in the CP, but has been moved here because ESMA considers that the addressing errors in contributed input data could be considered part of the policy ensuring that a contributor provide all the relevant input data, policy to which Article 3 refers.
128. Article 4 focuses on the pre- and post- contribution checks that contributors should apply to identify suspicious input data. In the pre-contribution phase the checks should include review of the data by a second person, and identification of unusual data values: here the wording has slightly changed from the version in the CP so as to increase legal

certainty. The Articles also explained that when a contributor is allowed to use an automated system for the contribution (i.e. a system, for the purpose of contributing input data, in which natural persons are not able to modify the contribution of input data), pre-contribution checks are not required. In this case, however, the contributor must monitor and check the automated system so as to be satisfied that such system is appropriate to contribute input data.

129. Article 5 is new, in the sense that there is no corresponding Article in the draft RTS included in the CP. The Article focuses on the “Policies on the use of discretion when contributing input data”, point (d)(ii) of Article 15(2) of the BMR. It is crucial that the code of conduct establishes the right policies in relation to the use of discretion by contributors, because the use of discretion is especially exposed to the risk of manipulation of the data. The new Article 5 includes the minimum element that the policies in the code of conduct should include in relation to the use of discretion by contributors. These elements are: the circumstances in which the contributor may exercise discretion; the persons within the contributor that are permitted to exercise discretion; any internal controls that govern the exercise of the contributor’s discretion in accordance with its policies; and any persons within the contributor that may evaluate ex-post the exercise of discretion.
130. Article 6 on record keeping policies (point (d)(iv) of Article 15(2) of the BMR) is very similar to the corresponding Article included in the CP. Following the comments from market participants, the new version of Article 6 does not require any longer the record of the substantial exposures of individual trades or trading desks to benchmark related instruments, because this was considered too burdensome. Another item that has been deleted, following comments from market participants, is the records of communication between the contributor and the administrator, because the administrator will have to record such communication under point (h) of Article 8(1) of the BMR. A new item that was included is the record keeping of the register of conflicts of interest established pursuant to the Article on conflicts of interest of these draft RTS. Reference to the register of conflicts of interest was already included in the CP, but only in the Article on conflict of interest, whereas now it is also Article 6 to refer to such register.
131. Article 6 now also states that the code of conduct should require the record-keeping policies to provide that information be kept for a minimum of five years, or for three years where the records are of telephone conversation or electronic communication, on a medium that allows the storage of information to be accessible for future reference. The reference to, respectively, five years or three years is in line with Article 8(2) of the BMR, that refers to record-keeping requirements for administrators.
132. In the new draft RTS, Article 7 “Reporting of suspicious input data” has been redrafted to increase the clarity of the text and its legal certainty, and reduce the administrative burden related to the production of code of conduct. The new Article now requires the code of conduct to require a contributor to establish documented internal procedures that provide for its staff to report any suspicious input data to the contributor’s compliance function, if any, or to senior management. Moreover, the code of conduct should also specify the circumstances in which it is required for a contributor to report suspicious input data to the

administrator, and should specify the method in which the contributor should contact the administrator. The Article does no longer refer to communication from the contributor to a national competent authority (as it was the case in the CP), because this is not considered in the scope of the code of conduct. It remains clear that contributors can always contact NCAs, but ESMA does not think that there should be rules on this in the code of conduct.

133. Policies regarding conflicts of interest within the contributors are dealt with in Article 8. The content of this Article is very similar to the content of the corresponding Article in the CP, while the wording has been amended to improve clarity. A core element of this Article is the remuneration policies of the contributor's staff: a distorted policy of remuneration can incentivise submitters to manipulate input data, and it is therefore essential that the code of conduct cover this potential area of conflicts of interest.

134. Article 8 "Conflicts of interest" requires the code of conduct to include a conflicts of interest policy that addresses "contributor's exposure to a financial instrument which uses the benchmark to which the contributor contributes input data as a reference". So the new obligation requires a code of conduct to have policies in place to manage this source of conflicts of interest. The new text reduces the burden of the obligation to the contributors, that will be defined in the code of conduct; also, there is no more reference to traders or trading desks, and it is made clear that the policies of conflict of interest do not have to refer to all financial instruments referencing a benchmark, but just to the ones referencing the benchmark to which the code of conduct refers.

135. The Article on training included in the CP is no more part of the new draft RTS, but Article 8 on conflicts of interest now states that codes of conduct should require that the staff of a contributor that are involved in the contribution process are trained in relation to all policies, procedures and controls relating to the identification, prevention or management of conflicts of interest. Without a proper education received by the interested parties in relation to the conflicts of interest and the policies that govern them, the establishment of rules managing conflict of interest would be of no use.

136. As said, ESMA has deleted the Article on "training" because no explicit reference to training is made in the elements listed in Article 15(2) of the BMR.

## 6 Governance and control requirements for supervised contributors (Article 16 BMR)

### 6.1 Mandate

#### Article 16

[...]

5. ESMA shall develop draft regulatory technical standards to specify further the requirements concerning governance, systems and controls, and policies set out in paragraphs 1, 2 and 3.

ESMA shall take into account the different characteristics of benchmarks and supervised contributors, in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors, and the developments in benchmarks and financial markets in light of international convergence of supervisory practices in relation to benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to supervised contributors of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

### 6.2 Background

137. Article 16 BMR requires ESMA to develop draft RTS to specify further the requirements concerning systems and control for supervised contributors set out in paragraphs 1, 2 and 3 for different types of benchmarks.

138. The scope of application of the mandate is specified as not extending to contributors to non-significant benchmarks. Furthermore, paragraph 5 of Annex 1 BMR states that the mandate does not cover interest rate benchmarks: instead, paragraphs 6 to 12 of Annex 1 contain rules specifically for contributors to interest rate benchmarks.

139. ESMA's proposals in this section should be considered alongside the proposals on the code of conduct (Article 15 BMR), and the proposals on input data (Article 11 BMR), as the requirements on supervised contributors all relate to the provision of input data. It should be noted, however, that while code of conduct RTS specify the element that administrators must include in the codes of conduct for their contributors, Article 16 and these draft RTS on supervised contributors are directly applicable to supervised contributors. In this respect, these draft RTS are the only ones applicable directly to (supervised) contributors, while, for code of conduct, it is the administrator that must make sure the code of conduct respects the BMR and the Level 2 measures, and it must be satisfied that contributors adhere to the code of conduct on a continuous basis.

140. In the Consultation Paper (CP), ESMA proposed that the general systems and controls of supervised contributor should ensure: identification of submitters and alternates; effective checks of contributions by staff other than the submitter; where sign-off has to follow submission – as may for example happen where there are frequent, automated contributions – clear rules and deadlines; periodic review of the process and effective oversight; management of conflict of interest; management of breaches of the Benchmarks Regulation and of the code of conduct.
141. ESMA's proposals in the CP included more detailed treatment of the way in which input data is contributed, with provisions about the submitters, the individuals who contribute the input data. In the CP, submitters were asked to have an understanding of the market or economic reality that the benchmark represents, and must be trained in the firm's conflicts of interest policy and on the applicable code of conduct. This training was meant to read in conjunction with the training required by point (b) of Article 16(2) of the BMR.
142. Point (c) of Article 16(2) of the BMR requires organisational separation of submitters "where appropriate". In the CP ESMA proposed that firms should also aim to separate submitters from other employees physically, and should have oversight and verification procedures in relation to possible submitters' conflicts of interests. Where separation is not possible, these procedures should be such as to control the interaction of submitters with front office employees. The draft RTS contained in the CP focused also on a firm's remuneration policies in order to avoid giving submitters any incentives that might affect their contributions.
143. In relation to contributions that involve the use of expert judgement, ESMA proposes that each supervised contributor's procedure for applying expert judgement should include a framework for ensuring consistency in contributions, and specification of the information to be used. There should also be procedures for reviewing the use of expert judgement afterwards.
144. ESMA also proposes some elaboration of the requirements in Article 16(2)(d) and (e) of the BMR for record-keeping by the supervised contributor.

### **6.3 Feedback from stakeholders**

145. The answers received by market participants in relation to these draft RTS were generally positive and did not ask for major changes in the approach. A general clarification asked by the respondents is about the scope of the draft RTS and, in particular, whether the draft RTS do not apply to commodity benchmarks that apply Annex II instead of Title II. The text of the BMR is clear in relation to this issue. Article 19 "Commodity benchmarks" states that: *"the specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities."* So, as long as the commodity benchmark is applying Annex II, Title II would not apply, and therefore Article 16 and the corresponding RTS would not apply as well. It

should be noted that, in light of the text of the BMR, if a commodity benchmark is *based on submissions by contributors the majority of which are supervised entities*, i.e. the majority of contributors are supervised contributors, Title II would apply instead of Annex II, and in this case Article 16 and the RTS would apply altogether.

146. In relation to the Article on “Governance, systems, and control”, ESMA received some comments on the process of sign-off of contribution of input data (specifying point (a) of Article 16(2)). A comment received by ESMA suggested that this provision should take into consideration whether expert judgment is involved.

147. In relation to the Article on process of contribution of input data, that in the CP covered also the issue of conflicts of interest, market participants commented on the provision related to the remuneration of submitters. Some responses argued that the proposal in the CP (asking that remuneration for submitters is not linked to the benchmarks, not linked to the submission made, and it is independent of the performance of any other business unit of the contributor that is likely to be significantly affected by the benchmark) will be problematic to apply, especially for small organisation.

148. Other comments made by the respondents in relation to the Article on process of contribution of input data of the draft RTS in the CP relate to the point (a) of paragraph (2): *“physical separation of submitters from other employees working in other business units within the contributor’s organisational structure, where reasonably practicable, units within the contributor’s organisational structure, where reasonably practicable, taking into account the nature, scale and complexity of the contributor’s activities and whether the contribution activity is based on the core business or on ancillary activities performed by the contributor”*. There was no unanimous message from the comments received by ESMA: some were favour of the proposal while others said that it was too demanding. It should be noted that is the text of the BMR to require supervised contributors to establish systems and controls regarding *“measures for the management of conflicts of interest, including organisational separation of employees where appropriate”*.

149. In relation to the Article on “Record keeping” of the draft RTS in the CP, market participants commented on paragraph (2) in relation to the exposure to financial instruments which use a benchmark as a reference. It was highlighted by respondents that it may be difficult to determine if instruments are core business or part of treasuries activities.

## 6.4 Content of the draft RTS

150. The content of the revised RTS in the Final Report is very similar to the draft RTS in the CP. The organisation of the Articles, however, has been reviewed so as to better highlight which element each Article is further specifying.

151. The Article on “Governance, systems and controls” in the draft RTS of the CP has now been divided in two Articles: the first one on control framework (specifying point (b) of Article 16(1) of the BMR), and the second on the controls to be made by the supervised

contributors during the submission (specifying point (a) of Article 16(1) of the BMR). The new Article 1 “Control framework” contains provisions requiring periodic review of the process for contributing input data, effective oversight of the same, and policy on whistleblowing, including appropriate safeguards for whistle-blowers.

152. New Article 2 on “Controls on submitters” includes the same provisions included the draft RTS of the CP. The only material difference in these provisions is the further specification that ESMA has now included in relation to the process of sign-off, following the comments from market participants. Article 2 now states that the controls of a supervised contributor should include a process for sign-off of a contribution by a natural person senior to the submitter either when it is required by the applicable code of conduct, or when the supervised contributor considers the sign-off proportionate on the basis of the following elements: the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflict of interest may rise between the contribution to the benchmark and trading or other activities performed by the contributor. The intent of this new wording is to further specify “where it is appropriate” (wording of the BMR) to establish a process of sign-off for contribution of input data.
153. Also the Article on “Process of contribution of input data” of the draft RTS contained in the CP has been divided into two new Articles to better identify the elements they specify.
154. Article 3 of the revised RTS is about the training for submitters (specifying point (b) of Article 16(2) of the BMR), while new Article 4 is about conflicts of interest (specifying point (c) of Article 16(2) of the BMR). The obligations related to the training for submitters are not materially different from the ones included in the CP (i.e. adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality, and adequate knowledge of all the elements of the applicable code of conduct) while for conflicts of interest the text of the draft RTS has been reviewed, following the feedback received. In particular, the paragraph related to the remuneration of the submitters now requires the remuneration not to be linked to the benchmark nor to the specific values of the submissions made, and also not to be linked to the performance of a specific activity of the supervised contributor that may rise a conflict of interest with the contribution to the benchmark. The new wording improves legal certainty and reaches the same policy scope that ESMA had in the CP while, at the same time, taking into account the concerns of market participants.
155. Following the comments made by stakeholders, also the paragraph related to physical and operational separation between submitters and other staff within a supervised contributor has been amended in a way that now the separation is requested only where there could be a conflict of interest between the contribution to the benchmark and other activities performed by the contributor.
156. Finally, the Articles on expert judgement and record keeping, specifying, respectively, Article 16(3) and points (d) / (e) of Article 16(2), have not materially changed from the text proposed in the BMR, with the exception of a single provision in the Article on record-



keeping. In particular, ESMA has changed the wording of the provision related to the record keeping of exposures to financial instruments which use a benchmark as a reference this section, with the deletion of reference to core business or treasury activities.

## 7 Compliance statement for administrators of significant and non-significant benchmarks (Articles 25 and 26 BMR)

### 7.1 Mandate

#### Article 25

7. Where an administrator of a significant benchmark does not comply with one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2), it shall publish and maintain a compliance statement that clearly states why it is appropriate for that administrator not to comply with those provisions.
8. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 7.

*ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.*

#### Article 26

3. Where an administrator of a non-significant benchmark chooses not to apply one or more of the provisions referred to in paragraph 1, it shall publish and maintain a compliance statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions. The administrator shall provide the compliance statement to its competent authority.
4. The relevant competent authority shall review the compliance statement referred to in paragraph 3 of this Article. The competent authority may also request additional information from the administrator in respect of its non-significant benchmarks in accordance with Article 41 and may require changes to ensure compliance with this Regulation.
5. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 3.

*ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.*

### 7.2 Background

#### *Compliance statement for administrators of significant benchmarks*

158. The Benchmarks Regulation (BMR) states that administrators of significant benchmarks may choose not to apply a number of provisions. These provisions, listed in Article 25(1), relate to the areas of: governance and conflict of interest (Article 4), input data (Article 11) and code of conduct (Article 15). An administrator may decide not to apply these requirements only when it “*considers that the application of one or more of those provisions would be disproportionate taking into account the nature or impact of the benchmark or the size of the administrator*” (Article 25(1)). However, the relevant national competent authority (“NCA”) may conduct an assessment and decide that one or more of

the requirements waived should be applied, depending on the outcome of the said assessment.

159. Where the administrator chooses not to comply with one or more of the provisions listed in Article 25(1), it has to publish and maintain a compliance statement explaining why it considers it appropriate not to comply with those provisions.

160. In this context, ESMA is empowered to develop implementing technical standards (ITS) to develop a template for the compliance statement, to be used by all administrators of significant benchmarks availing themselves of the provision in Article 25(1). The template should ensure that the statement is clear and unambiguous while, at the same time, the explanation of the non-application of the provisions within the template should be as detailed and comprehensive as possible. That is because the main aim of the compliance statement is to provide competent authorities and the public with an explanation of why it is appropriate not to apply some requirements of the BMR: transparency and clarity should therefore be prominent features of the template for compliance statements.

#### *Compliance statement for administrators of non-significant benchmarks*

161. In relation to non-significant benchmarks, the BMR has a similar approach towards possible non application of some requirements. According to Article 26(1) of the BMR, when a benchmark is not classified as critical or significant, its administrator may decide not to apply a number of provisions indicated under the same Article and related to: governance and conflict of interest (Article 4), oversight function (Article 5), control framework (Article 6), accountability framework (Article 7), input data (Article 11), transparency of methodology (Article 13), reporting of infringement (Article 14), code of conduct (Article 15), governance and control requirements for supervised contributors (Article 16).

162. If an administrator decides not to apply any of the provisions listed in Article 26(1), it will have to publish and maintain a statement explaining why it is appropriate not to comply with the specific provisions.

163. The main difference with respect to the process for significant benchmarks is that in the case of non-significant benchmarks: (a) there is no assessment by the competent authority of the appropriateness of the exemptions elected by the administrator (see Article 25(2) to (6) for significant benchmarks); (b) the compliance statement should also be provided to the relevant competent authority, and not just publish it (see difference between Article 25(7) for significant benchmarks and Article 26(3) for non-significant benchmarks); (c) the competent authority may require additional information as well as changes to ensure compliance with the BMR (see Article 26(4)).

164. Also in this context ESMA is empowered to develop draft ITS to establish a template for the compliance statement to be produced for non-significant benchmarks.

#### *Proposal in the Consultation Paper*

165. In the draft ITS included in the Consultation Paper (CP), ESMA proposed that administrators of significant benchmarks should publish a single compliance statement composed of multiple sections as it follows.
166. First, a “general” section should include the identity of the administrator and of the relevant NCA as well as the date of creation and latest update of the compliance statement.
167. After the “general” section, the compliance statement should contain a “core” section including: an indication to which significant benchmarks the waived provisions do not apply; which provisions the administrator has chosen not to apply; explanations on the appropriateness of not applying each of the provisions waived.
168. This “core” section should be included in the compliance statement for each identifiable group of significant benchmarks (whether or not belonging to the same family) provided by the administrator for which: (i) the same provisions are not complied with, and (ii) the same explanations for non-compliance apply.
169. For example, if an administrator of five significant benchmarks decides not to apply one of the requirements listed in Article 25(1) in the provision of three benchmarks, it would have to explain in the compliance statement why the application of that requirement is disproportionate in relation to those three benchmarks. In the case where the explanation of disproportionality is the same for the three benchmarks, the compliance statement of the administrator would be composed of: one “general” section and one “core” section, in which the three benchmarks are listed and the common explanation of appropriateness is included.
170. If the same administrator decides that for its remaining two significant benchmarks a different requirement, amongst the ones listed in Article 25(1), should not apply, it should check whether the reason for not applying this requirement to the two benchmarks is identical. If this is the case, the compliance statement of the administrator would thus include: a “general” section and two distinct “core” sections – a first “core” section for the group of three benchmarks referred to in the previous paragraph, and a second “core” section for the group of two benchmarks referred to in this paragraph.
171. In case the explanations for the non-application of one provision differ from one benchmark to another, in the second example provided, there would be a need to add an additional “core” section. In this case the result would be a compliance statement that includes: a “general” section and three distinct “core” sections - a first “core” section for the group of three benchmarks, a second “core” section for one of the two benchmarks belonging to the second group, and a third “core” section for the other benchmark of the second group. Indeed, even if the administrator applies the same exemption to several benchmarks, whenever the explanations for doing so are different, separate core sections are requested.

172. With this approach ESMA is aiming at minimising the administrative burden in connection with preparation of the compliance statement, while maintaining all the relevant information, in line with the Level 1 text.
173. The draft ITS requires an administrator of significant benchmarks also to amend the compliance statement whenever any of the information included within it is no longer up to date. This could be the case, for example, if a significant benchmark is to be added to the ones already included in the statement. After each amendment, the administrator of significant benchmarks should then publish the updated compliance statement (with a modified date of “last update” in the general section of the statement).
174. In the case of non-significant benchmarks, the draft ITS included in the Consultation Paper (CP) proposed the same approach proposed for significant benchmarks, with a multiple sections structure (i.e. a structure containing “general” and “core” sections). However, in line with the principle of proportionality, the draft ITS for administrator of non-significant benchmarks were demanding a reduced number of items compared to the compliance statement for significant benchmarks

### **7.3 Feedback from stakeholders**

175. The proposal included in the CP was welcomed by many respondents. However, a group of market participants, mainly users of benchmarks, indicated its preference for the proposal included in the Discussion Paper (DP), where it was stated that a compliance statement should refer to a single benchmark / family of benchmarks, therefore largely increasing the administrative burden for administrators of significant and non-significant benchmarks.
176. A market participant in favour of the general approach asked whether it would be possible for an administrator to issue statements intended for significant benchmarks for both significant and non-significant benchmarks. According to Articles 1 and 2 as drafted in the CP, this is not possible. The new version of the Articles, included in the Final Report, maintains the same approach. In this context it should also be considered that ESMA has received two separate empowerments under Articles 25 and 26 of the BMR.
177. Another general remark made by a market participant in favour of the approach proposed by ESMA is the following. A family of benchmarks may include significant and non-significant benchmarks at the same time: the market participant asked how to distinguish between these two sub-groups in a compliance statement referencing to a family of benchmarks including significant and non-significant benchmarks.
178. A request was made to add in section “A. general information” of the Annexes the item “version number” of the compliance statement, so reader is informed if the content of the compliance statement is changed frequently.

179. A market participant proposed to include in the provisions on the update of compliance statement “*by means that ensure and easy access*” with reference to the publication of the statement, in line with the wording of Article 27 of BMR (Benchmark Statement).
180. A different market participant suggested removing “*immediately*”, in relation to the update requirement, and including a less stringent term such as “*as soon as reasonably practicable*”.

## 7.4 Content of the draft ITS

181. The approach included in the final draft ITS on compliance statement for both administrators of significant benchmarks and non-significant benchmarks remains the same proposed in the CP, with the main difference that reference to family of benchmarks have been deleted. Also a small number of amendments have been introduced following the comments made by market participants.
182. The original approach included in the DP was modified in the CP following the feedback to the DP provided by the market participant. ESMA is still convinced that the approach first proposed in the CP, with a multiple sections structure (i.e. a structure containing “general” and “core” sections), is more appropriate than the one proposed in the DP. The proposed approach minimises, to the extent possible, the administrative burden for administrators while, at the same time, it retains all the information that was required in the first proposal. The main difference between the two is that the latest approach represents a more cost-efficient way of organising the same information.
183. ESMA nevertheless appreciates the comments made by the users of benchmarks in relation to the fact that the compliance statement should be as “user-friendly” as possible, because it is considered a public source of information for everyone interested in having more information on the way benchmarks are administered. Besides, both Articles 25 and 26 of the BMR do not refer to family of benchmarks, but only, respectively, to significant and non-significant benchmarks. Against this background, ESMA considers a fair trade-off a structure of the compliance organised in multiple sections, including each significant or non-significant benchmark without reference to family of benchmarks.
184. In the Articles of the draft ITS the main difference, if compared to the version in the CP, is that it now contains a single Article (excluding the “*Entry into force*”), but the content is aligned with the two Articles included in the draft of the CP, with the exception of the paragraph related to the requirements to update the compliance statement, as it is now considered outside the mandate received by ESMA.
185. Also, following a proposals from stakeholders, with reference to the publication of the statement, the text “*by means that ensure and easy access*” (that is in line with the wording of Article 27 of BMR), has been added in Article 1, and in the same Article the word “immediately” has been amended to “as soon as possible”.

186. The structure of, and the logic behind, the Annexes remains the same, containing a general section and one or more core sections. References to family of benchmarks are no more included so that users and competent authorities can easily identify every single benchmark and every non-complied provision to which each section of a compliance statement refers, and they would have all the elements to understand the rationale for non-compliance with every mentioned provision.
187. Annex I contains a general section with the following items: the identity of the administrator, the identity of the relevant NCA, the date of creation and latest update of the compliance statement.
188. In relation to the proposal to include the item “version number” of the compliance statement in the general section, ESMA believes that this information is not essential. For significant benchmarks, the administrator is requested by Article 25(2) of BMR to notify the NCA whenever it decides not to apply some of the provisions listed in Article 25(1) of BMR, therefore the NCA will be always informed of the frequency and number of changes of the compliance statement. For the template to be used only for non-significant benchmarks, the idea is to reduce to the extent possible the number of items as to reduce administrative burden for the administrators providing less-used benchmarks. In this context, it should be noted that both templates, for significant and non-significant benchmarks, include in their general section the date of the last update of the compliance statement, so this is an information always available to the NCAs as well as to the public.
189. The general section of Annex I is followed by one or more core sections. Each core section relates to an identified group of significant benchmarks provided by the administrator for which: the same provisions are not complied with, and the same explanations for non-compliance apply. The core section includes a list of all the single benchmarks to which it refers, their ISINs (if available) as well as an indication to where the benchmark statement of these significant benchmarks have been published. Finally, each core section will include a clear identification of each single provision not applied by the administrator for that group of benchmarks and, for each of this provision, an explanation on the appropriateness of the non-compliance. The explanation must be applicable for the benchmarks included in that core section.
190. Annex II can be used only with reference to non-significant benchmarks. The structure of the template is exactly the same as the template in Annex I, with the only differences being the following: in the general section is not required to include the identity of the relevant national competent authority; in the core sections it is not required to indicate where the relevant benchmark statements have been published by the administrator.

## 8 Criteria for significant benchmarks (Article 25 BMR)

### 8.1 Mandate

#### *Article 25*

*3. A competent authority may decide that the administrator of the significant benchmark is nevertheless to apply one or more of the requirements of Articles 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) 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. In its assessment, the competent authority shall, based on the information provided by the administrator, take into account the following criteria:*

- a. the vulnerability of the benchmark to manipulation;*
- b. the nature of the input data;*
- c. the level of conflicts of interest;*
- d. the degree of discretion of the administrator;*
- e. the impact of the benchmark on markets;*
- f. the nature, scale and complexity of the provision of the benchmark;*
- g. the importance of the benchmark to financial stability;*
- h. the value of financial instruments, financial contracts or investment funds that reference the benchmark;*
- i. the administrator's size, organisational form or structure.*

*8. ESMA shall develop draft regulatory technical standards to further specify the criteria referred to in paragraph 3.*

*ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.*

### 8.2 Background

191. Administrators of significant benchmarks may choose not to apply a number of provisions of the BMR regarding the avoidance of conflicts of interest through organisational separation of the benchmark provision from other business or through increased control measures on their employees, regarding control mechanisms for input data contributed from a front office function and regarding minimum contents of the code of conduct for contributors.



192. Where an administrator has chosen not to apply one or more provisions, the competent authority may decide that the administrator shall nevertheless apply one or more of the respective provisions if it considers that it would be appropriate and has taken into account the nature or the impact of the benchmark or the size of the administrator as well as nine criteria set forth in Article 25(3) BMR, which ESMA is required to further specify.

*Proposal in the Consultation Paper*

193. For the proposal ESMA has put forward in the Consultation Paper ESMA has considered that competent authorities when assessing each of the criteria of Article 25(3) BMR should take into account the purpose of the provision of the BMR which the administrator has decided not to apply. ESMA proposed that in their assessment of the criteria competent authorities should evaluate if such purpose can nonetheless be achieved through other means.

194. In ESMA's view the criteria of the vulnerability of the benchmark to manipulation, the nature of the input data and of the nature, scale and complexity of the provision of the benchmark (point (a), (b) and (f) of Article 25(3) BMR) address aspects that are inherent to the benchmark itself and to its methodology respectively. ESMA suggested that the competent authority in the assessment of these criteria should take into account in particular structural elements of the benchmark to evaluate whether or not individual characteristics of the benchmark or its actual provision process may justify requiring the application of one or more of the requirements the administrator has opted out of. For the mentioned criteria, the requirements regarding the input data (Article 4(7) of the Regulation (EU) 2016/1011) would be of particular relevance.

195. ESMA considered that the letters (c), (d) and (i) of Article 25 (3) BMR on the level of conflicts of interest, the degree of discretion of the administrator and the administrator's size, organisational form or structure would relate foremost to the properties of the administrator and proposed specifying elements in the RTS to point to typical sources of conflicts of interest – for example whether the administrator holds positions in financial instruments or financial contracts referencing the benchmark, its involvement with contributors or its corporate ties to actual or potential users of the benchmark – and possible means to mitigate them – through transparency, organisational separation or other adequate governance mechanisms. ESMA was of the opinion that the elements that ESMA proposed would be particularly helpful for competent authorities when they assess the re-application of requirements concerning governance and exclusion of conflicts of interest (Articles 4(2) and point (c),(d) and (e) of Article 4(7) BMR).

196. According to ESMA's proposal in the Consultation Paper, all of the remaining criteria of the impact of the benchmark on markets, the importance of the benchmark to financial stability and of the value of financial instruments, financial contracts or investment funds that reference the benchmark (point (e), (g) and (h) of Article 25(3) BMR) would relate to the financial importance of the benchmark – to either single markets or to financial stability on a wider scale. ESMA proposed that competent authorities should take the economic importance of the benchmark into account when they assess whether or not it can be

appropriate to mandate the re-application of one or more requirements of the BMR. According to ESMA's proposal, competent authorities should also consider the relevance the individual benchmark has or may have for a specific market or markets and – where known by the competent authority, through the application process or otherwise – the total value of financial instruments, financial contracts and investment funds referencing that benchmark, and any relevant quantitative relation to the total value of the respective instruments in the Member State, where available.

### **8.3 Feedback from stakeholders**

197. Respondents were generally in support of ESMA's approach and of the proposed draft specification of criteria and only few respondents suggested amendments.
198. Some comments suggested that the draft RTS should take into account whether or not the input data is regulated data and that ESMA should clarify that regulated data was not contributed but readily available. ESMA is of the opinion that it cannot give such clarification because it would clearly be outside its mandate. In a related comment a respondent asked that ESMA should replace transaction data by readily available data in point (f) and (i) of Article 1(1) of the draft RTS, another commented there was an unjustified dichotomy of input data and transaction data in the same Article.
199. On ESMA's proposal to take into account prior cases of manipulation, one respondent suggested that proven cases of manipulation of a benchmark with a similar methodology and similar input data should not be considered when these precedents related to different benchmarks from different administrators. Also with respect to the vulnerability of the benchmark to manipulation, another respondent asked for clarification of the incentives ESMA proposed to be taken into consideration in point (iv) of Article 1(a) of the draft RTS.
200. Another stakeholder requested that ESMA should give clear guidance and monitor the consistent application of the criteria and that competent authorities should be required to obtain ESMA's approval when they decide to mandate the re-application of provisions by benchmark administrators. According to this comment, administrators should also have a right to appeal.

### **8.4 Content of the draft RTS**

201. ESMA has reflected on the comments and has upheld the proposal of the Consultation Paper to a large extent. When respondents requested that the concept of transaction data should be replaced by readily available data, ESMA has upheld the wording for the reasons explained above. ESMA does also not share the view that in its proposal input data and transaction data would be mutually exclusive. To the contrary, in ESMA's view transaction data is always input data and it may often, when contributed by the sources listed in Article 3(1)(24) BMR, regulated data and this is reflected in the draft RTS. ESMA also thinks that the draft RTS should require that NCAs take into whether input data is transaction data (as opposed to the narrower concept of regulated data) because this will in practice cover a

wider range of benchmarks and administrators and in particular in relation to the nature, scale and complexity of the provision of the benchmark (Article 1 (1)(f) of the draft RTS) is the most relevant aspect for the control mechanisms that an administrator applies to the input data.

202. ESMA has also decided not to limit the consideration of past proven cases of manipulation to similar benchmarks by the same administrator or to consider only those cases that relate to similar input data. In ESMA's view this would be an unjustified limitation of the scope of manipulated benchmarks that competent authorities should take into account. ESMA has no longer upheld as an element for the specification of point (a) of Article 25(3) BMR the incentives for a third party to try to manipulate the benchmark (formerly point (iv) of Article 1(1) of the draft RTS). While those incentives would have to be specified as those that result from the methodology of the benchmark itself to align it with its vulnerability, ESMA acknowledges that incentives to manipulate should not result from the benchmark itself more generally and be rather considered as external factors.

## 9 Benchmark statement (Article 27 BMR)

### 9.1 Mandate

#### *Article 27*

*3. ESMA shall develop draft regulatory technical standards to further specify the contents of the benchmark statement and the cases in which an update of such statement is required, distinguishing for different types of benchmarks and sectors as set in this Regulation and taking into account the principle of proportionality.*

*ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.*

### 9.2 Background

203. Article 27 of the Benchmarks Regulation (BMR) requires administrators to publish a benchmark statement. Article 27(1) states general requirements regarding transparency, appropriateness, and elements of discretion in the calculation of the benchmark and user caution. The minimum contents for all benchmark statements are specified in Article 27(2) with reference to the methodology and the process to determine the benchmark, in particular the input data.

204. Recital 43 of the Regulation explains that the benchmark statement is a tool for users of benchmarks to choose appropriately from among, and understand the risks of, benchmarks, and for this reason the statement provides information in relation to what a given benchmark intends to measure and its susceptibility to manipulation. The main aim of the statement is therefore to provide clear information to the public, informing it in a precise yet “user friendly” way.

205. In the Consultation Paper (CP) ESMA has proposed a draft RTS for the benchmark statement organised as follows: Article 1 “General disclosure requirements”, common for all benchmark statements; Articles 2 to 7 specify the items to be included in the benchmark statements in relation to the different types of benchmarks: regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks significant benchmarks, non-significant benchmarks; and Article 8 specifies the cases in which an update of the benchmark statement is required.

206. ESMA has developed this structure of the draft RTS in the CP with the intent to propose a linear and easily understandable set of requirements that administrators should be able to implement smoothly, without an excessive increase in administrative cost.

### 9.3 Feedback from stakeholders

207. The respondents to the CP expressed a broad support for the proposal in the CP, and made the following specific comments.

208. A small group of market participants suggested that to flag indices that rely on contributions as this is considered a characteristic of utmost importance. It was also suggested to require including a date of publication in the benchmark statement and of its last update.
209. Several respondents voiced their concerns in relation to duplication of information in the benchmark statement vis-à-vis other documents that administrators have to publish under the BMR, in particular the methodology (see Transparency of Methodology, Article 13 BMR). One respondent even suggested merging the two documents in a single one. Others highlighted the need to have the possibility to cross-refer in the benchmark statement to the methodology document.
210. In response to this comments, it should be noted that it is the text of the BMR imposing the benchmark statement to include reference to the methodology, as per Article 27(2), so the draft RTS cannot change this. Also, the BMR requires both, the publication of a benchmark statement (Article 27) and to publish, or make available, information related to methodology (Article 13).
211. Some respondents opposed the requirement to include information on professional profiles of contributors in the benchmark statement with respect to commodity benchmarks. They argued that Article 27 of the BMR does not make any reference to the provision of such information and therefore consider these provisions exceed the requirements of the BMR.
212. In relation to the same Article on commodity benchmarks, it was suggested adding a provision allowing administrator to refer to the external audit report required in Annex II, paragraph 18, of the BMR since such information is likely to be relevant to the benchmark user. It was argued by the respondent that this addition would respond to the purpose of a benchmark statement as outlined in Recital 43 of the BMR and would align Article 4 of the draft RTS with Article 3 of the draft RTS, which specifies that the benchmark statement for an interest rate benchmark may include a reference to the external audit report required in Annex I, paragraph 4, of the BMR.
213. One respondent suggested modifying the Article on critical benchmarks in a way that the list of contributors to a critical benchmark would be presented at aggregate level.
214. A market participant suggested to change the term “significant change” in the Article on the updates of the benchmark statement to “material change”, as the latter term is already used in Article 13 of the BMR, “transparency of methodology”.
215. A number of participants asked about the combination of different types of benchmarks and the parallel applicability of the relevant provisions. They provided some examples of benchmarks and asked under which type(s) these benchmarks would fall. What emerged from the comment of the respondents is that, while it is clear that (i) “*critical, significant, non-significant*” and (ii) “*regulated data, interest rate and commodity*” are characteristics belonging to different dimensions and therefore combinable among them (with the notable

exception of critical and regulated data benchmarks: this cannot exist as per the definition of critical benchmarks in Article 3(1), point (25)) of the BMR, it is less clear whether “regulated data”, “interest rate” and “commodity” are characteristics that can co-exist in the same benchmark. This is more a matter of interpretation of the text of the BMR, which is outside the scope of this Final Report. Nevertheless, if a benchmark is considered to fall under more than one type, all relevant provisions are applicable in parallel and in addition to the general requirements in Article 1 of the draft RTS.

216. “Interest rate” and “commodity” are clearly self-excluding types of benchmarks, while “regulated-data” is a characteristic that looks at the nature of the input data used for the determination of the benchmark, rather than the market or economic reality the benchmark is using, and in theory could co-exists with both types interest rate and commodity.
217. In relation to the combination “commodity” and “regulated data”, attention should also be paid to Article 19(1) of the BMR, on commodity benchmarks. The wording of the Article 19(1) implies that a commodity benchmark can be a regulated-data benchmark (the paragraph states that, if this is the case, Annex II does not apply).
218. In relation to the combination “interest rate” and “regulated data”, the two definitions of these types of benchmarks are in Article 3(1), points (22) and (24) respectively. Interest rate benchmarks must be determined “*on the basis of the rate at which banks may lend to, or borrow from, other banks, or agents other than banks, in the money market*”. If these data cannot be sourced directly and entirely from one of the “systems” listed under point (a) in the definition of regulated-data benchmark, this means that the benchmark in question will be an interest rate benchmark, and not a regulated-data benchmark as well.
219. Finally, some respondents highlighted that the information in the benchmark statement regarding whether the benchmark / family of benchmarks complies with UCITS rules (i.e. UCITS Directive and/or ESMA Guidelines on ETFs and other UCITS issued the 1 August 2014) would be of great benefit for the fund industry. While understanding the reasons behind these queries, ESMA considers that such requirement would exceed Level 1, because it could not be considered a further specification of any of the elements included in Article 27 of the BMR. Therefore, it is not possible to introduce the requested declaration requirement in the draft RTS. It should also be noticed that the scopes of the draft RTS and of the ESMA Guidelines are different and the requirements included in the draft RTS would not have any effect on the content of the mentioned ESMA Guidelines.

## 9.4 Content of the draft RTS

220. The general approach included in the final draft RTS on benchmark statement remains the same proposed in the CP. Only some small amendments have been introduced following the comments made by market participants as described in the previous section “Feedback from stakeholders”. The structure of the draft RTS is the following:

- Article 1 includes the “General disclosure requirements” that should be present in all benchmark statements, and specifies in particular the elements included in paragraphs (1) and (2) of Article 27 of the BMR;
- Articles 2 to 6 specify the contents to be included in the benchmark statement in relation to the different types of benchmarks: regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks, significant benchmarks and non-significant benchmarks (now in a single Article); and
- Article 7 specifies the cases in which an update of the benchmark statement is required under Article 27(1) of the BMR.

### *General disclosure requirements*

221. Article 1 now includes a new paragraph 1 requesting the statement to include the date of publication and date of update of the benchmark statement, the ISIN of the benchmark or of the benchmarks part of the family of benchmarks (if available) and whether the benchmark or family of benchmarks relies on contributions of input data. These items were included following the suggestions of stakeholders.

222. The following paragraphs of Article 1 refer to the key terms relating to the benchmark, and in particular focus on the market or economic reality measured by the benchmark or family of benchmark. In particular, Article 1(2) requires the benchmark statement to include a reference to the geographical boundaries of the measured market or economic reality, where applicable. The term “where applicable” was added following a comment by a stakeholders, as reference to geographical boundaries can, in some cases, be not applicable.

223. Article 1(3) refers to the potential limitations of the benchmark or family of benchmarks and, in particular, the circumstances in which the measurement of the relevant market or economic reality may become unreliable. Administrators should include in the benchmark statements the circumstances in which the administrator would lack sufficient input data to determine the benchmark according to the methodology, and also circumstances in which the degree of liquidity of the underlying market becomes insufficient to ensure the integrity and reliability of the benchmark determination according to the methodology.

224. Article 1(4) focuses on the use of discretion in the calculation of a benchmark, proposing that the benchmark statement should indicate the position of each function or body who may exercise discretion, and outline each step of the ex-post evaluation process for the use of discretion, including a clear reference to the position of the persons that evaluates any exercise of discretion.

225. This set of elements, together with the ones already required in point (d) of Article 27(1) of the BMR, should provide the public with a clear and comprehensive view on the use of discretion during the determination of the benchmark. As already said, the presence of discretion in the computation of the benchmark could potentially imply the existence of

conflict of interest and therefore could represent a source of manipulation of the benchmark, increasing the vulnerability of the latter.

226. Article 1(5) states that administrators of critical benchmarks are required to indicate the means by which users will be informed of a change to or the cessation of the benchmark. The same paragraph requires administrators of significant and critical benchmarks to indicate any expected impacts of changes to, or the cessation of the benchmarks upon the financial contracts, financial instruments that reference the benchmark or the measurement of the performance of investment funds.
227. Paragraphs 6 and 7 include some proportionality in relation to Article 1 for, respectively, significant and non-significant benchmarks.
228. Finally, the new paragraph 8, that was introduced following comments by respondents to the CP, states that for any relevant additional or more detailed information, references to other public sources of information, including information available on the administrator's website or published in compliance with the BMR, may be included in the benchmark statement. This general provision allows administrators to refer to other documents, including the one for methodology, as long as the minimum content of the benchmark statement is respected, with the aim of reducing duplication of information provided by the administrator. Under this paragraph, administrators should be able to cross refer to the external audit report both in reference to interest rate and commodity, as long as they are accessible free of charge.

#### *Disclosure on types of benchmarks*

229. Articles 2 to 6 further specify the content of the benchmark statement in relation to the different types of benchmarks.
230. For regulated data benchmarks, due to their nature and minor susceptibility to manipulation, the content of the benchmark statement is limited to the addition in the description of the input data of the sources of the input data used, and within which type of source, as defined in Article 3(1)(24) of the BMR, the used source falls. (Article 2 of the draft RTS).
231. Article 3 of the draft RTS requires administrators of interest rate benchmarks to refer to the enhanced regulatory regime applicable to interest rate benchmarks under Annex I to the BMR, and state which arrangements have been put in place to comply with such Annex.
232. For commodity benchmarks, according to Article 4 of the draft RTS administrators would have to: indicate whether the benchmark falls under the regime of Title II of the BMR ("Benchmark integrity and reliability", Article 4 to 16 of the BMR) or of Annex II ("Commodity benchmarks")<sup>7</sup>, and why this is the case; include in the definitions of key terms a concise

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<sup>7</sup> Title II applies where a commodity benchmark:



description of the criteria that define the relevant underlying physical commodity; and, where applicable, with respect to the explanations that the administrator has to publish for each benchmark calculation according to Annex II, paragraph (7)(a) and (b) of BMR, indicate the source where such explanations may be found.

233. Following the comments from stakeholders, the requirement to include information on professional profiles of contributors in the benchmark statement with respect to commodity benchmarks has been deleted, as Article 27 of the BMR does not make any reference to the provision of such information.
234. Article 5 refers to critical benchmarks for which, apart from an indication of the qualification of critical benchmark (with specific reference of the case under which the benchmark was classified as critical), the draft RTS proposes an enhanced set of information. In particular, the benchmark statement for critical benchmarks should: refer to the enhanced regulatory regime applicable to critical benchmarks under the BMR and specify which increased oversight mechanisms are in force for the benchmark; contain information, to the extent available, on the most used types of financial instruments / contracts and investment funds that reference the critical benchmark; state how users will be informed of any delay in the publication of the benchmark or of a re-determination of the benchmark, indicating any time limits that apply to these procedures.
235. The information on the most used types of financial instruments should allow users to understand the extent of use of the benchmark and, therefore, why it has been classified as critical.
236. The requirement regarding the delay in the publication of the benchmark or of a re-determination of the benchmark is needed because, in the case of critical benchmarks, a delay in the publication or a re-determination of the benchmark would have very broad effect and possible systemic risk spill-over: it is therefore important that users can be properly informed about these two circumstances.
237. As a result of the above elements, the public should be able to understand why the benchmark is considered critical and what are its characteristics, degree of use and the implications of being classified as critical.
238. Following comments from stakeholders, the list of contributors to a critical benchmark is no more requested in the benchmarks statement, as it is not considered a key element. Another reason to delete the requirement to include the list of contributors is that the

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• Is a regulated data benchmark (input data from electricity and natural gas exchange are considered regulated data), or  
• is based on submissions by contributors which are in majority supervised entities, or  
• is a critical benchmark and the underlying asset is gold, silver or platinum.  
Annex II applies in substitution of Title II (with exception of Article 10 – Outsourcing) where a commodity benchmark is not a regulated data benchmark and is based on submissions by contributors which are in majority non-supervised entities (unless it is outside the scope of the BMR), including critical benchmarks whose underlying asset is not gold, silver or platinum (for critical commodity benchmarks subject to Annex II, the requirements regarding mandatory contribution and colleges are not applicable).

benchmark statement would need to be updated every time there is a change in the list of contributors, and this has been considered an unnecessary administrative burden

239. Article 6 of the draft RTS requires that benchmark statements referring to significant or non-significant benchmarks should clearly state that this is the case. In case the benchmark statement refers to a family of benchmarks including both significant and non-significant benchmarks, this should be clearly stated within the benchmark statement.

#### *Update requirement*

240. The empowerment received by ESMA in Article 27(3) of the BMR refers to further specification of “*the cases in which an update of such statement is required*”, and Article 7 of the draft RTS covers this topic.

241. Article 7(1) of the draft RTS states that administrators should review and update the benchmark statement whenever the information it provides would no longer be considered correct or sufficiently precise and, in particular, that an update of the statement is needed in the following cases: there is a change in the type of the benchmark or there is a material change in the methodology for determining the benchmark.

242. The term “material change” has been introduced instead of “significant change” following a comment from a market participant. Material change is a term already used in Article 13 of the BMR, “transparency of methodology”.

243. This list of circumstances should be understood as non-exhaustive, identifying specific cases where the update is indispensable, but clearly administrators could be required to update the statement in other cases too.

## 10 Authorisation and registration of an administrator (Article 34 BMR)

### 10.1 Mandate

#### Article 34

1. A natural or legal person located in the Union that intends to act as an administrator shall apply to the competent authority designated under Article 40 of the Member State in which that person is located in order to receive:

(a) authorisation if it provides or intends to provide indices which are used or intended to be used as benchmarks within the meaning of this Regulation;

(b) registration if it is a supervised entity, other than an administrator, that provides or intends to provide indices which are used or intended to be used as benchmarks within the meaning of this Regulation, on condition that the activity of provision of a benchmark is not prevented by the sectoral discipline applying to the supervised entity and that none of the indices provided would qualify as a critical benchmark; or

(c) registration if it provides or intends to provide only indices which would qualify as non-significant benchmarks.

[...]

8. ESMA shall develop draft regulatory technical standards to specify further the information to be provided in the application for authorisation and in the application for registration, taking into account that authorisation and registration are distinct processes where authorisation requires a more extensive assessment of the administrator's application, the principle of proportionality, the nature of the supervised entities applying for registration under point (b) of paragraph 1 and the costs to the applicants and competent authorities.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

### 10.2 Background

244. The draft RTS specify further the information to be provided from an applicant to its relevant competent authority for an application for authorisation or registration. The purpose of the draft RTS is to set out the appropriate and sufficient information in order for a competent authority to make a decision as to whether the applicant fulfils the requirements under the Regulation (EU) 2016/1011 (BMR). Article 34(4) of the BMR stipulates that “the applicant shall provide all information necessary to satisfy the

*competent authority that the applicant has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation.”*

245. The mandate expressly recognises that authorisation and registration are distinct processes. Article 34(1) of BMR describes the circumstances in which an applicant would initiate one or the other of those processes. Authorisation is a more extensive process which is appropriate, as stipulated in the Level 1, in relation to the importance of the benchmarks provided and whether the applicant is not already supervised. The draft RTS, in its Annex I, set out in detail the required information for an authorisation application.
246. An application for registration would be a more streamlined process, which is appropriate where the applicant is already known to the relevant competent authority as a supervised entity, i.e. where the legal framework applicable to the entity does not prevent it from acting as an administrator and only where it does not intend to act as administrator to critical benchmarks, or in light of the importance of the benchmarks involved (i.e. non-significant benchmarks). Hence, in line also with the mandate, Annex II of the draft RTS sets out the applicable requirements, by reducing the information required, as compared to an authorisation application. It should be noted that there is not a single set of requirements applicable to all applications for registration; the requirements vary depending on the particular circumstances entitling the applicant to initiate the registration process. The requirements set out in Annex II of the draft RTS are tailored for supervised entity providing non-critical benchmarks and non-supervised entity providing only non-significant benchmarks. In the circumstance where a supervised entity provides a mix of significant and non-significant benchmarks, the elements of information concerning the providing entity and the provision process remain the same, while those inherent to the particular benchmarks provided are subject to a different degree of granularity of required information, depending on the category to which the benchmarks belong to.
247. Article 34(1) of the BMR provides for the authorisation and registration of a natural person - as well as a legal person - located in the EU that intends to act as an administrator by a competent authority. The draft RTS set out specific requirements which are viewed as non-appropriate to a natural person as applicant.
248. ESMA considers that an application for authorisation and registration is a “one-off” process, i.e. if an applicant is authorised or registered, then it would become subject to the requirements of the BMR.
249. Information can be provided at the level of families of benchmarks, so long as they fall within the applicable definition in Article 3, paragraph 1(4) of the BMR, and none of the benchmarks in the family is a critical benchmark.
250. In order to reduce the burden on applicants sending duplicative information, the draft RTS provide that the information need not be provided by the applicant if the relevant competent authority would easily be in possession of it, or where the information is or will be required from the applicant by the BMR apart from the application process: it can be

provided by the applicant to satisfy both the requirements for information in the application and the requirements otherwise in the BMR – e.g. compliance statement, benchmark statement or methodology. If the applicant provides a compliance statement for its non-significant and/or significant benchmarks, along with the rationale behind the application of any exemption, then the information so provided does not have separately to be submitted to the competent authority as part of the application process.

251. ESMA considers it appropriate to require information of a general nature from all applicants. This information would include basic information, such as name and address. It would also cover more comprehensive details about the operations of the applicant and its ownership, which information may prove useful for a consideration of the appropriateness of an applicant's arrangements in different aspects, e.g. conflicts of interest.
252. Information on the organisational structure and governance of the applicant is required and focuses on how the business is conducted. The requirements would also give the competent authority an indication on the applicant's allocation of human resources. All the organisational information requirements apply to both authorisation and registration processes, taking into account the need of a competent authority to have access to such information for its thorough review of the application.
253. ESMA considers that information on conflicts of interest is particularly important. All applicants should provide information regarding: the policies and procedures which will cover the identification and management of conflicts of interest - including a description of particular circumstances which apply to an applicant in relation to which potential conflicts could most likely arise, and the structure of the remuneration policy of the persons involved in the activity of provision of a benchmark in order for the competent authority to assess that the remuneration of these persons does not depend on the level of the benchmarks provided. In addition, for critical benchmarks only, an inventory of conflicts, together with mitigating measures, must be provided.
254. For the purpose of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, and oversight and accountability frameworks, an applicant should provide to the competent authority policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks, including information on: information technology systems; risk management policies, the appointment, substitution or removal of individuals within the key functions, and the internal reporting of infringements.
255. For an application for registration of applicants providing only non-significant benchmarks, the information on internal control structure, as well as oversight and accountability frameworks can be provided to the relevant competent authority in the form of a summary.
256. For the purposes of allowing the competent authority to assess each benchmark's representativeness of the underlying market or economic reality it intends to measure, the

applicant should provide the relevant competent authority with a description of each benchmark or family of benchmarks provided or intended to be provided and the type to which the applicant believes the benchmark belongs, i.e. critical, significant or non-significant - this is to be assessed to the best of the knowledge of the applicant and should be provided along with an indication of the sources of data used.

257. The application should also clearly state to which type each benchmark belongs to: regulated-data benchmarks, interest-rate benchmarks or commodity benchmarks. ESMA's view is that there is no need to require specific additional information regarding the first type, as information otherwise required should be sufficient. However, specific information should be provided for interest-rate benchmarks, allowing the competent authority to assess whether the more stringent requirements set out in Annex I of the BMR covering input data, oversight function, auditing, and the contribution process for such benchmarks are fulfilled.
258. As set out in Article 19 of BMR, in case (i) the commodity benchmark is compiled from regulated data, or (ii) the majority of contributors to it are supervised entities, or (iii) the benchmark is critical and the underlying is a precious metal, the general requirements established in the BMR will be applicable (under Title II). Otherwise, the requirements set out in Annex II of the BMR would be applicable. ESMA has proposed that, apart from the addition of specific information for commodity benchmarks set out in Annex II of BMR, no other change needs to be made to the requirements for an application for a benchmark covered by the Annexes.
259. In addition, the information in the application should also include the list of the key elements of a benchmark's methodology the applicant intends to publish. The information is likely to be covered by the methodology also required by the BMR, Articles 12 and 13, and the related draft RTS, because the requirements are similar. An applicant can submit the methodology as part of its application and then it would not need to duplicate the information elsewhere in the application.
260. The information requirements for input data and methodology depend on whether the application is for authorisation or registration; for registration of non-significant benchmarks some of the requirements are not applicable, e.g. the procedure for material change to the methodology, or can be provided in the form of a summary.
261. ESMA considers that arrangements - if any - relating to outsourcing of any activity forming a part of the process for the provision of a benchmark justifies a separate section within the application. The arrangements involved may be important to an application and should cover the details about the service provider, the outsourced functions and oversight of the outsourcing arrangements. But more streamlined requirements apply to registration.
262. The BMR, in Article 34(4), allows the relevant competent authority to request more information – even if it is not specifically described in the RTS – in order to satisfy the competent authority that the applicant has established the necessary arrangements to

meet the BMR's requirements. Similarly, the draft RTS contemplate that an applicant can provide more information to its relevant competent authority.

263. ESMA is including below a summary of the comments received from stakeholders in relation to this chapter of the CP and in the next section ESMA's responses to these comments.

### **10.3 Feedback from stakeholders**

264. To the question regarding the distinction between the processes of authorisation and registration and the fact that each of the two is a one-off process, all respondents to the CP supported the proposal. However, some stakeholders suggested some drafting amendments to increase clarity and certainty of the requirements among market participants, e.g. market participants suggested, in addition to the specific paragraph included in the first article of the draft RTS to make explicit reference throughout the RTS to the family of benchmarks where applicable.

265. A broad concern raised by several respondents related to the derogations set in the BMR to the applicability of the different annexes of the draft RTS, i.e. which annex of the draft RTS should an administrator apply depending on the types of benchmarks provided. These respondents encouraged ESMA to clarify in the draft RTS the usage of each Annex. In addition, in relation to the natural person requirements included in Annex III, while some respondents highlighted that more information should be applicable for natural person, others pointed out that the information included in section 3 of the annexes on the organisational structure and governance and in particular, the information on senior management and human resources should not apply to natural persons.

266. Respondents highlighted that the requirement in the first article of the RTS asking an applicant to explain items of the annexes of the draft RTS that do not apply to such applicant is burdensome and should be removed, as it is a duplicate with the compliance statement.

267. The majority of the respondents welcomed the approach introduced in the draft RTS to avoid duplicate information by providing to the relevant competent authority the information in the form of a document already available. They stressed that reducing the duplication of information will reduce the compliance costs. However, some of the respondents pointed out that several additional information or documents can be provided to the relevant competent authority and suggested the following: in the case of a commodity benchmark the disclosure of the methodology and the external audit pursuant to Annex II of BMR could be provided, or public companies could provide a web address or link where the information can be found. Further, some respondents stressed the differences in burden proposed for an EU based applicant vis-à-vis third country applicant penalising EU applicants and creating an un-level playing field with the non-EU competitors: in the recognition draft RTS the required information can also be provided in the form of a report by an independent external auditor of compliance with IOSCO principles. Market participants stated that EU benchmarks administrator can also provide this type of report.

268. Some market participants suggested including a more streamlined process to applicants already authorised in a Member State, e.g. administrators already authorised under national law in a Member State.
269. The financial information requested in the CP raised concerns of market participants mainly in relation to the financial forecasts that can include commercially sensitive information and administrators, that are public listed companies, may find it difficult to provide financial forecasts.
270. Regarding the organisational structure and governance requirements, stakeholders expressed concerns about the information required with respect to the members of senior management and in particular, the details included in the self-declaration of good repute. One respondent suggested deleting the reference to insolvency because an undertaking can go into insolvency for various reasons and this cannot be used to review the qualification of a senior management. In addition, some respondents highlighted that the requirement on the details of the senior management other activities is very wide. Finally, the requirement with respect to the human resources was perceived as dispensable as the number of employees might change over time or might be misleading in case of outsourcing.
271. In relation to the conflicts of interest policies, respondents mentioned that the remuneration policy is beyond the BMR mandate and could potentially lead to the disclosure of the entire remuneration policy of the group when an administrator is part of a group. These respondents highlighted that the BMR only requires the removal of the direct link between the remuneration and the provision of a benchmark. Further, they pointed out that this requirement is not aligned with the recognition draft RTS requirement that only requires that the structure of the remuneration should be provided. This can imply an un-level playing field between the EU and non-EU benchmarks. Respondents were also concerned about the use of “marketing of a benchmark” in this same section of the Annex, as the marketing department does not make decisions relating to the benchmark design, calculation, or maintenance. Some respondents highlighted that the draft RTS should take into account that more conflicts of interest may arise with supervised entities than with independent administrations.
272. The draft RTS require the applicant to provide the policies and procedures regarding its control and accountability framework. One respondent highlighted that the mapping of risks which may arise is a duplicative requirement of the policies and procedures for risk management. Further, in respect of policies and procedures for checking and monitoring contributor’s adherence to the code of conduct, stakeholders stressed that the ultimate responsibility of adherence to the code of conduct should lie on the contributor’s compliance function and suggested that a self-certification by contributors should be sufficient. Further, market participants suggested that the requirement that relates to business continuity arrangements to address an administrator’s temporary inability to publish a benchmark should not be a long term measure requiring the production of an alternative rate.



273. In the CP, the draft RTS included a section about the description of the benchmarks that the applicant provides or intends to provide. The main concern expressed by market participants related to the provision of the description of benchmarks for non-significant benchmarks when administrators provide also critical or significant benchmarks. Stakeholders pointed out that the level of details with regard to the description of the benchmark provided should not be the same when an applicant provides critical together with significant and non-significant benchmarks, as it would be too burdensome for the applicant to provide this information.
274. In addition, stakeholders mentioned the availability of data issue in order to estimate the degree of use of the benchmark in the Union, in particular. the assessment of the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds and as a result the difficulty in determining the types of benchmarks. In this context, they suggested to include in the draft RTS that the type of the benchmark should be assessed to the best of the knowledge of the applicant.
275. Stakeholders also stressed that in the context of the application for registration and for commodity benchmarks, ESMA should consider that the applicant provides the information on the identity of the contributor at an aggregate level, e.g. on professional profile arguing that it is impossible to name single contributors to a commodity benchmark in some circumstances.
276. In relation to the input data and methodology requirements, stakeholders encouraged ESMA to include a lightened regime for the application of registration (second column of Annex II) in compliance with the BMR. While stakeholders generally agreed with the requirements on the outsourcing of activities, some pointed out that the outsourcing contracts and Service Legal Agreements is duplicative of the information contained in the other requirements.
277. Respondents further highlighted that in the context of the last section “others”, ESMA should clarify the type of information that could be requested by the relevant competent authority and the delay of response granted to the administrator. Other respondents mentioned that competent authorities should avoid using discretion when requesting new requirements and should include a clear explanation of why the competent authority needs the information and how it relates to the BMR’s requirements. Further, the capability to require additional information should not be misused by competent authorities to impose unwarranted delays or difficulties on applicants and adequate time should be given to the market participants to review and engage with the competent authority to discuss any issues.
278. Finally, several stakeholders expressed concerns in relation to the transitional provisions in Article 51 of BMR. In particular, these stakeholders encouraged ESMA to provide some clarification on the following issue: in order to avoid any risk of market disruption, administrators applying for authorisation and registration before 1 January 2020 should be able to provide new benchmarks while waiting for their authorisation or

registration approval, in the transitional period - between the entry into application of the BMR and 1 January 2020 – in particular when there is a market demand for a new benchmark. ESMA highlights that it cannot give such comfort and interpretation of the Level 1 text as it would fall outside its mandate.

## 10.4 Potential limitations of the transitional regime

279. ESMA would like to draw the attention of the Commission to one issue of particular relevance related to the transitional regime for administrators of existing benchmarks. The provisions on authorisation and registration will only enter into application on 1 January 2018 and the administrators will be able to file their respective application only as of this date. To avoid market disruption resulting from an empty ESMA register before the first authorisations or registrations are granted Article 51(1) BMR gives index providers, who provided a benchmark on the date of entry into force of the Regulation on 30 June 2016, a grace period to apply for authorisation or registration until 1 January 2020. But Article 51(1) BMR only addresses authorisation and registration, so third country index providers will not profit from this provision.

280. Article 51(3) BMR allows administrators to continue to provide and supervised entities to use “an existing benchmark” until January 2020. According to Article 51(5) BMR benchmarks provided by a third country administrator may continue to be used by supervised entities in the Union “where the benchmark is used in the Union as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund”. The provisions of Article 51(3) and 51(5) BMR do not specify which date would be relevant to determine if a benchmark is covered by the respective provision.

281. When read in conjunction, the transitional provisions allow for (at least) two readings: On the one hand, Article 51(1) BMR could be read to allow index providers providing a benchmark on 30 June 2016 to issue any type of benchmarks, including those newly developed after the entry into application of the BMR, without a requirement to apply for authorisation or registration until the 1<sup>st</sup> of January 2020. This wide interpretation of Article 51(1) BMR would not take into consideration that Article 51(3) BMR explicitly states that index providers may continue to provide an “existing benchmark” only and it would not clarify if newly provided (i.e. not existing) benchmarks can be used by supervised entities. On the other hand, Article 51(3) BMR could be read to limit the benefits of Article 51(1) BMR only to those index providers that do not develop and provide any new benchmarks after 1 January 2018. In other words, as Article 51(3) BMR only allowed for the continued provision and use of existing benchmarks, an administrator who intends to provide a new benchmark would have to seek authorisation or registration as of January 2018. Following this more literal reading, supervised entities would also be prevented from the use of new benchmarks provided by an existing benchmark administrator, unless it has obtained authorisation or registration. As many administrators provide new benchmarks frequently to adapt to market needs, this reading of the transitional regime of Article 51 BMR may in consequence lead to significant market disruption and may put supervised entities at a considerable disadvantage.

282. ESMA therefore urgently calls on the Commission to provide interpretative guidance with a clarification on the interpretation of Article 51(1) and (3) BMR and similarly for third country benchmarks, of Article 51(5) BMR.

## **10.5 Content of the draft RTS**

283. On the basis of the feedback received from stakeholders to the CP, ESMA is proposing a draft RTS to specify further the information to be provided in the application for authorisation and in the application for registration.

284. This draft RTS include a first article that lists the Annexes and the use of each annex depending if the applicant is a legal or natural person. Compared to the draft RTS in the CP, the final report does no longer include a third annex dedicated to the application of a natural person as the applicable requirements are specified directly in the first article of the draft RTS. In particular, ESMA is excluding from the requirements for natural person the information on the legal status of the applicant that does not apply to natural persons.

285. ESMA acknowledges the concerns of market participants in relation to the difficulty of application of the different annexes of the draft RTS to the various types of benchmarks. ESMA is therefore introducing in the draft RTS a specific Article (Article 2) in order to clarify the information to be provided for each type of benchmark, i.e. which Annex would apply and therefore which regime should be considered by the applicant.

286. ESMA has introduced in the draft RTS several requirements to reduce the burden on the administrators and the costs that this application would generate. First, a requirement in the first article of the draft RTS requests the applicant to explain the information that would not be provided to the relevant competent authority, as they are not applicable to such application. Market participants commented that this is burdensome and is a duplicate of the compliance statement. ESMA considers that the flexible approach adopted in the draft RTS requesting the information from the applicant “as applicable” needs to be accompanied with a requirement requesting the applicant to explain why such information would not apply to its particular benchmarks or activity to allow the relevant competent authority to assess the application. However, ESMA highlights that this explanation can be provided in the form of a compliance statement whenever the non-application of an item of the Annex depends on an exemption as set under Articles 25 or 26 of BMR.

287. Second, ESMA highlights that the draft RTS include a more streamlined process for supervised entities, i.e. the information already in the possession of the competent authority would be assessed pursuant to paragraph 4 of Article 1 of the draft RTS. Further, the applicant can supplement its application with any document that it considers useful for the assessment of its relevant competent authority.

288. ESMA is including in the draft RTS a set of general information that would allow the relevant competent authority to access some general and basic information about the administrator. ESMA has added the number of benchmark(s) provided in the general information as suggested by some markets participants. The CP included also some

financial information that raised concerns of market participants. In the new draft RTS, ESMA took into account the related comments received and has deleted the requirements on financial information as the BMR does not include any specific financial requirement for administrators.

289. The draft RTS include some information on the organisational structure and governance of the administrator that would allow the competent authority to assess the governance structure of the administrator including some specific information with respect to its senior management. ESMA has reviewed this part taking into account the reduction of the burden on administrator and has deleted some requirements in relation to the members of the senior management of the administrator and has included a specific requirement relating to the skills, knowledge, and experience of the employees of the administrator. Also, and in order to reduce the burden on administrators, the information is limited to the activities related to benchmarks. Regarding the human resources requirements, ESMA has lightened the information to be provided to only the number of employees of the administrator involved in the provision of benchmarks. The outsourcing is also information required under the application that the relevant competent authority would have the opportunity to assess together with the other information provided. ESMA would like also to highlight, as mentioned above, that the application is a one-off process and most of the information provided will probably change over time.
290. Conflicts of interest information are important to limit the related risk of manipulation that could arise. ESMA acknowledges stakeholders concern in relation to the remuneration policy mentioned above and considers that the requirements should be aligned with the draft RTS on the recognition of third country administrators in order to avoid an un-level playing field. So, the draft RTS include now a reference to the structure of the remuneration of the benchmark that specifies the criteria used to determine the remuneration of the persons involved in the activity of provision of benchmarks. Also, ESMA considers that this information is important to be provided in the context of the registration application.
291. The draft RTS require for critical benchmarks an up-to-date inventory of actual and potential conflicts of interest. In addition, the draft RTS require also that for non-critical benchmarks, a list of the material conflicts of interests should be provided in order for the competent authority to assess the conflicts of interest that could arise for significant and non-significant benchmarks.
292. The policies and procedures regarding the internal control structure, oversight and accountability framework of the applicant should be provided to allow the competent authority to assess the risk management and the related requirements of the BMR. ESMA mentions in the draft RTS that the policies and procedures for the risk management should include a mapping of the risks that may arise.
293. The following two sections on the description of the benchmarks provided and the input data and methodology will enable the competent authority to assess the types of benchmarks provided by the applicant and the type of input data used together with the controls that the applicant performs and the methodology to determine the benchmark.

294. The draft RTS in this final report in relation to the description of the benchmarks provided are very similar to the CP, the main change relates to the inclusion of an additional level of proportionality in Article 2 in order to reduce the burden on administrators, i.e. Article 2 paragraph 1 allows an applicant that provides critical, significant and non-significant benchmarks to provide the information of section 6 of Annex I in the form of a summary in relation to the non-significant benchmarks it provides.
295. ESMA is including in this section a requirement for the applicant to provide a description of the contributors to a benchmark when a benchmark is based on contributions. For critical benchmarks, the applicant should provide the identity - in the form of the name and location - of the contributors. Stakeholders expressed their concerns in relation to this requirement and the difficulty of providing the identity of contributors in some circumstances, e.g. for commodity benchmarks. ESMA would like to point out that the requirement to provide the identity of the contributors applies only to critical benchmarks and in this case the information should be available.
296. ESMA has also increased the proportionality in the registration application regarding input data and has included that the requirements could be provided in the form of a summary for administrators of non-significant benchmarks. In addition, ESMA has reviewed the application for registration in its entirety in order to include the same proportionality as in BMR, i.e. in accordance with the exemptions specified in Articles 25 and 26 of BMR for significant and non-significant benchmarks. For example, according to Article 26 of BMR, administrators of non-significant benchmarks may choose not to provide information relating to input data being verifiable.
297. Regarding the outsourcing of activities, ESMA considers that the outsourcing contracts should be provided in the authorisation application and the registration application for significant benchmarks together with the details of the outsourced functions if this information is not already included in the relevant outsourcing contracts.

## 11 Recognition of an administrator located in a third country (Article 32 BMR)

### 11.1 Mandate

*Article 32*

*[...]*

*5. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with the competent authority of its Member State of reference. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 and shall provide the list of its actual or prospective benchmarks which may be used in the Union and shall, where applicable, indicate the competent authority responsible for its supervision in the third country.*

*Within 90 working days of receipt of the application referred to in the first subparagraph of this paragraph, the competent authority shall verify that the conditions laid down in paragraphs 2, 3 and 4 are fulfilled.*

*[...]*

*9. ESMA may develop draft regulatory technical standards to determine the form and content of the application referred to in paragraph 5 and, in particular, the presentation of the information required in paragraph 6.*

*In the event that such draft regulatory technical standards are developed, ESMA shall submit them to the Commission.*

*Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.*

### 11.2 Background

298. In the absence of an equivalent decision by the Commission regarding a 3<sup>rd</sup> country, index providers based in that 3<sup>rd</sup> country can apply for recognition, as per Article 32 of the Benchmarks Regulation (BMR).

299. In the process of recognition of a third-country benchmarks provider, a number of conditions are to be fulfilled and demonstrated in the context of the application. First of all it is required that the third-country provider complies with the requirements foreseen in the BMR, with the exclusion of the provisions of the Regulation respectively dealing with the input data representativeness of a benchmark's underlying market or economic reality

(Article 11(4) BMR), imposing obligations on EU supervised contributors (Article 16 BMR) and addressing the peculiarities of EU benchmarks declared critical by the Commission (Article 20, 21, 23 BMR).

300. The Regulation additionally provides that a third-country entity applying for recognition may alternatively fulfil the obligations under the BMR by demonstrating the compliance with the IOSCO Principles for Financial benchmarks (FR07/13, July 2013) or the IOSCO Principles for Price Reporting Agencies (FR06/12, 5 October 2012), as applicable, provided that the application of such principles is equivalent to compliance with the requirements established in the BMR. In this respect, Recital 45 of the BMR clarifies the NCA should assess the application of the IOSCO principles by the 3<sup>rd</sup> country benchmarks provider and determine whether such application is equivalent, for the provider in question, to compliance with the various requirements established in the BMR, taking into account the specificities of the regime of recognition as compared to the equivalence regime.
301. Another condition for granting recognition is the establishment of a legal representative of the third-country provider in the EU (Article 32(3) BMR), which can be either a natural person domiciled in the EU or a legal person with its registered office in the EU. The legal representative has to perform the oversight function, within the provision process of benchmarks, together with the applicant third-country entity. The legal representative plays a key role as it should act on behalf of the third-country entity vis-à-vis the EU authorities and any other person in the EU and should be accountable to the competent authority of the Member State of reference.
302. There are some other essential conditions for the granting of recognition of a third-country benchmarks provider (included in Article 32(5) BMR): (i) where the provider located in a third country is subject to supervision, the existence of a cooperation arrangement between the competent authority of the Member State of reference and the competent authority of the third country; (ii) the effective exercise by the competent authority of the Member State of reference of the supervisory functions assigned by the BMR is neither prevented by the laws, regulations or administrative provisions of the third country where the provider is located, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authority.
303. Article 32(9) of the BMR states that ESMA may develop regulatory technical standards to specify the form and content of an application for recognition, specifying the information to be included. Notwithstanding the non-mandatory nature of the empowerment, ESMA has elected to draft regulatory technical standards in this field, with a view to ensure consistency of approach within the different Member States' competent authorities, which is particularly relevant given the third-country provider, once it is granted recognition in one Member State, is entitled to passport for the provided benchmarks in the whole Union territory. Furthermore, a common approach at EU level would provide for legal certainty to potential third-country applicant providers.
304. The competent authority of the Member State of reference has 90 days to process the request for recognition and adopt a decision. However, such period of time is suspended

for one month to allow ESMA to issue its advice on the eligibility of the benchmarks, declared by the third-country entity in the request for recognition, for the application of the regime set forth in the BMR either for the significant benchmarks or for the non-significant ones.

305. The appraisal of the opportunity to apply one or the other regime is mainly based on the information provided by the applicant, which is due to be examined by both the competent authority of the Member State of reference and ESMA. For this reason, the empowerment in the Level 1 specifies that in case ESMA decides for the development of regulatory technical standards, these should also elaborate on the presentation of the information supporting demonstration of the relevance of each benchmark provided and intended for use in the Union, so that ESMA can elaborate its advice.

#### *Proposal in the Consultation Paper*

306. In the Consultation Paper (CP), the content of the application for recognition proposed was in line with the approach followed in the draft RTS on the contents of the application for authorisation or registration. Therefore, the contents of the application for recognition was covering in addition to the general information on the providing entity, all information necessary to the competent authority to come to an understanding on whether the required arrangements for meeting the relevant requirements have been put in place.

307. In the proposal it was recognised that in the specific context of the recognition of a provider located in a third country, the documents that should be produced and disclosed in the third country for the sake of compliance with the relevant IOSCO Principles, may be submitted as part of the application for recognition including a clear mention of the information needed for the assessment performed by the competent authority of the Member State of reference.

308. ESMA additionally considered that the receiving competent authority should also satisfy itself that its jurisdiction is the Member State of reference on the basis of the application of the criteria laid down in Article 32(4) of BMR. This is an important element to avoid the 3<sup>rd</sup> country provider choosing a Member State without following the requirements of the BMR. As a consequence, it is considered of use that the applicant provides the documented evidence for the choice of the Member State of reference in accordance with the Article 32(4).

309. The draft RTS in the CP was including: a number of information on the legal representative; financial information regarding the 3<sup>rd</sup> country provider; information regarding its organisational and governance structure, information on its policies regarding internal conflict of interest; information on the internal oversight; information on input data and methodology; and information on outsourcing.

310. According to the BMR if a 3<sup>rd</sup> country provider is able to demonstrate that a benchmark it provides is a regulated-data benchmark or a commodity benchmark that is not based on submissions by contributors the majority of which are supervised entities, the requirements



applicable in the provision process of such benchmarks are those laid down under Article 17 and Article 19 of the BMR. Moreover, as already said, benchmarks provided from a third-country may be entitled to the exemptions respectively applicable to significant and non-significant benchmarks.

311. In this context, ESMA proposed in the CP that the applicant provides documented evidence of the nature and the relevance of the benchmarks it would want to offer in the EU (Section B of the Annex). With particular reference to the information concerning the relevance of the benchmarks, the draft RTS in the CP required the applicant to follow, to the extent possible, the indications laid down in the delegated act that the EU Commission is due to adopt pursuant to Article 20(6), to specify how to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds that make reference to benchmark, including in the event of an indirect reference to any such benchmark within a combination of benchmarks.
312. In the CP ESMA was acknowledging that benchmarks provided from a third country and not yet used in the Union at the time of the application for recognition should be considered as non-significant at that time.

### 11.3 Feedback from stakeholders

313. Respondents broadly approved the content of the draft TS on recognition, and have the following proposals and remarks.
314. There were a number of comments on how the equivalence between IOSCO principles and the requirements of the BMR will be assessed in practice. These comments can be divided in two groups.
315. On one side there is a group arguing for an “equivalence assessment” that should be principles based. A respondent from this group also suggested the following statement on this: *“the application of the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs should be considered equivalent to the legal regime of the EU if it ensures that the substantial result of the applicable principles is similar to the EU requirements in accordance with the general regulatory goals of ensuring the accuracy, robustness and integrity of benchmarks and of the benchmarks determination process”*. It should be noted the use of the word “similar” in the statement proposed by a respondent.
316. The second group of respondents commented on this issue arguing that the BMR explicitly states that the application of the IOSCO principles for financial benchmarks by a third-country administrator must be *“equivalent to compliance with the requirements established in this Regulation”* (Art. 32(2) BMR), and that these words set a very high standard. The respondents argued that the full equivalence cannot be assessed by the relevant NCA based on the information required under the draft RTS of the CP, and they suggest requiring the same detail of information and proof of compliance with the BMR from third-country administrators as from EU administrators because a level playing field on a global level is of paramount importance in the indexing industry.

317. In response to the first group, ESMA reiterates what it has already said in relation to the text of the BMR that requires “equivalence”. This term is not only used in Article 32(2) of the BMR, but also in Recital 45 of the BMR. This Recital clarifies that the NCA should assess the application of the IOSCO principles by the 3<sup>rd</sup> country benchmarks provider and determine whether such application is equivalent, for the provider in question, to compliance with the various requirements established in the BMR. In other words, implementation of IOSCO principles by the 3<sup>rd</sup> country entity might be not sufficient to receive recognition, if the NCA considers that such implementation is not equivalent with the BMR.
318. In response to the second group, ESMA broadly agrees with the comment and notices that the content of the Annex of the draft RTS on recognition is aligned with the one of authorisation / registration.
319. In relation to the Annex, ESMA received a number of comments in relation to the financial information requested to the 3<sup>rd</sup> country provider. A respondent said that the item financial forecast should be deleted, as it is difficult to provide in particular for listed companies. Others had questions on the financial statement.
320. A respondent argued, in relation to Recital 13 of the draft RTS and section B(10) point (i) of the Annex, that it should not be necessary for a third-country applicant to provide information on the reference values of the benchmarks if the administrator is not seeking to use the exemptions for significant or non-significant benchmarks. Other respondents said that the measure of the degree of use of 3<sup>rd</sup> country benchmark may be particularly difficult.
321. A respondent commented on the choice of the Member State of reference as follows. When the “group” runs and operates an “EU supervised entity”, the EU Member State of reference is determined by the location of that “EU supervised entity”. The “EU supervised entity” will automatically become the legal representative of the “third country administrator”, responsible for the oversight function. While the respondent understands that this would be entirely suitable for groups operating one kind of business (i.e. benchmark administration in multiple jurisdictions), for a global diversified market infrastructure organisation involved in various businesses, this may not be a suitable solution. For example, the “EU supervised entity” might be dedicated to a completely different business, requiring different expertise and different governance arrangements; these competencies might be insufficient to fulfil the oversight function as envisaged in the RTS and indeed the supervised entity could face conflicts of interest in performing this function
322. The selection of the Member State of reference is defined by the criteria by Article 32(4) of the BMR, that already includes all the possible situations in which a 3<sup>rd</sup> country administrator can find itself. ESMA is not required to further specify how to select the Member State of reference, and this is also not needed in light of BMR.

323. In relation to the Member State of reference another respondent argued that the information required in the draft RTS may suffice to explain how the third-country applicant has chosen a Member State of reference in accordance with Art. 32 (4) a) and b), i.e. when he already has subsidiaries or affiliates within the EU. However, if the Member State of reference will have to be determined based on the procedures contained in Art. 32 (4) c) to e), the required information is insufficient.

## **11.4 Content of the draft RTS**

324. The revised draft RTS contained in this final report are fairly similar to the standards included in the CP, and they now include some of the suggestions made by market participants.

325. In the Recitals, ESMA explained that if the 3<sup>rd</sup> country benchmark has not been yet used in the Union, it should be considered as a non-significant benchmark because its degree of use is non-existent and therefore cannot be classified as significant.

326. Article 1(4) has been amended, and now requires the applicant to provide the independent external auditor's assessment on IOSCO principles and in the certification by the 3<sup>rd</sup> country competent authority about the IOSCO principles. According to Article 32(2) of the BMR, a competent authority may rely on such assessment or certification for the analysis of the application of recognition, and therefore these documents should be provided whenever they are available.

327. Article 2 related to the format of the application and it is now required the application to be submitted in the language of the Member State of reference (with exclusion of the assessment / certification mentioned in the previous paragraph) and by electronic means or, accepted by the relevant competent authority, in paper form.

328. Article 3 on "Policies and procedures" has not changed if compared with the version included in the CP, with the only difference being the introduction of a new paragraph 2 stating that an applicant that is part of a group may fulfil the obligation to provide information regarding its policies and procedures under the BMR by submitting the policies and procedures of its group, to the extent that these are applicable to the activities of provision of benchmarks. A similar paragraph has been introduced in the Authorisation / Registration draft RTS.

329. The new draft RTS includes a new Article 4, referring to Article 32(6) of the BMR. This paragraph states that in the event that the competent authority considers that a 3<sup>rd</sup> country administrator provides a significant or non-significant benchmark it should, notify ESMA and should support such assessment with the information provided by the administrator in the relevant application for recognition. Within one month of receipt of the notification referred to in the first subparagraph, ESMA should issue advice to the competent authority about the type of the benchmark and the requirements applicable to its provision: the advice may, in particular, address whether ESMA considers that the conditions for such

type are fulfilled on the basis of the information provided by the administrator in the application for recognition.

330. The empowerment received by ESMA in Article 32(9) refers also to the presentation of the information required in paragraph 6 of the same Article. The newly introduced Article requires the assessment made by the NCA to be sent by electronic means to ESMA and together with the relevant application.
331. The Annex is divided in Section A “information on the providing person and its legal representative in the Union” and Section B “information on the benchmarks provided”.
332. Section A is divided in 7 sub-sections. The sub-section of the Annex related to financial information has been deleted following the comments received by market participants. In this respect, it should be noted that the BMR does not refer to the financial details of an applicant as a criterion to be taken into account during the analysis of the application. Also, the sub-section on input data and methodology has been moved to Section B of the Annex.
333. The first sub-section of Section A includes the general information of the applicant and it is fairly aligned with the similar section in the “Authorisation and registration” draft RTS, with the adjustment needed for the fact that the entity is not a European one (see in particular point (e) and (f)).
334. The second sub-section refers to information related to the legal representative in the Member State of reference. The first item in this sub-paragraph requires the applicant to include documented evidence for the choice of the Member State of reference, by application of the criteria laid down in Article 32(4) of the BMR. It is important that the identification of the Member State of reference is made following the criteria in Article 32(4) and therefore the applicant must provide to the NCA the information regarding such identification so that the NCA is satisfied that the Member State selected is the right one. In addition, this sub-section requires the applicant to include in the application the basic information regarding the legal representative, including address, e-mail address and telephone number so that the NCA is in a position to contact it.
335. The third subsection refers to the organisational structure and governance and it demands basic information about the bodies responsible for the provision of the benchmark within the 3<sup>rd</sup> country entity. This information is of use for the NCA to understand if the internal organisation of the country provider is adequate to the requirements of the BMR.
336. Sub-section four and five relates to specific requirements of the BMR that the 3<sup>rd</sup> country provider must respect in order to be granted recognition. These sections refer, respectively; to conflict of interest and internal control structure, oversight and accountability framework. The conflict of interest section includes, among other items, information on the structure of the remuneration policy, specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks. A proper remuneration policy is essential to avoid incentives to manipulation of the benchmarks, that is why this information is required in the application

file. The following sub-section five on control includes information related to the constitution, role and functioning of the oversight function, as described in Article 5 of the BMR, as the newly introduced oversight function is one of the main feature of the BMR. 3<sup>rd</sup> country applicant will have to provide information about the oversight function and the appointment, substitution or removal of individuals within the it, and they can do so by referring to the or the corresponding IOSCO Principles for financial benchmarks or for PRAs.

337. Finally, sub-section six of Section A refers to any activity forming a part of the process for the provision of a benchmark or family of benchmarks is outsourced: information about outsourced activity will complete the general description of the 3<sup>rd</sup> country provider.
338. Section B refers to description of the actual or prospective benchmarks or family of benchmarks that may be used in the Union. A new item in this section is the first one, that asks the applicant to provide a list of all of its benchmarks that are already used in the Union. A following item requires the list including all the benchmarks that are intended to be marketed for their use in the Union. This information is important because for 3<sup>rd</sup> country administrator ESMA register will include not only the name of the administrator, but the list of their benchmarks that can be used in the Union by supervised entities (in the case of EU administrator, the register will include only the name of the administrator, not its benchmarks).
339. The approach regarding the information to be provided by the 3<sup>rd</sup> country applicant in relation to the use of its benchmarks in the Union has not changed from the CP. The approach requires the applicant to always provide the documented evidence of the degree of use of the benchmarks because this information is essential to competent authorities and ESMA to fulfil their tasks under Article 32 of the BMR.
340. In response to the comments received on the measure of degree of use of benchmarks, it should be noted that, according to Article 32(6) of the BMR, a competent authority should notify ESMA whenever it considers that a third country applicant is providing significant or non-significant benchmarks and it should share with ESMA an assessment based on the information provided by the applicant on the degree of use of its benchmarks. ESMA will then have to issue an advice to the competent authority about the type of the benchmarks and the requirements applicable to their provisions. Also ESMA's advice should be based on the information provided by the third country provider in its application. It is therefore clear that the application must provide information on the degree of use of the benchmarks, so that both competent authorities and ESMA could fulfil the tasks the BMR assigned to them
341. The section also requests information on the rationale behind the application of any of the "exemptions" listed under Article 25(1) of the BMR for significant benchmarks, and Article 26(1) of the BMR for non-significant benchmarks. Beside the classification as significant or non-significant, the 3<sup>rd</sup> country applicant would need to provide a proper explanation regarding the decision of not applying the provisions listed in Articles 25(1) and 26(1), so that NCA can produce an assessment on this ground, as per Article 32(6). ESMA

would also advise the NCA on the type of benchmark and the requirements applicable to its provision.

342. Finally, the last sub-section is about input data and methodology, and it has been moved from Section A to Section B because it refers to the characteristics of the benchmarks that are described in the first part of Section B.

## 12 Procedures and forms for exchange of information (Article 47 BMR)

### 12.1 Mandate

#### *Article 47*

2. *The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties, in accordance with Article 35 of Regulation (EU) No 1095/2010.*
3. *ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information a referred to in paragraph 2.*

*ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.*

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.*

### 12.2 Background

343. ESMA has limited supervisory powers under the BMR and depends largely on the cooperation with competent authorities in the Member States. One of the most important roles for ESMA is the establishment and the maintenance of the register of benchmarks and administrators according to Article 36 BMR, as a listing of the relevant administrator on this register is a precondition for benchmarks provided by an administrator in the EU to be used by supervised entities in the Union, Article 29(1) BMR. In other areas, ESMA may need to request information from competent authorities in the Member States in order to fulfil its duties under them BMR.

344. In some cases, competent authorities may have to request information from ESMA to discharge of their supervisory responsibilities. ESMA believes that this may e.g. be required when a competent authority needs information regarding the register that ESMA will establish according to Article 36 BMR and that is not contained in the information that ESMA publishes on its website.

### 12.3 Content of the draft ITS

345. Article 2 of the draft ITS specifies the instances in and the means by which competent authorities have to notify ESMA in order for ESMA to carry out its duties under the BMR and it takes into account that ESMA has established information technology that Member States should employ to notify ESMA accordingly. Article 2(2) of the draft ITS provides that ESMA and the competent authorities will enter into additional arrangements on the use of

such technical means that will allow the authorities and ESMA to adapt to changing environments, if need be.

346. The draft ITS also specify that the exchange of information between ESMA and competent authorities beyond the notifications according to Article 2 of the draft ITS should occur using forms for request for information and replies thereto. ESMA proposes forms in the Annexes to the draft ITS. This approach to the exchange of information reflects that according to Article 47(3) BMR ESMA shall determine the procedures and forms for the exchange of information and that by this concept the flow of information can occur in either direction, although ESMA acknowledges that the relevant paragraph 2 of Article 47 BMR only states that competent authorities should provide ESMA with information and that this could be read as a one-directional flow of information.

347. This understanding of the exchange of information is also reflected in Article 5 of the draft ITS that covers confidentiality and the permissible uses of information which would otherwise already be largely or fully covered by the provisions of Article 48 BMR.

348. Competent authorities cooperate with each other and with ESMA in a variety of areas of financial legislation already and different forms and procedures or cooperation arrangements apply. The draft ITS therefore only apply to the exchange of information for the discharge of the authorities' responsibilities under the BMR and only to the exchange of information between ESMA and national competent authorities.



## 13 Annexes

### 13.1 Annex I: Draft Technical Standards

#### 13.1.1 Oversight function

**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 for the procedures and characteristics of the oversight function**

(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<sup>8</sup>, and in particular Article 5(5) thereof,

Whereas:

- (1) The list of appropriate governance arrangements set out in this Regulation is not exhaustive. Administrators have discretion to design the oversight function most appropriate for the benchmarks they provide to achieve the requirements of Article 5 of Regulation (EU) 2016/1011.
- (2) External stakeholders acting as members of an oversight function can provide valuable expertise and their participation can increase the effectiveness of the oversight function. Conflicts of interest within the oversight function may arise due to the conflicting interests of these members or due to relationships between members of the oversight function and their clients or other stakeholders. To mitigate such conflicts, independent members that are free from conflicts of interest may be included within the oversight function – and they should be included in those overseeing critical benchmarks due to their importance for market integrity, financial stability, consumers, the real economy and the financing of households and businesses in Member States. Where such independent members are not required by this Regulation, administrators should adopt

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<sup>8</sup> OJ L 171, 29.6.2016, p. 1

other procedures to address potential conflicts of interest such as excluding members from certain discussions or removing voting rights of specific members.

- (3) Persons that are directly involved in the provision of the benchmark may sit on the oversight function in a non-voting capacity as they can provide useful insight into the work of the administrator. Their status as non-voting members is appropriate to ensure that the administrator does not hold undue influence over the decisions of the oversight function.
- (4) One oversight function can include committees with specific, dedicated competencies, for different benchmarks or families of benchmarks or it can include multiple functions carrying out different tasks when persons with appropriate expertise cannot all sit on one committee, for example when they are based in different geographical regions. These oversight functions need single person or committee in charge of the direction of the oversight function and responsible for interaction with the management body of the administrator and with the competent authority to facilitate the centralisation of oversight.
- (5) For some lesser used and less vulnerable significant benchmarks, it may be possible for a single natural person to act as the oversight function, if the natural person can devote the appropriate amount of time to the oversight of the relevant benchmarks. Where the oversight function is a natural person, it is exempt from certain procedures which are only appropriate for a committee. Due to the high degree of use of critical benchmarks and the risks they pose in certain instances, critical benchmarks cannot be overseen by a natural person.
- (6) To fulfil the responsibilities of the oversight function, members may need to have expert knowledge of the benchmark provision process but also of the underlying market the benchmark seeks to measure. Such expertise may be sourced from users and contributors active in the markets or from providers of regulated data. An oversight function may benefit from the expertise of contributors, as long as appropriate measures are taken to ensure the absence of conflicts of interest, and users have an interest in ensuring the benchmark is robust. It is therefore appropriate that contributors and users be considered as members for such benchmarks.
- (7) The oversight function is an essential tool for managing conflicts of interest at the level of the administrator and in order to ensure the integrity of the function persons that were sanctioned for breach of financial services-related laws are prohibited from becoming members of an oversight function.
- (8) External stakeholders can have an interest in the benchmark if it is widely used in their markets and they can provide additional expertise. Administrators may establish procedures that allow for them to participate as observers to the oversight function.
- (9) Independent committees cannot be completely separated from the organisation of the administrator as the final decisions with regards to the business of the administrator lie with the management body and a separate committee could take decisions without fully appreciating the potentially detrimental impact of such decisions on the business of the administrator. An oversight function embedded within the organisation of the administrator, or of the parent company of the group to which it belongs to, is best placed to challenge the decisions of the administrator with respect to the benchmarks.

- (10) In order for the oversight function to perform the role assigned by Regulation (EU) 2016/1011, it is important that it has the ability to fully assess and to challenge the decisions of the management body of the administrator and that, in case of a disagreement, the deliberations of the oversight function in this regard are recorded.
- (11) Procedures on the criteria for selection of members and observers, on conflicts of interest management and, in case the oversight function is a committee, procedures covering dispute resolution are necessary to ensure that the oversight function can operate without impediment. There may be other procedures appropriate to the oversight function for certain types of benchmarks or administrators which are not envisaged in this Regulation but are necessary and appropriate for the correct governance of their benchmarks. Administrators are therefore free to introduce alternative procedures provided they achieve the appropriate level of oversight.
- (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<sup>9</sup>.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *Composition of the oversight function*

1. The structure and composition of the oversight function shall be appropriate to the ownership and control structure of the administrator and shall be determined, where appropriate, in accordance with one or more of the non-exhaustive list of governance arrangements in the Annex to this Regulation.
2. Where the benchmark is a critical benchmark, the oversight function shall be carried out by a committee with at least two independent members. Independent members shall be natural persons sitting on the oversight function who are not directly affiliated with the administrator other than through their involvement in the oversight function, and shall be free from conflicts of interest, particularly those resulting from a potential interest in the level of the relevant benchmark.
3. An administrator shall not establish an oversight function in accordance with Number 3 of the Annex for critical benchmarks.
4. The oversight function shall be composed of members that together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities the oversight function is required to fulfil. Members of the

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<sup>9</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

oversight function shall have appropriate knowledge of the underlying market or economic reality the benchmark seeks to measure.

5. Administrators of regulated-data benchmarks shall consider including, as members of the oversight function, representatives from the entities listed in the definition of a regulated-data benchmark at point (a) of Article 3(1)(24) of Regulation (EU) 2016/1011 and, where applicable, from entities contributing net asset values of investment funds to regulated-data benchmarks.
6. Where a benchmark is based on contributions, and representatives of contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator shall ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority. Before the appointment of members, administrators shall also give due consideration to conflicts arising from relationships between potential members and other external stakeholders, in particular resulting from a potential interest in the level of the relevant benchmarks.
7. Persons directly involved in the provision of the benchmark may be non-voting members. Representatives of the management body shall not be members or observers but may be invited to attend meetings by the oversight function in a non-voting capacity.
8. Members of the oversight function shall not include persons who have been subject to sanctions of administrative or criminal nature relating to financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.

## *Article 2*

### *Characteristics and positioning of the oversight function*

1. The oversight function shall be embedded within the organisational structure of the administrator, or of the parent company of the group to which it belongs to, but separate from the management body and other governance functions of the benchmark administrator.
2. The oversight function shall assess, and where appropriate challenge, the decisions of the management body of the administrator with regards to benchmarks provision to ensure the fulfilment of the requirements of Regulation (EU) 2016/1011. Without prejudice to point (i) of Article 5(3) of Regulation (EU) 2016/1011, the oversight function shall address all recommendations on benchmark oversight to the management body.
3. Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations resulting from a decision of the oversight function, it shall record this fact clearly in the minutes of its next meeting, or in its record of decisions where an oversight function has been established in accordance with the third governance arrangement in the Annex to this Regulation.

### *Article 3*

#### *Procedures governing the oversight function*

1. An oversight function shall have procedures at least relating to the following areas:
  - (a) its terms of reference, the frequency of its meetings, which shall occur regularly, the recording of minutes of the meetings or decisions of the oversight function and procedures for periodic information sharing with the management body of the administrator;
  - (b) the criteria to select its members, including to evaluate the potential members' expertise and skills and whether they can meet the time commitments required, taking into account their role in any other oversight function;
  - (c) the criteria to select observers who may be permitted to join a meeting of the oversight function;
  - (d) the election, nomination or removal and replacement of its members;
  - (e) where applicable, the criteria for choosing the person or committee responsible for its overall direction and coordination and for acting as the contact point for the management body of the administrator and the competent authority, in accordance with the fourth or fifth governance arrangement of the Annex;
  - (f) the public disclosure of summary details of its membership, along with any declarations of conflicts of interest and of any measures taken to mitigate them;
  - (g) the suspension of voting rights of external members for decisions that would have a direct business impact on the organisations they represent;
  - (h) requiring members to disclose any conflict of interest before discussion of an agenda item during meetings of the oversight function and their recording in the minutes of the meeting;
  - (i) the exclusion of members from specific discussions in respect of which they have a conflict of interest and the recording of the exclusion in the minutes of the meeting;
  - (j) its access to all documentation necessary to carry out its duties;
  - (k) the management of any disputes within it;
  - (l) measures to be taken in respect of breaches of the code of conduct, where appropriate;
  - (m) the notification to the competent authority of any suspected misconduct by contributors or the administrator and of any anomalous or suspicious input data;
  - (n) the prevention of improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function.
2. Where the oversight function is carried out by a natural person:
  - (a) Subparagraphs (e), (g), (i), and (k) of paragraph 1 do not apply;

- (b) The administrator shall appoint an alternate appropriate body or natural person to ensure the duties of the oversight function can be consistently fulfilled in case of the absence of the person responsible for the oversight function.

*Article 4*

*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 1 January 2018.

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]*

**ANNEX**  
**to the**  
**COMMISSION DELEGATED REGULATION (EU) .../...**

[...]  
**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**

*Non-exhaustive list of governance arrangements*

1. An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
2. Where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function, a committee that shall include:
  - (a) persons involved in the provision of the relevant benchmarks in a non-voting capacity;
  - (b) at least two members of staff representing other parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities; and
  - (c) where appropriate staff members in accordance with subparagraph 2(b) are not available, at least two independent members;
3. Where a benchmark is not critical and based on a preliminary assessment of its complexity, use and vulnerability, a natural person who is a staff member of the administrator or any other natural person whose services are placed at the administrator's disposal or under the control of the administrator, who is not directly involved in the provision of any relevant benchmark and is free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;
4. An oversight function consisting of multiple committees, each responsible for the oversight of a benchmark, type of benchmarks or family of benchmarks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority;
5. An oversight function consisting of multiple committees, each performing a subset of the oversight responsibilities and tasks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.

### 13.1.2 Input data

## COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for ensuring that input data is appropriate and verifiable and for the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where input data is contributed from a front office function**

(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<sup>10</sup>, and in particular Article 11(5) thereof,

Whereas:

- (1) In order for input data to be appropriate in accordance with Regulation (EU) 2016/1011, it is important that the input data represents the underlying market or economic reality that the benchmark seeks to measure and that it conforms to the methodology. Administrators should ensure that input data is appropriate taking into consideration the characteristics of the underlying market or economic reality as well as the methodology set by the administrator.
- (2) Whether input data is verifiable relates to its accuracy, which is highly dependent on the type of input data used. Input data which is not transaction data or does not come from a regulated data source as set out in the definition of a regulated-data benchmark in point (24) of Article 3(1) of Regulation (EU) 2016/1011 may still meet the requirement of being verifiable if sufficient information is available to conduct the extensive checks set out in this Regulation. Information that is needed from contributors to ensure input data is verifiable is to be specified by the administrator. The administrator has available to it several ways of communicating requests and expectations to contributors, including, but not limited to, its code of conduct.
- (3) In order to ensure input data is appropriate and verifiable, input data should be monitored on a regular basis, reflecting the vulnerability of the input data type. Existing

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<sup>10</sup> OJ L 171, 29.06.2016, p. 1.



regulation and supervision ensure the integrity of regulated data which can therefore be subject to less extensive checks by an administrator. Other types of input data that require more verification might be subject to more complex checks, notably input data which is not transaction data especially that contributed from a front-office function.

- (4) When input data is contributed, one important monitoring check is to ensure that the contributions are provided within a time-period set by the administrator to ensure consistency between contributions from different contributors. When input data is not contributed, the time at which the input data is considered has also to be checked in order to ensure consistency between different input data.
- (5) Effective internal oversight relies on appropriate structures within the contributor organisation such as three levels of control functions. As an element of the first level of control, it is important that processes to ensure the effective checking of input data are in place.
- (6) Contributions from a front office function present a particular risk as a result of an inherent conflict of interest between the commercial role of the front office and its role in contributing to a benchmark. As an element of the second level of control, it is important to manage and maintain a conflict of interest policy and to perform regular checks on the input data used. In addition, a notable tool that may be useful in bringing to light and escalating any misconduct, or in detecting activities potentially affecting the integrity of the benchmark, would be the establishment of a whistleblowing procedure that permits any staff member to report an instance of misconduct to the relevant compliance function or other appropriate internal function.
- (7) Regulation (EU) 2016/1011 requires that an administrator ensures input data is appropriate and verifiable as well as that a contributor has adequate internal oversight and verification procedures in place. This Regulation applies to administrators of critical and significant benchmarks and, in accordance with the principle of proportionality, it avoids putting an excessive burden on administrators of significant benchmarks by allowing these to apply the conflicts of interests requirements only for material actual or potential conflicts of interests. In addition, it may be appropriate to afford an administrator additional discretion in how it ensures internal oversight and verification procedures at contributor level. In particular, it may be justified to differentiate the required measures in accordance with the nature, scale and complexity of the contributor's organisation.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (9) The European Securities and Markets Authority 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 Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>11</sup>.

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<sup>11</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

*Article 1*

*Ensuring appropriate and verifiable input data*

1. An administrator shall ensure the availability of all information necessary to check, where applicable, that:
  - (a) the submitter has been authorised to contribute input data on behalf of the contributor in accordance with any requirement for authorisation under point (b) of Article 15(2) of Regulation (EU) 2016/1011;
  - (b) input data is provided by the contributor or is selected from a source specified by the administrator within a time-period prescribed by the administrator;
  - (c) input data is provided by the contributor in a format specified by the administrator;
  - (d) input data is contributed from the input data sources as defined in point 24 of Article 3(1) of Regulation (EU) 2016/1011;
  - (e) the source of input data is reliable;
  - (f) the input data meets the requirements set out in the methodology in particular the requirements on the currency or the unit of measurement, the tenor, and the types of counterparties;
  - (g) relevant thresholds for the quantity of input data and standards for the quality of input data are met in accordance with the methodology;
  - (h) the priority of use of different types of input data are applied in accordance with the methodology;
  - (i) the exercise of any discretion or expert judgement in the contribution of input data is applied within the limits of the methodology and the code of conduct set by the administrator.
2. For the purposes of paragraph 1, administrators shall rely on information retained in accordance with the record-keeping requirements in Article 8 of Regulation (EU) 2016/1011 and with any record-keeping policies established pursuant to point (iv) of paragraph (d) of Article 15(2) of Regulation (EU) 2016/1011.
3. An administrator shall conduct the checks on input data set out in paragraph 1 on a regular basis. Administrators of critical benchmarks shall conduct the checks set out in points (a), (b), (c), and (d) of paragraph 1 prior to any publication of the benchmark.

*Article 2*

*Internal oversight and verification procedures of a contributor*

1. Where input data is contributed from a front office function, the administrator shall ensure that the contributor has the following procedures in place:

- (a) an internal oversight procedure that describes:
  - (i) the respective roles of the three levels of control functions set out in points (b), (c) and (d) of paragraph 1 of this Article as well as the means of cooperation and flow of information between them;
  - (ii) regular reporting of the operations of the three levels of control functions to the senior management of the contributor;
  - (iii) communication to the administrator, upon request, of information requested by the administrator relating to the contributor's internal oversight and verification procedures.
- (b) a first level of control function that is responsible for:
  - (i) effective checking of input data prior to contribution in accordance with any requirement for the validation of input data to which it is subject pursuant to point (iii) of paragraph (d) of Article 15(2) of Regulation (EU) 2016/1011;
  - (ii) the review of input data prior to contribution to check its integrity and accuracy;
  - (iii) checking that the submitter is authorised to contribute input data on behalf of the contributor in accordance with any requirement under point (b) of Article 15(2) of Regulation (EU) 2016/1011;
  - (iv) the restriction of contributed input data to persons involved in the contribution process, except where access is justified under the rules and procedures of the contributor, such as for persons involved in audits related to the contribution of input data or persons involved in investigations relating to suspicious input data or errors;
- (c) a second level of control function that is responsible for:
  - (i) the review of input data after contribution, that is independent from the first level control function, in relation to the integrity and accuracy of the contributions;
  - (ii) the maintenance of a whistleblowing procedure that includes appropriate safeguards for whistleblowers;
  - (iii) the maintenance of procedures for the internal reporting of any attempted or actual manipulation of input data and any failure to comply with the contributor's benchmark-related policies and procedures as well as for the investigation of such events as soon as they become apparent;
  - (iv) the maintenance of internal reporting procedures for any operational problems in the contribution process, as soon as they arise;
  - (v) the maintenance of a physical presence of a staff member from the second level control function in the front office;
  - (vi) surveillance of communications between front office function staff directly involved in contributions and between front office function staff

directly involved in contributions and other internal functions or external bodies;

(vii) the establishment and maintenance of a conflicts of interest policy that covers:

- (1) the identification and disclosure to the administrator of actual or potential conflicts of interest in relation to the contributor's front office staff who are involved in the contribution process;
- (2) the separation of the remuneration of a submitter from the value of the benchmark, the specific values of the submissions made and any performance of an activity of the contributor that might give rise to a conflict of interest related to the contribution to the benchmark;
- (3) a clear segregation of duties between front office staff involved in contributing input data and other front office staff;
- (4) a physical separation between front office staff involved in contributing input data and other front office staff;
- (5) effective procedures to control the exchange of information between front office staff and other staff of the contributor involved in activities that may create a risk of conflicts of interest, where that information may affect the input data contributed;
- (6) contingency provisions in case of temporary disruption of the controls regarding the exchange of information referred to in point (5);
- (7) measures to prevent any person from exercising inappropriate influence over the way in which front office staff involved in contributing input data carry out their activities.

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

2. Taking into consideration the nature, scale and complexity of the activities of the contributor, whether a conflict of interest may rise between the contribution to the benchmark and trading or other activities performed by the contributor, or the level of discretion involved in the process of contribution, administrators may choose:

- (a) not to require the measures specified in point (v) and point (vii), (3), (4), and (6) of paragraph 1 (c);
- (b) to permit a simplified internal oversight architecture for contributors the size of whose organisation does not allow for the establishment of three levels of control.

3. An administrator of a significant benchmark may choose to apply the measures specified in point (vii) of paragraph 1(c), only for the actual or potential material conflicts of interest.

*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 1 January 2018.

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]*

### 13.1.3 Transparency of 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 information to be provided on the key elements of the methodology, the details of the internal review and the approval of a methodology and the procedures for consulting on any proposed material change in the benchmark administrator's methodology**

(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<sup>12</sup>, and in particular Article 13(3) thereof,

Whereas:

- (1) It is important that administrators disclose the key elements of the methodology to allow users and potential users to understand how a benchmark is determined, what it measures and therefore to understand the appropriateness of the benchmark for their purposes and any limitations or risks of the methodology. A uniform disclosure of the key elements of the methodology across the Union will allow users and potential users to easily compare the methodologies of different benchmarks and choose appropriately according to their intended use.
- (2) Benchmarks' methodologies are highly divergent. The key elements of the methodology that are specified by this Regulation therefore only need to be published or made available insofar as they apply to a particular benchmark methodology.
- (3) For the purposes of ensuring the reliability and accuracy of a benchmark, two key elements to be disclosed by the administrator are the minimum quantity and quality of input data required to be able to apply the methodology of the benchmark and perform its calculation. In addition, the use of discretion in the determination of benchmarks increases their vulnerability to manipulation. In order to minimise this risk of manipulation, the administrator should disclose, as part of the key elements of the

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<sup>12</sup> OJ L 171, 29.06.2016 p. 1.

methodology, clear rules in relation to the circumstances when discretion can be used and how this discretion may be exercised

- (4) In order for users and potential users to be sufficiently informed of the administrator's process for reviewing the methodology it is important that the administrator publishes the policies and procedures related to this process together with the bodies involved and the relevant governance process in which it is embedded.
- (5) Regulation (EU) 2016/1011 requires the information regarding the key elements of the methodology and the details of the internal review of the methodology to be publicly accessible for critical and significant benchmarks. In accordance with the principle of proportionality, this Regulation avoids putting an excessive burden on administrators of significant benchmarks, by allowing them to choose to reduce disclosure to a more limited set of elements or to disclose certain elements at a reduced level of detail.
- (6) In order for a user or a potential user to understand how an administrator will consult on a proposed material change to a benchmark, the administrator should disclose in advance certain information on how it will conduct the consultation, and on the rationale for a proposed material changes including how it will assess the impact of a proposed change. In specific circumstances, such as in case of sudden market events, the administrator might conduct a consultation within a shorter time frame than the standard period otherwise set out.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (8) The European Securities and Markets Authority 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 Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>13</sup>.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *Key elements of the methodology to be published or made available*

1. An administrator shall publish or make available at least the following information, as applicable to the relevant benchmark and input data used:
  - (a) a definition and description of the benchmark and of the market or economic reality it is intended to measure;
  - (b) the currency or other unit of measurement of the benchmark;
  - (c) the criteria used by the administrator for selecting the sources of input data;

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<sup>13</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (d) types of input data used and the priority given to each type;
  - (e) the composition of any panel of contributors and the criteria determining eligibility for panel membership;
  - (f) a description of the constituent elements of a benchmark and the criteria used for their selection and for assigning weights to them;
  - (g) any minimum liquidity requirements for the constituent elements of the benchmark;
  - (h) any minimum requirements for the quantity of input data and minimum standards for the quality of input data;
  - (i) rules identifying how and when discretion may be exercised in the determination of the benchmark;
  - (j) whether the benchmark takes into account any reinvestment of dividends and coupons paid by its constituent elements;
  - (k) where the methodology is changed periodically to remain representative, any criteria used to:
    - (i) determine when such a change is necessary;
    - (ii) determine the frequency of such a change; and
    - (iii) rebalance the constituent elements of the benchmark in the process of such a change.
  - (l) limitations of the methodology and details of the applicable methodology in exceptional circumstances including in illiquid markets or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable;
  - (m) details of the roles of any third parties involved in data collection for, or the computation or dissemination of, the benchmark;
  - (n) the method used for the extrapolation and any interpolation of data.
2. Administrators of significant benchmarks may opt not to disclose elements (m) and (n) of paragraph 1.

## *Article 2*

### *Elements of the internal review of the methodology to be published or made available*

1. An administrator shall publish or make available the following information regarding the internal review and approval of the methodology of a benchmark:
- (a) any policies and procedures relating to the internal review or approval;
  - (b) details of any specific events that may give rise to an internal review including details of any mechanism used by the administrator to determine whether the methodology is traceable and verifiable;
  - (c) the bodies or functions within the administrator's organisational structure that are involved in reviewing and approving the methodology;



- (d) the roles performed by any persons involved in reviewing and approving the methodology;
  - (e) a description of the procedure for the nomination and removal of the persons involved in reviewing and approving the methodology.
2. Administrators of significant benchmarks may choose not to publish or make available the information described at points (d) and (e) of paragraph 1.

### *Article 3*

#### *Information on a proposed material change to an administrator's methodology*

1. An administrator shall publish or make available the following information on its procedures for consulting on any proposed material change in its methodology:
- (a) the key elements of the methodology that will in its view be impacted by a proposed material change;
  - (b) its procedures for undertaking, in specified circumstances, a consultation within a shorter time frame than the standard period otherwise set out.
2. An administrator shall publish or make available information on the rationale for any proposed material change including an assessment as to whether the representativeness of the benchmark and its appropriateness for its intended use are put at risk in case the proposed material change is not put in place.

### *Article 4*

#### *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 1 January 2018.

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]*

#### 13.1.4 Code of conduct for contributors

### **COMMISSION DELEGATED REGULATION (EU) .../..**

**of XXX**

**[...]**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the elements of the code of conduct to be developed by benchmark administrators**

(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<sup>14</sup>, and in particular Article 15(6) thereof,

Whereas:

- (1) This Regulation specifies further the elements that a benchmark administrator should include in a code of conduct, in order to ensure both consistent behaviour by contributors and input data of the quality, accuracy and quantity needed by the methodology used to determine the benchmark.
- (2) The requirements of this Regulation should be met by an administrator taking into consideration the nature, scale and complexity of the activities of the contributors, including whether contributors are supervised entities; whether conflict of interest may rise between the contribution to the benchmark and trading or other activities performed by the contributors; and the level of discretion involved in the process of contribution.
- (3) A key component of ensuring the integrity of a benchmark that is based on input data contributions is that a contributor appoints persons to submit the input data that have the correct knowledge, skills, experience and behaviour to perform the role. This Regulation therefore requires the code of conduct to specify that a contributor undertake a number of checks in respect of persons who are to become submitters prior to authorising them.

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<sup>14</sup> OJ L 171, 29.6.2016, p. 1.

- (4) A code of conduct should require a contributor to keep records of the data that was considered for each contribution and any related exercise of discretion. Such records represent an essential element to establish a contributor's adherence to the code of conduct's policies ensuring that a contributor provides all relevant input data.
- (5) The proper identification and management of conflicts of interest at the level of the contributors is a necessary step towards the integrity and accuracy of the benchmark. For this reason, this Regulation specifies that a code of conduct should require a contributor's systems and controls to include a register of conflicts of interest, in which a contributor should record identified conflicts of interest and the measures taken to manage them.
- (6) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden in relation to the provision of significant and non-significant benchmarks by allowing administrators of significant and non-significant benchmarks to develop codes of conducts that are less detailed.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (8) The European Securities and Markets Authority 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 by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>15</sup>.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *Description of input data*

The code of conduct shall include a clear description of at least the following aspects related to the input data to be provided by a contributor:

- a) the types of input data;
- b) the required quality and accuracy of the input data;
- c) the required quantity of the input data;
- d) the priority, if any, in which input data is to be contributed;

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

- e) the format of the input data;
- f) the frequency of submission of input data;
- g) the timing of submission of input data;
- h) contributor's procedures, if any, for adjustments to, and standardisation of, the input data.

## *Article 2*

### *Submitters*

1. The code of conduct shall require that a person can act as a submitter of input data on behalf of a contributor only when a contributor is satisfied that the person has the necessary skills, knowledge, training and experience for the role.
2. The code of conduct shall describe the due diligence process that a contributor shall undertake before being satisfied that a person has the necessary skills, knowledge, training and experience to submit input data on its behalf. This process shall include undertaking checks to verify:
  - a) the identity of the potential submitter;
  - b) the qualifications of the potential submitter; and
  - c) the reputation of the potential submitter, including whether the potential submitter has previously been excluded by any party from submitting input data to a benchmark for reasons of misconduct.
3. The code of conduct shall state the method by which a contributor is to notify the identity of any individual authorised to submit input data on its behalf to the administrator.

## *Article 3*

### *Policies to ensure that a contributor provides all relevant input data*

The code of conduct shall require that a contributor has in place at least the following policies to ensure that a contributor provides all relevant input data:

- a) An input data policy that includes at least a description of:
  - i) the data to be taken into account in determining the input data contribution;
  - and

- ii) the data that a contributor may exclude from a contribution of input data and any reason that might justify such an exclusion;
- b) a policy on the transmission of data to the administrator that includes at least:
- i) a method to be used for the secure transfer of data; and
  - ii) contingency plans for submitting input data that address at least the following elements: technical and operational difficulties, the temporary absence of a submitter, and a lack of input data required by the methodology.

#### *Article 4*

##### *Systems and controls*

1. The code of conduct shall specify that the effective systems and controls that a contributor must have in place provide for at least the following:
- a) pre-contribution checks to identify suspicious input data, including effective checking processes in the form of a review of the data by a second person, and unusual data values;
  - b) post-contribution checks to verify the input data has been contributed in accordance with the requirements of the code of conduct and to identify suspicious input data; and
  - c) monitoring of the transfer of input data to the administrator in accordance with the applicable policies.
2. A code of conduct may allow the use of an automated system for the contribution of input data, in which natural persons are not able to modify the contribution of input data, on condition that the contributor using an automated system:
- (a) is able to monitor the proper functioning of the automated system on a continuous basis; and
  - (b) checks the automated system following any update or change to its software, before new input data is contributed.

In such a case, a code of conduct may not require the contributor using an automated system to establish the checks in point (a) of paragraph 1.

3. The code of conduct shall define the procedures that a contributor must have in place to address any errors in the contributed input data.

4. The code of conduct shall require that a contributor regularly reviews, at least annually, the systems and controls established in relation to the contribution of input data.

#### *Article 5*

##### *Policies on the use of discretion when contributing input data*

Where the code of conduct allows the contributor to use discretion in contributing input data, it shall require the contributor to establish policies on the use of discretion that specify at least the following:

- a) the circumstances in which the contributor may exercise discretion;
- b) the persons within the contributor that are permitted to exercise discretion;
- c) any internal controls that govern the exercise of the contributor's discretion in accordance with its policies;
- d) any persons within the contributor that may evaluate ex-post the exercise of discretion.

#### *Article 6*

##### *Record-keeping policies*

1. The code of conduct shall require a contributor to keep a record of all relevant information necessary to check the contributor's adherence to the code of conduct, including a record of at least the following information:

- a) policies and procedures governing the contribution of input data and any relevant changes therein;
- b) the register of conflicts of interest established pursuant to point (b) of Article (8)(1);
- c) any disciplinary action taken against any of the contributor's staff in respect of benchmark-related activities;
- d) a list of submitters and persons performing checks in respect of contributions, including their names and roles within the contributor, and the dates when the submission-related roles were authorised and exited;
- e) in respect of each contribution of input data:
  - i. the contribution of input data;

- ii. the data taken into account in determining the input data contribution, and any data that was excluded;
- iii. any use of discretion;
- iv. any input data checks undertaken by the contributor;
- v. communications in relation to the contribution of input data between the submitter and any persons within the contributor performing checks in respect of contributions.

2. The code of conduct shall require the record-keeping policies to provide that information be kept for a minimum of five years, or three years where the records are of telephone conversation or electronic communications, on a medium that allows the storage of information to be accessible for future reference.

3. A code of conduct applicable to a contributor to a significant benchmark may not address the record-keeping policies in point (e)(iv) of paragraph 1.

4. A code of conducts applicable to a contributor to a non-significant benchmark may not address the record-keeping policies in point (e)(iv) and (v) of paragraph 1.

#### *Article 7*

##### *Reporting of suspicious input data*

1. The code of conduct shall require a contributor to establish documented internal procedures that provide for its staff to report any suspicious input data to the contributor's compliance function, if any, or to the contributor's senior management.

2. The code of conduct shall specify the conditions under which a contributor should report suspicious input data to the administrator, and shall specify the method in which the contributor should contact the administrator.

#### *Article 8*

##### *Conflicts of interest*

1. The code of conduct shall require a contributor to establish systems and controls concerning the management of conflicts of interest that include at least:

- a) a conflicts of interest policy that addresses:
  - i. the identification and internal escalation of conflicts of interest;



- ii. the recruitment process for submitters;
  - iii. remuneration policies of the contributor's staff;
  - iv. potential conflicts of interest arising from the contributor's management structure;
  - v. communications between the submitters and other staff within the contributor;
  - vi. any physical and operational separation between submitters and other staff of the contributor;
  - vii. the contributor's exposure to a financial instrument which uses the benchmark to which the contributor contributes input data as a reference.
- b) a register of conflicts of interest, that shall be kept up to date and used to record any conflicts of interest identified and any measures taken to manage them. The register shall be accessible by internal or external auditors.

2. The code of conduct shall require that the staff of a contributor that are involved in the contribution process are trained in relation to all policies, procedures and controls relating to the identification, prevention or management of conflicts of interest.

3. A code of conduct applicable to a contributor to a non-significant benchmark may not address the systems and controls concerning the management of conflicts of interest in points (a)(iii), (v), (vi) and (vii) of paragraph 1.

#### *Article 9*

#### *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 1 January 2018.

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]*

### 13.1.5 Governance and control requirements for supervised contributors

#### COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

[...]

#### **supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the governance and control arrangements for supervised contributors to 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<sup>16</sup>, and in particular Article 16(5) thereof,

Whereas:

- (1) It is important that the control framework established by a supervised contributor includes a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 or of the applicable code of conduct, a policy on whistleblowing, oversight of the process for contributing input data and periodic review of the same, as supervised contributors need to have such elements in place in order to ensure that they act lawfully and submit input data that is accurate and reliable.
- (2) Recognising that there may be processes where sign-off of input data in advance of individual contributions may be disproportionate, including where contributions are made many times a day by an automated system used by the supervised contributor, this Regulation provides for alternative checks that cater for such circumstances.
- (3) Submitters within a supervised contributor should receive adequate training so that they have a full understanding of all the elements of the code of conduct applicable to the contribution of input data. This is an essential element to ensure submitters act correctly and in line with the methodology of the benchmark.
- (4) This Regulation includes details on the separation of submitters of a supervised contributor from other employees and on the supervised contributor's remuneration

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<sup>16</sup> OJ L 171, 29.6.2016, p. 1.

policy for submitters to minimise the exposure of a supervised contributor's submitters to incentives to manipulate the contribution of input data.

- (5) The use of discretion by supervised contributors increases the vulnerability of the relevant benchmarks to manipulation. Therefore this Regulation imposes specific requirements on supervised contributors in relation to the use of expert judgment, including an obligation to have regular internal reviews of the application of expert judgement.
- (6) This Regulation specifies further that the requirement to keep records of communications in relation to provision of input data should include the names of the submitters to provide an adequate level of transparency.
- (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 by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>17</sup>,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### *Control framework*

The control framework of a supervised contributor shall include at least:

- (a) effective oversight of the process for contributing input data including risk management, the identification of senior personnel responsible for the process, and the involvement, if any, of the compliance and internal audit functions;
- (b) a policy on whistleblowing, including appropriate safeguards for whistleblowers;
- (c) a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 or of the applicable code of conduct referred to in Article 15 of that Regulation. The procedure for managing breaches shall include reviewing any detected breach or error, and recording the actions taken as a consequence; and
- (d) periodic review of the process for contributing data, to be conducted at least annually and whenever there is a change in the applicable code of conduct.

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

## *Article 2*

### *Controls on submitters*

1. The systems and controls of a supervised contributor shall include a documented and effective process for contributing data, and shall include at least:

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

2. The controls of a supervised contributor shall include a process for sign-off of a contribution by a natural person senior to the submitter when it is required by the applicable code of conduct as developed pursuant to Article 15 of Regulation (EU) 2016/1011, or when the supervised contributor considers such a sign-off appropriate on the basis of consideration of the following elements: the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor.

3. Where the controls of a supervised contributor include a process for sign-off by a natural person senior to the submitter, the procedures of a supervised contributor shall include clear rules about the timing of the sign-off. If these rules include the possibility of sign-off after submission of the input data, the procedures shall include the circumstances in which it is permitted and the maximum time-period within which it should occur.

## *Article 3*

### *Training for submitters*

1. The systems and controls of a supervised contributor shall include training programmes to ensure that each submitter has:

- (a) adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality; and
- (b) adequate knowledge of all the elements of the applicable code of conduct.

2. The knowledge of submitters referred to in points (a) and (b) in paragraph 1 shall be periodically re-assessed, at least annually, to verify that it is still appropriate that they act as submitters.
3. Paragraph 2 shall not apply in the case of contributions to significant benchmarks.

#### *Article 4*

##### *Conflicts of interest*

1. The measures for the management of conflicts of interest of a supervised contributor shall include at least:
  - (a) a register of conflicts of interest, that shall be kept up to date and used to record any conflicts of interest identified and any measures taken to manage them. The register shall be accessible by internal or external auditors;
  - (b) physical separation of submitters from other employees of the contributor, where appropriate, taking into account: the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor; and
  - (c) appropriate internal oversight procedures; when there is no organisational or physical separation of employees, the oversight procedures shall prescribe rules on the interaction of submitters with front office employees.
2. The measures for the management of conflict of interest should also include remuneration policies in relation to submitters that ensure that the remuneration of a submitter:
  - (a) is not linked to the benchmark nor to the specific values of the submissions made; and
  - (b) is not linked to the performance of a specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the benchmark.

#### *Article 5*

##### *Record-keeping*

1. Records to be kept of communications in relation to provision of input data by the supervised contributor shall include the contributions made and the names of the submitters.

2. Records to be kept of the contributor's exposure to financial instruments that use the benchmark as a reference shall include the type of activity of the supervised contributor that gives rise to the exposure.
3. Records to be kept of internal and external audits shall include the audit brief, the audit report, and a record of actions taken in response to each audit.
4. Paragraph 3 shall not apply in the case of contributions to significant benchmarks.

#### *Article 6*

##### *Expert judgement*

Where the contribution of input data relies on expert judgement, the policies of a supervised contributor in relation of the use of judgement or the exercise of discretion shall include at least:

- (a) a framework for ensuring consistency between different submitters, and consistency over time, in relation to the use of judgement or the exercise of discretion;
- (b) identification of the information that can be used to support expert judgement or discretion, and of any information that should not be taken into account; and
- (c) procedures for the systematic review of any use of expert judgement.

#### *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 1 January 2018.

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]



### 13.1.6 Compliance statement for administrators of significant and non-significant benchmarks

#### COMMISSION IMPLEMENTING REGULATION (EU) No .../..

of **XXX**

#### **supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to implementing technical standards to develop a template for compliance statements to be used by administrators of significant and 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<sup>18</sup>, and in particular Articles 25(8) and 26(5) thereof,

Whereas:

- (1) A compliance statement should allow any party to identify clearly the provisions of Regulation (EU) 2016/1011 that an administrator of a benchmark has chosen not to apply, the reasons why the administrator considers it is appropriate for it not to apply the provisions, and every benchmark in respect of which the administrator has chosen not to apply them. For this reason, this Regulation provides a template for a compliance statement that is organised in sections, one of which allows an administrator to identify the benchmark in respect of which it has chosen not to apply provisions or any identified group of benchmarks in respect of which it has chosen not to apply the same provisions.
- (2) It is important that a compliance statement provide clear reasons why the administrator considers it appropriate not to comply with the provisions identified in the compliance statement, so that users can easily understand the rationale behind the decision of the administrator. This Regulation therefore requires a separate explanation for each of the provisions not applied by the administrator.
- (3) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on an administrator of a non-significant benchmark by

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<sup>18</sup> OJ L 171, 29.6.2016, p. 1

providing a template for a compliance statement for an administrator of a non-significant benchmark that is less detailed.

- (4) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.
- (5) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>19</sup>,

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *Template for the compliance statement*

1. An administrator of a significant benchmark shall use the template included in Annex I for the publication and maintenance of a compliance statement pursuant to Article 25(7) of Regulation (EU) 2016/1011.
2. An administrator of a non-significant benchmark shall use the template included in Annex II for the publication and maintenance of a compliance statement pursuant to Article 26(3) of Regulation (EU) 2016/1011.

### *Article 2*

#### *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 1 January 2018.

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.]*

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<sup>19</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).



*On behalf of the President*

*[...]*

*[Position]*

**ANNEXES**

**to the**

**COMMISSION IMPLEMENTING REGULATION (EU) No .../..**

**laying down implementing technical standards with regard to the template for compliance statements to be used by administrators of significant and non-significant benchmarks according to Regulation (EU) No 2016/1011 of the European Parliament and of the Council**

**ANNEX I**

**Template for the compliance statement under Article 25 (7) of Regulation (EU) 2016/1011**

<i>Item</i>	<i>Text field</i>
<b>A. General Information</b>	
1. Date of creation of the compliance statement and of the latest update	1. Created: [dd/mm/yy]  Last updated: [dd/mm/yy]
2. Identity of the administrator	2. [As it appears in the “Register of administrators and benchmarks” published by ESMA]
3. Relevant National Competent Authority	3. [The NCA who has authorised the administrator]
<p><i>The following section(s) includes:</i></p> <ul style="list-style-type: none"> <li>• <i>the significant benchmark in respect of which provisions do not apply,</i></li> <li>• <i>the provisions that the administrator has chosen not to apply, and</i></li> <li>• <i>an explanation as to why it is appropriate not to apply each provision.</i></li> </ul> <p><i>Each section should be completed for any identified group of significant benchmarks provided by the administrator in respect of which:</i></p> <ul style="list-style-type: none"> <li>• <i>the same provisions are not complied with, and</i></li> <li>• <i>the same explanations for non-compliance apply.</i></li> </ul>	

<b>B. [Insert identity of the administrator as in field 2] chooses not to apply the following provisions of Regulation (EU) 2016/1011 with respect to its significant benchmarks listed below</b>	
4. Identification of benchmarks for which this section is relevant	<i>4. [List of names of all the single benchmarks including, where available, their ISINs]</i>
5. Indication as to where the benchmark statement(s) of the benchmark(s) referred to in this section have been published	<i>5.[ e.g. webpage link]</i>
6. (i) clear identification of each single provision;  (ii) for each provision listed under point (i), a dedicated, detailed and clear explanation of the reasons why the administrator considers it appropriate not to comply with that specific provision	<i>6(i). [Number of the Article and paragraph of Regulation (EU) 2016/1011 and full text of each single provision]</i>
	<i>6(ii). [Explanation on the appropriateness of the non-compliance for each specific provision]</i>

## ANNEX II

### Template for the compliance statement under Article 26 (3) of Regulation (EU) 2016/1011

Item	Text field
<b>A. General Information</b>	
1. Date of creation of the compliance statement and of the latest update	1. Created: [dd/mm/yy]  Last updated: [dd/mm/yy]
2. Identity of the administrator	2. <i>[As it appears in the “Register of administrators and benchmarks” published by ESMA]</i>
<p><i>This section should identify:</i></p> <ul style="list-style-type: none"> <li>• <i>the non-significant benchmark in respect of which provisions do not apply,</i></li> <li>• <i>the provisions that the administrator has chosen not to apply, and</i></li> <li>• <i>an explanation as to why it is appropriate not to apply each provision.</i></li> </ul> <p><i>Each section should be completed for any identified group of non-significant benchmarks provided by the administrator in respect of which:</i></p> <ul style="list-style-type: none"> <li>• <i>the same provisions are not complied with, and</i></li> <li>• <i>the same explanations for non-compliance apply.</i></li> </ul>	
<b>B. [Insert identity of the administrator as in field 1] chooses to not apply the following provisions of Regulation (EU) 2016/1011 with respect to its non-significant benchmarks listed below</b>	
3. Identification of benchmark(s) for which this section is relevant	3. <i>[List of names of all the single benchmarks including, where available, their ISINs]</i>
4. (i) clear identification of each single provision;  (ii) for each provision listed under point (i), a dedicated, detailed and clear explanation of the reasons why the administrator considers it	4(i). <i>Number of the Article and paragraph of Regulation (EU) 2016/1011 and full text of each single provision</i>
	4(ii). <i>[Explanation on the appropriateness of the non-compliance for each specific provision]</i>

appropriate not to comply with that specific provision	
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### 13.1.7 Criteria for 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 for the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements**

(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<sup>20</sup>, and in particular Article 25(9) thereof,

Whereas:

- (1) Competent authorities have to take into account a number of criteria when they assess the appropriateness of the administrator applying one or more requirements of Regulation (EU) 2016/1011 that it has previously chosen not to apply. Further specification of these criteria will make an assessment by a competent authority more practical and to ensure they are undertaken consistently in all Member States. This Regulation sets forth minimum elements for each criterion which further define its relevance in the context of Article 25(3) of Regulation (EU) 2016/1011 and which competent authorities shall consider in their assessment.
- (2) The further specification of the criteria takes into consideration the nature of the provisions that administrators may waive when they provide significant benchmarks. Administrators of significant benchmarks may elect not to apply certain provisions that require them to put in place organisational measures to reduce conflicts of interest that may result from their employees' involvement in the provision of the benchmark and it is appropriate that competent authorities consider whether other adequate means to protect the benchmark's integrity are in place when they assess the criteria of point (a), (c) and (i) of Article 25(3) of Regulation (EU) 2016/1011.
- (3) The specification of the criteria of point (a) and (b) of Article 25(3) of Regulation (EU) 2016/1011 relating to the robustness of the benchmark and to the quality of input data



includes elements for competent authorities to consider in particular when administrators of significant benchmarks decide not to apply additional control measures for input data from front office functions or to develop the code of conduct without the minimum contents of Article 15(2) of Regulation (EU) 2016/1011.

- (4) This Regulation further includes elements for competent authorities to take into account when they assess the criteria of Article 25(3) of Regulation (EU) 2016/1011 that relate to the benchmark's impact on one of more specific markets, the economy more generally and its importance to financial stability and it suggests that competent authorities use information that is already in their domain, through disclosure to them by the administrator or otherwise, and public information.
- (5) This Regulation includes elements for the specification of criterion (f) of Article 25(3) of Regulation (EU) 2016/1011 that relate to the benchmark itself and to whether the administrator has adequate technical means and control mechanisms in place to allow a continued and robust provision of the benchmark in absence of the provisions the administrator has opted out of.
- (6) When assessing the administrator's size, organisational form and structure, the elements in this Regulations specify aspects for the competent authority to take into account that relate to the avoidance of conflicts of interest when administrators opt out of some of the provisions of Regulation (EU) 2016/1011.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (8) The European Securities and Markets Authority 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 Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>21</sup>.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *Assessment of the appropriateness of specific requirements to significant benchmarks*

1. When deciding whether an administrator of a significant benchmark is to apply one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) of Regulation (EU) 2016/1011, the competent authority shall take into account at least the following elements:
  - (a) in relation to the vulnerability of the benchmark to manipulation:

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<sup>21</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (i) whether the benchmark is based on transaction data, whether contributors are supervised entities or whether measures apply that increase the robustness of input data;
  - (ii) whether the administrator's organisational structure reduces incentives to manipulation and whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark;
  - (iii) whether there are proven cases of manipulation of the same benchmark or a benchmark with a similar methodology provided by an administrator of similar size and organisational structure;
- (b) in relation to the nature of the input data:
- (i) when the input data is transaction data, whether the administrator is a participant in the market or economic reality the benchmark intends to measure;
  - (ii) when the input data is provided by contributors, whether the contributors hold positions in financial instruments referencing that benchmark;
  - (iii) when the input data is sourced from third country exchanges or trading systems, whether a supervisory framework applicable to these exchanges or trading systems maintains the integrity of the input data;
  - (iv) where the input data consists of quotes, whether these are committed or indicative and whether the adequate control mechanisms apply;
- (c) in relation to the level of conflicts of interest:
- (i) whether the administrator holds positions in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund which is measured by the benchmark;
  - (ii) where the benchmark is based on contributions, how the administrator's actual or potential relations with contributors are governed by adequate control mechanisms;
  - (iii) whether the administrator has controls or other measures in place that mitigate potential conflicts of interest effectively;
- (d) in relation to the degree of discretion of the administrator:
- (i) where the benchmark methodology allows for expert judgement by the administrator, whether its exercise is sufficiently transparent;
  - (ii) where the benchmark is based on estimates, the effectiveness of the internal control measures the administrator has in place;
- (e) in relation to the impact of the benchmark on markets:
- (i) where a benchmark has particular relevance for a specific market or markets, whether the unreliability on behalf of the benchmark would have a disruptive effect on the functioning of that specific market or markets and whether there are adequate substitutes for that benchmark;

- (ii) when the benchmark qualifies as a significant benchmark according to point (b) of Article 24 (1) of Regulation (EU) 2016/1011, and where known to the competent authority, any relevant quantitative relation of financial instruments, financial contracts, or investment funds referencing the benchmark to the total value of the respective instruments in a Member State;
- (f) in relation to the nature, scale and complexity of the provision of the benchmark:
  - (i) the degree to which input data is based on contributions or whether the input data is transaction data and how this is reflected in the control mechanisms the administrator has in place;
  - (ii) the amount of data to be processed and the number of data sources and whether the administrator has sufficient technical means to process the data continuously and robustly;
  - (iii) whether the methodology gives rise to operational risks in processing the data;
  - (iv) the extent to which the administrator relies on external contributors for the determination of the benchmark;
- (g) in relation to the importance of the benchmark to financial stability:

the quantitative relation of the total value of financial instruments, financial contracts and investment funds referencing the benchmark to the total assets of the financial sector and of the banking sector in a Member State, where known to the competent authority;
- (h) in relation to the value of financial instruments, financial contracts or investment funds that reference the benchmark:
  - (i) the total value of all financial instruments, financial contracts and investment funds referencing the benchmark on the basis of all the range of maturities or tenors of the benchmark, where known to the competent authority;
  - (ii) whether the use of the benchmark is concentrated in individual categories of financial instruments, financial contracts or investment funds;
  - (iii) when a benchmark is a significant benchmark according to point (a) of Article 24 (1) of the Regulation (EU) 2016/1011, and where known to the competent authority, the proximity of the total value of referencing financial instruments, financial contracts and investment funds to the thresholds in points (a) and (c)(i) of Article 20 of the Regulation (EU) 2016/1011;
- (i) in relation to the administrator's size, organisational form or structure:
  - (i) when the provision of benchmarks is not the administrator's principal business activity, whether the provision of the benchmark is organisationally separate or whether other appropriate means are in place to avoid conflicts of interest.

- (ii) when the administrator is part of a group and where one or more entities within such a group are actual or potential users of the benchmark, whether the entity providing the benchmark is acting independently and how appropriate the other means the administrator has in place are to avoid conflicts of interest.

## *Article 2*

### *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 1 January 2018.

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]*

### 13.1.8 Benchmark statement

## COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the benchmark statement to be published by an administrators 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<sup>22</sup>, and in particular Article 27(3) thereof,

Whereas:

- (1) It is important that the content of benchmark statements is uniform across the Union and that they contain the key information required by this Regulation, so as to provide users with comparable and comprehensive information needed to choose appropriately from among, and understand the risks of, benchmarks.
- (2) Benchmark statements should include comprehensive information regarding the market or economic reality the benchmark or family of benchmarks intends to measure and an explanation of when the measurement of such market or economic reality may become unreliable. Users rely on such information in order to understand fully the benchmark or family of benchmarks.
- (3) Benchmark statements should indicate the discretionary elements in the benchmark's methodology, as well as any ex-post evaluation process applicable to the use of discretion, because this is key information for ensuring that users have an understanding of the susceptibility to manipulation of the benchmark or family of benchmarks.
- (4) Different types of benchmarks (i.e. regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks, significant benchmarks, and non-significant benchmarks) are subject to different requirements under Regulation (EU) 2016/1011. It is therefore important that a benchmark statement unambiguously

identifies the type of benchmark to which the benchmark or family of benchmarks belongs.

- (5) In relation to critical benchmarks, the benchmark statement should include additional information explaining why the benchmark is qualified as critical, so that users have at their disposal the elements to understand the basis on which the determination as critical was made.
- (6) Where a benchmark exhibits the characteristics of different types of benchmark, the specific provisions in this Regulation in relation to those different types of benchmarks will apply in parallel and in addition to the general disclosure requirements, so as to provide the stakeholders with comprehensive information on all of the benchmark's characteristics.
- (7) This Regulation pursues a proportional approach, requiring a reduced set of information in relation to significant and non-significant benchmarks, in order to avoid putting an excessive administrative burden on administrators of significant and non-significant benchmarks.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (9) The European Securities and Markets Authority 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 by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>23</sup>,

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *General disclosure requirements*

1. The benchmark statement shall:
  - (a) state the date of its publication and the date of its last update;
  - (b) include, where available, the ISIN of the benchmark or, when the benchmark statement refers to a family of benchmarks, a reference to a location where the ISINs of the benchmarks within the family of benchmarks are publicly accessible free of charge;
  - (c) state whether the benchmark or at least one benchmark in the family of benchmarks is determined using contributions of input data.
2. For the purpose of defining the key terms relating to the benchmark or family of benchmark, and, in particular, the market or economic reality measured by the

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<sup>23</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

benchmark or family of benchmark, the benchmark statement shall contain at least the following information:

- (a) a general description of the market or economic reality;
  - (b) the geographical boundaries of the market or economic reality, where applicable;
  - (c) any other relevant information the administrator considers beneficial for a benchmark user to understand the relevant features of the market or economic reality. Subject to the availability of reliable data, the administrator shall consider including, inter alia:
    - (1) information on actual or potential participants in the market;
    - (2) barriers to market access;
    - (3) an indication of the size of the market or economic reality.
3. For the purpose of defining the potential limitations of the benchmark or family of benchmarks and, in particular, the circumstances in which the measurement of the relevant market or economic reality may become unreliable, the benchmark statement shall contain at least the following elements, giving consideration to the methodology used for the specific benchmark or family of benchmarks:
  - (a) the circumstances in which the administrator would lack sufficient input data to determine the benchmark according to the methodology;
  - (b) where relevant, circumstances in which the degree of liquidity of the underlying market becomes insufficient to ensure the integrity and reliability of the benchmark determination according to the methodology;
  - (c) any other relevant information the administrator considers beneficial for a benchmark user to understand the circumstances in which the measurement of the relevant market or economic reality may become unreliable, including exceptional market events.
4. For the purpose of providing information on the controls and rules that govern any exercise of judgment or discretion in the calculation of the benchmark or of the family of benchmarks, the benchmark statement shall at least:
  - (a) indicate the position of each function or body that may exercise discretion;
  - (b) outline each step of any ex-post evaluation process on the use of discretion, including a clear reference to the position of any person(s) who evaluates an exercise of discretion.
5. For the purpose of providing information on the review of the methodology and of advising users in relation to changes to, or the cessation of, the benchmark or family of benchmark, a benchmark statement shall at least:
  - (a) refer to its procedures for public consultation on any material changes to its methodology;
  - (b) to the extent known, indicate possible impacts of changes to, or the cessation of the benchmarks upon the financial contracts, financial instruments that reference the benchmark or the measurement of the performance of investment funds.

6. Point (c) in paragraph 3 and point (a) in paragraph 5 shall not apply to the benchmark statement of a significant benchmark.
7. Point (c) of paragraph 2, points (b) and (c) of paragraph 3, paragraph 4 and paragraph 5 shall not apply to the benchmark statement of a non-significant benchmark. In respect of the benchmark statement of a non-significant benchmark, the administrator may satisfy the requirements in points (a) and (b) of paragraph 2 by providing a clear reference to a published document, accessible free of charge, that includes the same information.
8. A benchmark administrator may include additional information at the end of the benchmark statement by way of referencing to a published document, accessible free of charge.

## *Article 2*

### *Specific disclosure requirements for regulated-data benchmarks*

In addition to Article 1, for a regulated-data benchmark or a family of regulated-data benchmarks, the benchmark statement shall at least:

- (a) indicate the benchmark's qualification as a regulated-data benchmark;
- (b) state, in its description of the input data, the source of the input data used; and
- (c) state within which type of source of input data set out in the definition of a regulated-data benchmark in point (24) of Article 3(1) of Regulation (EU) 2016/1011 the source of input data falls.

## *Article 3*

### *Specific disclosure requirements for interest rate benchmarks*

In addition to Article 1, for an interest rate benchmark or a family of interest rate benchmarks, the benchmark statement shall at least:

- (a) indicate the benchmark's qualification as an interest rate benchmark;
- (b) refer to the additional regulatory regime applicable to interest rate benchmarks under Annex I of Regulation (EU) 2016/1011 and state which arrangements have been put in place to comply with it.

## *Article 4*

### *Specific disclosure requirements for commodity benchmarks*

In addition to Article 1, for a commodity benchmark or a family of commodity benchmarks, the benchmark statement shall at least:

- (a) indicate the benchmark's qualification as a commodity benchmark and the applicable regime, as set out in Article 19 of Regulation (EU) 2016/1011;



- (b) include an explanation as to why the benchmark or the family of benchmarks falls either under the regime of Title II or of Annex II of Regulation (EU) 2016/1011;
- (c) include in the definitions of key terms a concise description of the criteria that define the relevant underlying physical commodity;
- (d) with respect to the explanations that the administrator has to publish for each benchmark calculation according to points (a) and (b) of paragraph 7 of Annex II of Regulation (EU) 2016/1011, indicate where such explanations are published.

#### *Article 5*

##### *Specific disclosure requirements for critical benchmarks*

In addition to Article 1, for a critical benchmark, the benchmark statement shall at least:

- (a) indicate the benchmark's qualification as a critical benchmark pursuant to point 25 of Article 3(1) of Regulation (EU) 2016/1011, with reference to either point (a), (b) or (c) of Article 20(1) of Regulation (EU) 2016/1011, as applicable;
- (b) refer to the enhanced regulatory regime applicable to critical benchmarks under Regulation (EU) 2016/1011 and specify which enhanced oversight mechanisms apply to the benchmark;
- (c) contain information, to the extent available, on the most used types of financial instruments, financial contracts and investment funds that reference the critical benchmark;
- (d) state how users will be informed of any delay in the publication of the benchmark or of a re-determination of the benchmark, indicating any time limits that apply to these procedures.

#### *Article 6*

##### *Specific disclosure requirements for significant and non-significant benchmarks*

1. In addition to Article 1, for a significant benchmark or a family of benchmarks that includes only significant benchmarks, the benchmark statement shall at least indicate the qualification of the benchmark(s) as a significant benchmark pursuant to point 26 of Article 3(1) of Regulation (EU) 2016/1011.
2. In addition to Article 1, for a non-significant benchmark or a family of benchmarks including only non-significant benchmarks, the benchmark statement shall at least indicate the qualification of the benchmark(s) as a non-significant benchmark pursuant to point 27 of Article 3(1) of Regulation (EU) 2016/1011.
3. In addition to Article 1, for a family of benchmarks that includes both a significant and a non-significant benchmark, the benchmark statement shall at least indicate that the family of benchmarks includes both a benchmark qualified as a significant benchmark, pursuant to point 26 of Article 3(1) of Regulation (EU) 2016/1011, and a benchmark

qualified as a non-significant benchmark, pursuant to point 27 of Article 3(1) of Regulation (EU) 2016/1011.

#### *Article 7*

##### *Updates*

An update of the benchmark statement is required whenever the information it provides is no longer correct or sufficiently precise and at least where:

- (a) there is a change in the type of the benchmark;
- (b) there is a material change in the methodology for determining the benchmark or, where the benchmark statement refers to a family of benchmarks, in the methodology for determining any benchmark within the family of benchmarks.

#### *Article 8*

##### *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 1 January 2018.

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]

### 13.1.9 Authorisation and registration

## COMMISSION DELEGATED REGULATION (EU) .../..

of **XXX**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the information to be provided in an application for authorisation and in an application for registration**

(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<sup>24</sup>, and in particular Article 34(8) thereof,

Whereas:

- (1) This Regulation sets out the information that a competent authority should receive in an application for authorisation or registration to act as administrator of benchmarks, depending on the characteristics of the applicant or of the benchmarks provided and intended for use in the European Union. This specification of the information to be provided in the application for authorisation and in the application for registration promotes a common and consistent process throughout the Union.
- (2) It is important for a competent authority to receive the information laid down in this Regulation to assess whether the arrangements established by the applicant for authorisation or registration meet the requirements laid down in the Regulation (EU) 2016/1011.
- (3) In order for competent authorities to assess if any conflicts of interest arising from the benchmark activity and business interests of the owners of an applicant might affect the independence of an applicant in the benchmark calculation and thus impair the accuracy and integrity of the benchmark, an applicant should be required to submit information regarding the activities of its owners and the ownership of its parent undertakings.
- (4) An applicant should provide information on the composition, functioning and independence, in the benchmark calculation, of its governing bodies in order for competent authorities to be able to assess whether the corporate governance structure

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<sup>24</sup> OJ L 171, 29.06.2016, p. 1.

ensures the independence of the applicant in the benchmark calculation and the avoidance and management of conflicts of interest.

- (5) An applicant should provide information on its policies and procedures regarding the identification, management, mitigation and disclosure of conflicts of interests in relation to its activity of provision of benchmarks or families of benchmarks. For critical benchmarks, given their greater systemic importance, an applicant should provide the competent authority with an up-to-date inventory of existing conflicts of interest, along with an explanation of how they are managed.
- (6) For the purposes of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, an applicant should provide the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks. This information is necessary for the competent authority to assess whether these policies and procedures meet the requirements of the Regulation (EU) 2016/1011.
- (7) Information should also be included in the application to demonstrate to the competent authority that the controls on the input data used to determine the benchmarks provided by the applicant are adequate to ensure the representativeness, accuracy and integrity of such data, and that the methodology applied for the calculation of the benchmarks present all the characteristics required by the Regulation (EU) 2016/1011.
- (8) For the purposes of allowing the competent authority to assess the benchmark's representativeness of the economic reality it intends to measure, the applicant should provide the competent authority with a description of a benchmark or family of benchmarks provided or is intended to be provided and the types to which they belong, in line with the provisions of Regulation (EU) 2016/1011. The type to which the benchmark belongs is to be assessed to the best of the knowledge of the applicant and should be provided along with an indication of the sources of data used, so as to allow the competent authority to understand the reliability and exhaustiveness of the underlying information.
- (9) This Regulation also specifically sets out the contents of an application for an authorisation or registration where the applicant is a natural person.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (11) The European Securities and Markets Authority 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 Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>25</sup>.

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<sup>25</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

## *Article 1*

### *General requirements*

1. An application shall provide, as appropriate, information that includes at least the items:
  - (a) listed in Annex I, when the applicant is a legal person applying for authorisation;
  - (b) listed in Annex II, when the applicant is a legal person applying for registration;
  - (c) listed in Annex I, when the applicant is a natural person applying for authorisation, with the exception of the information listed at points (c), (f), (h) and (i) of paragraph 1 of Annex I;
  - (d) listed in Annex II, when the applicant is a natural person applying for registration, with the exception of the information listed at points (c), (f), (h) and (i) of paragraph 1 of Annex II.
2. An application may provide information at the level of a family of benchmarks only where none of the benchmarks within the family qualifies as a critical benchmark.
3. An application shall indicate where the applicant has not provided any of the required information and include an explanation as to why the applicant has not done so.
4. An applicant shall not be required to provide the information listed at points (f), (g), (h), (i), and (j) of paragraph 1 of Annex I or Annex II, as applicable, to the extent that the applicant is already supervised in the Member State by the same competent authority for other activities than the provision of benchmarks.

## *Article 2*

### *Information to be provided for types of benchmarks*

1. An applicant may decide to submit for any non-significant benchmark it provides the information required by paragraph 6 of Annex I in the form of a summary.
2. Non-supervised entities providing critical and significant benchmarks shall submit the information listed in Annex I.
3. Supervised entities providing only a non-critical benchmark or benchmarks shall submit the information listed in the first column of Annex II.
4. An applicant providing only a non-significant benchmark or benchmarks shall submit the information listed in the second column of Annex II.
5. Without prejudice to previous paragraphs, an applicant providing only a regulated-data benchmark or benchmarks shall not submit information in points 5(c), 6(a)(iii) and 6(a)(iv) of Annex I and Annex II.
6. An applicant providing only an interest rate benchmark or benchmarks shall submit the information listed in the Annexes of this Regulation and shall specify how the

specific requirements set out in Annex I of Regulation (EU) 2016/1011 are implemented where the provisions in Annex I of Regulation (EU) 2016/1011 apply in addition to, or as a substitute for, the requirements in Title II of Regulation (EU) 2016/1011, pursuant to Article 18 of the same Regulation.

7. An applicant providing only a commodity benchmark or benchmarks shall provide the information listed in Annex I of this Regulation if it is a non-supervised entity or provides a critical benchmark. If it is a supervised entity and none of the benchmarks it provides is a critical benchmark, it should provide the information listed in the first column of Annex II. The applicant shall specify how the requirements set out in Annex II of Regulation (EU) 2016/1011 are implemented for any commodity benchmark subject to Annex II instead of Title II of Regulation (EU) 2016/1011 pursuant to Article 19 of Regulation (EU) 2016/1011.

### *Article 3*

#### *Policies and procedures*

1. Any policies and procedures provided in an application shall contain or be accompanied by:
  - (a) an indication of the identity of the person or persons responsible for the approval and maintenance of the policies and procedures;
  - (b) a description of how compliance with the policies and procedures is monitored and the identity of the person or persons responsible for this monitoring;
  - (c) a description of the measures to be taken in the event of a breach of the policies and procedures.
2. An applicant that is part of a group may comply with paragraph 1 by submitting the policies and procedures of its group to the extent that they relate to the provision of benchmarks.

### *Article 4*

#### *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 1 January 2018.

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]*

## **ANNEXES**

**to the**

### **COMMISSION DELEGATED REGULATION (EU) .../.. of XXX**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the information to be provided in an application for authorisation and in an application for registration**

#### **ANNEX I**

#### **Information to be provided in an application for authorisation under Article 34 of Regulation (EU) 2016/1011**

### **1. GENERAL INFORMATION**

- (a) Full name of the applicant and its Legal Entity Identifier (LEI).
- (b) Address of the office within the European Union.
- (c) Legal Status.
- (d) Website, if any.
- (e) With respect to the contact person for the purpose of the application:
  - (i) name;
  - (ii) title;
  - (iii) address;
  - (iv) e-mail address;
  - (v) telephone number.
- (f) Where the applicant is a supervised entity, information about its current authorisation status, including the activities for which it is authorised and its relevant competent authority in its home Member State.
- (g) A description of the operations of the applicant in the European Union, whether or not subject to financial regulation, that are relevant for the activity of provision of benchmarks, along with a description of where these operations are conducted.
- (h) Any deed of incorporation, articles of association or other constitutional documents.
- (i) Where the applicant is part of a group, its group structure along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.



- (j) A self-declaration of good repute including details, if applicable, of any:
  - (i) proceedings of a disciplinary nature against it (unless dismissed);
  - (ii) refusal of authorisation or registration by a financial authority;
  - (iii) withdrawal of authorisation or registration by a financial authority.
- (k) Number of benchmarks provided.

## **2. ORGANISATIONAL STRUCTURE AND GOVERNANCE**

- (a) Internal organisational structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions involved in the provision of a benchmark, including their:
  - (i) terms of reference or a summary thereof; and
  - (ii) adherence to any governance codes or similar provisions.
- (b) Procedures ensuring that the employees of the administrator and any other natural persons whose services are placed at its disposal or under its control and who are directly involved in the provision of a benchmark have the necessary skills, knowledge and experience for the duties assigned to them and operate in respect of the provisions under Article 4(7) of the Regulation (EU) 2016/1011;
- (c) The number of employees (temporary and permanent) involved in the provision of a benchmark.

## **3. CONFLICTS OF INTEREST**

- (a) Policies and procedures that address:
  - (i) how current and potential conflicts of interest are or will be identified, recorded, managed, mitigated, prevented, disclosed and remedied;
  - (ii) the controls put in place in respect of current or potential conflicts of interest, including the controls implemented through information systems, along with any other part of the conflicts of interest management framework;
  - (iii) particular circumstances which apply to the applicant or to any particular benchmark provided by the applicant, in relation to which conflicts of interest are most likely arise, including where expert judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of a benchmark and where the applicant is a participant in the market or economic reality that the benchmark intends to measure.
- (b) For a benchmark or a family of benchmarks, a list of any material conflicts of interests identified, along with the respective mitigation measures. For each

critical benchmark, an up-to-date inventory of actual and potential conflicts of interest along with the respective mitigation measures.

- (c) The structure of the remuneration policy, specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks.

#### **4. INTERNAL CONTROL STRUCTURE, OVERSIGHT AND ACCOUNTABILITY FRAMEWORK**

- (a) Policies and procedures for monitoring the activities of the provision of a benchmark or a family of benchmarks, including those relating to:
  - (i) the information technology systems;
  - (ii) risk management, together with a mapping of risks which may arise and which may impact the accuracy, integrity and representativeness of the benchmark provided or the continuity of the activity of provision, along with the respective mitigation measures;
  - (iii) the constitution, role and functioning of the oversight function, as described in Article 5 of Regulation (EU) 2016/1011 and further specified in Regulation [...] [RTS on procedures and characteristics of the oversight function], including procedures for the appointment, substitution or removal of individuals within the oversight function;
  - (iv) the constitution, role and functioning of the control framework, as described in Article 6 of Regulation (EU) 2016/1011, including procedures for the appointment, substitution or removal of individuals responsible for this framework;
  - (v) the accountability framework as described in Article 7 of Regulation (EU) 2016/1011, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.
- (b) Fall-back systems and arrangements for determining and publishing a benchmark on a temporary basis.
- (c) Procedures for the internal reporting of infringements of Regulation (EU) 2016/1011 by managers, employees and any other natural persons whose services are placed at the applicant's disposal or under the control of the applicant.

#### **5. DESCRIPTION OF BENCHMARKS OR FAMILIES OF BENCHMARKS PROVIDED**

- (a) A description of a benchmark or family of benchmarks provided or that the applicant is intended to provide and the type to which the benchmark belongs, to the best of the knowledge of the applicant taking into account the provisions

of Regulation (EU) 2016/1011, along with an indication of the sources used to determine the type of the benchmark.

- (b) A description of the underlying market or economic reality that the benchmark or family of benchmarks is intended to measure, along with an indication of the sources used to provide this description.
- (c) A description of contributors to a benchmark or family of benchmarks, along with the code of conduct as described in Article 15 of the Regulation (EU) 2016/1011 and for critical benchmarks, the identity of contributors (i.e. name and location).
- (d) Information on measures to deal with corrections to the determination or publication of a benchmark or family of benchmarks.
- (e) Information on the procedure to be undertaken by the administrator in the event of changes to or the cessation of a benchmark or a family of benchmarks in compliance with Article 28(1) of the Regulation (EU) 2016/1011.

## **6. INPUT DATA AND METHODOLOGY**

- (a) For each benchmark or family of benchmarks, policies and procedures with respect to input data including those relating to:
  - (i) the type of input data used, their priority of use and any exercise of discretion or expert judgment;
  - (ii) any processes for ensuring that input data is sufficient, appropriate and verifiable;
  - (iii) the criteria that determine who may contribute input data to the administrator and the selection process of the contributors;
  - (iv) the evaluation of the contributor's input data and the process of validating input data.
- (b) For each benchmark or family of benchmarks, with respect to the methodology:
  - (i) a description of the methodology highlighting the key elements of the methodology in accordance with Article 13 of the Regulation (EU) 2016/1011 and further specified in Regulation [.../...] [RTS on transparency of methodology];
  - (ii) Policies and procedures including those relating to:
    - (1) the measures taken to provide validation and review of the methodology, including any trials or back-testing performed;
    - (2) the consultation process on any proposed material change in the methodology.

## **7. OUTSOURCING**

If any activity forming a part of the process for the provision of a benchmark or family of benchmarks is outsourced:

- (a) the relevant outsourcing arrangements, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation (EU) 2016/1011;
- (b) details of the outsourced functions unless this information is already included in the relevant contracts;
- (c) policies and procedures regarding the oversight of the outsourced activities.

## **8. OTHER INFORMATION**

- (a) The applicant may provide any additional information relevant to its application that it considers appropriate.
- (b) The applicant shall provide the requisite information in any manner and form stipulated by the competent authority.

## ANNEX II

### Information to be provided in an application for registration under Article 34 of Regulation (EU) 2016/1011

A' means 'Applicable'

'N/A' means 'Not applicable'

Annex I Reference		Supervised entities providing only non-critical benchmarks	Entities providing only non-significant benchmarks
<b>1) General information</b>			
1(a)	Full name	A	A
1(b)	Address	A	A
1(c)	Legal status	A	A
1(d)	Website	A	A
1(e)	Contact person	A	A
1(f)	Current authorisation status	A <sup>26</sup>	A <sup>26</sup> to supervised entities - N/A to non-supervised entities
1(g)	Operations conducted	A <sup>26</sup>	A <sup>26</sup>
1(h)	Constitutional documents	A <sup>26</sup>	A <sup>26</sup>
1(i)	Group structure	A <sup>26</sup>	A <sup>26</sup>
1(j)	Self-declaration of good repute	A <sup>26</sup>	A <sup>26</sup>
1(k)	Number of benchmarks	A	A
<b>2) Organisational structure and governance</b>			

<sup>26</sup> Unless already supervised by the same competent authority for other activities than the provision of benchmarks

2(a)	Internal organisational structure	A	A
2(b)	Employees	A	A
2(c)	Human resources	A	N/A
<b>3) Conflicts of interest</b>			
3(a)	Policies and procedures	A <sup>27</sup>	A <sup>27</sup> in the form of a summary
3(b)	Material conflicts of interest	A	N/A
3(c)	Remuneration structure	A	A
<b>4) Internal control structure, oversight and accountability framework</b>			
4(a)	Policies and procedures for monitoring the activities of the provision of a benchmark	A	A <sup>28</sup> in the form of a summary
4(b)	Internal arrangements for determining and publishing a benchmark	A	A in the form of a summary
4(c)	Internal reporting of infringements	A	A in the form of a summary
<b>5) Description of benchmarks provided</b>			

<sup>27</sup> An applicant may choose not to provide information relating to point 3(a)(iii) of Annex I, in respect of a significant or non-significant benchmark it provides.

<sup>28</sup> An applicant may choose not to provide information relating to point 4(a)(iii) of Annex I - with the exception of information on the establishment and maintenance of a permanent oversight function - points 4(a)(iv) and 4(a)(v) of Annex I - for some of the information to be provided on the control and accountability framework - in respect of a non-significant benchmark it provides.

5(a)	Description	A <sup>29</sup>	A in the form of a summary
5(b)	Underlying market	A <sup>29</sup>	A in the form of a summary
5(c)	Contributors	A <sup>29</sup>	A in the form of a summary
5(d)	Corrections	A <sup>29</sup>	A in the form of a summary
5(e)	Changes to and cessation	A <sup>29</sup>	A in the form of a summary
<b>6) Input data and methodology</b>			
6(a)(i)	Description of input data used	A <sup>29</sup>	A in the form of a summary
6(a)(ii)	Input data - sufficient, appropriate and verifiable	A <sup>29</sup>	A <sup>30</sup> in the form of a summary
6(a)(iii)	Contributors	A <sup>29</sup>	A in the form of a summary
6(a)(iv)	Evaluation of contributor's input data and validation of input data	A <sup>31</sup>	N/A

<sup>29</sup> A supervised entity which provides both significant and non-significant benchmarks may elect to provide such information in the form of a summary with reference to its non-significant benchmarks.

<sup>30</sup> An applicant may choose not to provide information relating to input data being verifiable in respect of a non-significant benchmark that it provides.

<sup>31</sup> A supervised entity which provides both significant and non-significant benchmarks may elect to provide such information only for the significant benchmarks it provides.

6(b)(i)	Description of the methodology	A <sup>29</sup>	A in the form of a summary
6(b)(ii)(1)	Validation/Review	A <sup>29</sup>	A in the form of a summary
6(b)(ii)(2)	Material change	A <sup>31</sup>	N/A
<b>7) Outsourcing</b>			
7(a)	Contracts	A <sup>31</sup>	N/A
7(b)	Outsourced functions	A <sup>31</sup>	A in the form of a summary
7(c)	Control	A <sup>31</sup>	A in the form of a summary
<b>8) Others</b>			
8(a)	Additional information	A	A
8(b)	Form	A	A



13.1.10 Recognition

**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 on the form and content of the application for recognition with the competent authority of the Member State of reference**

(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<sup>32</sup>, and in particular Article 32(9) thereof,

Whereas:

- (1) This Regulation sets out the information that a competent authority is to receive as part of an application for recognition by a third-country provider of benchmarks, with a view to provide a comprehensive representation of the arrangements, policies and procedures established by the third-country provider in order to fulfil the applicable requirements set out in Regulation (EU) 2016/1011. This Regulation also ensures that competent authorities across the Union receive uniform and consistent information by third-country providers of benchmarks when they apply for recognition.
- (2) An application for recognition should include information related to the choice of the Member State of reference, as per Article 32(4) of Regulation (EU) 2016/1011, and to the legal representative in the Member State of Reference. This information enables the competent authority to satisfy itself that the Member State of reference has been correctly identified and that a legal representative of the third-country provider is established in its jurisdiction and has the power to act as required by Regulation (EU) 2016/1011.
- (3) In order for competent authorities to assess if any conflicts of interest arising from the business interests of the owners of the applicant might affect the independence of the applicant, and thus impair the accuracy and integrity of its benchmarks, an applicant

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<sup>32</sup> OJ L 171, 29.06.2016, p. 1.

should provide information regarding the activities of its owners and the ownership of its parent undertakings.

- (4) An applicant should provide information on the composition, functioning and degree of independence of its governing bodies, in order for the competent authority to be able to assess whether the corporate governance structure ensures the independence of the provider in the benchmark calculation and the avoidance of conflicts of interest.
- (5) For the purposes of assessing how conflicts of interest are eliminated, or managed and disclosed, an applicant should provide the competent authority with an explanation as to how any resulting conflicts of interest are identified, recorded, managed, mitigated, prevented and remedied.
- (6) For the purposes of enabling the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, an applicant provider should provide the competent authority with the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks.
- (7) The application should include information demonstrating to the competent authority that the controls on the input data, on the basis of which the benchmarks provided by the third-country applicant are calculated, are adequate to ensure the representativeness, accuracy and integrity of such data.
- (8) For the purpose of enabling the competent authority to evaluate whether the benchmarks provided by the applicant are suitable for their continued or prospective use in the Union, and with the final objective of their inclusion in the register of Article 36 of Regulation (EU) 2016/1011, a list of all benchmarks already used in the Union or intended for future use in the Union and a description of them need to be provided within the application for recognition.
- (9) Information on the nature and characteristics of the benchmarks provided by the third-country applicant would prove relevant in order to demonstrate to the competent authority whether the assessment of compliance with the applicable requirements of Regulation (EU) 2016/1011 is to be conducted with reference to the special regimes applicable, respectively, to regulated-data benchmarks and to commodity benchmarks not based on submissions by contributors the majority of which are supervised entities, as set out in Regulation (EU) 2016/1011.
- (10) Where an applicant considers one or more of its benchmarks as significant or non-significant, it should include in the application for recognition information on the degree of use of such benchmark(s) in the Union, so that the competent authority could assess if the categorisation as significant or non-significant is correct. Applicant's benchmarks that are not yet being used in the Union and are included in the application for recognition for reason of their prospective use in the Union should be considered as non-significant benchmarks.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (12) The European Securities and Markets Authority 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 Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>33</sup>.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *General requirements*

1. An application for recognition shall be addressed to the competent authority of the Member State of reference to be determined by the applicant on the basis of the criteria laid down in Article 32(4) of Regulation (EU) 2016/1011.
2. In order for the competent authority of the Member State of reference to assess whether the arrangements established by an applicant at the time of the request for recognition meet the requirements laid down in Article 32(2) of Regulation (EU) 2016/1011, the applicant shall at least provide the information listed in the Annex.
3. An application shall indicate where the applicant has not provided any of the required information and include an explanation as to why the applicant has not done so.
4. An applicant shall include in the application for recognition the following documents, where available:
  - (a) an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs;
  - (b) in cases where the applicant is subject to supervision, a certification provided by the competent authority of the third country where the applicant is located, attesting compliance with the IOSCO Principles for financial benchmarks or for PRAs.

### *Article 2*

#### *Format of the application*

1. An application for recognition shall be submitted in the official language or one of the official languages of the Member State of reference. The documents referred to in Article 1(4) shall be submitted in a language customary in the sphere of international finance or in the official language or one of the official languages of the Member State of reference.
2. An application for recognition shall be submitted by electronic means or, if accepted by the relevant competent authority, in paper form. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission. The applicant shall ensure that each document submitted clearly identifies to which specific requirement of this Regulation it refers.

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<sup>33</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

### *Article 3*

#### *Policies and procedures*

1. Any policies and procedures established for fulfilling the requirements of Regulation (EU) 2016/1011 and described in an application shall contain or be accompanied by:
  - (a) an indication of the identity of the person or persons responsible for the approval and maintenance of the policies and procedures;
  - (b) a description of how compliance with the policies and procedures is monitored and the identity of the person or persons responsible for this monitoring;
  - (c) a description of the measures to be undertaken in the event of a breach of the policies and procedures.
2. An applicant that is part of a group may comply with paragraph 1 by submitting the policies and procedures of its group, to the extent that they relate to the provision of benchmarks.

### *Article 4*

#### *Assessment by a competent authority*

1. A competent authority shall provide to ESMA the assessment referred to in Article 32(6) of Regulation (EU) 2016/1011, together with the application for recognition.
2. The documents referred to in paragraph 1 shall be shared with ESMA by electronic means ensuring that completeness, integrity and confidentiality of the information are maintained during the transmission.

### *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 1 January 2018.

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]*

## **ANNEX**

**to the**

### **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 on the form and content of an application for recognition with the competent authority of the Member State of reference**

## **ANNEX**

### **Information to be provided in an application for recognition under Article 32 of Regulation (EU) 2016/1011**

#### **SECTION A - INFORMATION ON THE PROVIDING PERSON AND ITS LEGAL REPRESENTATIVE IN THE UNION**

##### **1. GENERAL INFORMATION**

- (a) Full name of the applicant and its Legal Entity Identifier (LEI).
- (b) Address of the office in the third country of location.
- (c) Legal Status.
- (d) Website, if any.
- (e) Where the applicant is supervised in the third country where it is located, information about its current authorisation status, including the activities for which it is authorised, the name and address of the competent authority of the third country and the link to the register of such competent authority, where available; where more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided.
- (f) A description of the operations of the applicant in the EU and/or in third countries, whether or not subject to any EU or extra-EU regulation, that are directly related to the activity of provision of benchmarks.
- (g) Where the applicant is part of a group, its group structure, along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.
- (h) A self-declaration of good repute including details, if applicable, of any:
  - (i) proceedings of a disciplinary nature against it (unless dismissed);
  - (ii) refusal of authorisation or registration by a financial authority;
  - (iii) withdrawal of authorisation or registration by a financial authority.

## **2. LEGAL REPRESENTATIVE IN THE MEMBER STATE OF REFERENCE**

- (a) Documented evidence supporting the choice of the Member State of reference, by application of the criteria laid down in Article 32(4) of Regulation (EU) 2016/1011.
- (b) With respect to the legal representative established in the Member State of reference as set out in Article 32(3) of Regulation (EU) 2016/1011, its:
  - (i) full name;
  - (ii) title, in case of a natural person, or legal status, in case of a legal person;
  - (iii) deed of incorporation, articles of association or other constitutional documents, in case of a legal person and clarification of whether it is supervised by a supervisory authority;
  - (iv) address;
  - (v) e-mail address;
  - (vi) telephone number;
  - (vii) written confirmation of the authority of the legal representative to act on behalf of the applicant in accordance with Article 32(3) of Regulation (EU) 2016/1011;
  - (viii) details of the performance by the legal representative in the oversight function relating to the provision of benchmarks that may be used in the Union;
  - (ix) the name, title, address, e-mail address and telephone number of a contact person within the legal representative.

## **3. ORGANISATIONAL STRUCTURE AND GOVERNANCE**

- (a) Internal organisational structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions involved the provision of a benchmark, including their:
  - (i) terms of reference or summary thereof; and
  - (ii) adherence to any governance codes or similar provisions.
- (b) Procedures ensuring that the employees of the administrator and any other natural persons whose services are placed at its disposal or under its control and who are directly involved in the provision of a benchmark have the necessary skills, knowledge and experience for the duties assigned to them and operate in respect of the provisions under Article 4(7) of the Regulation (EU) 2016/1011.

- (c) The number of employees (temporary and permanent) involved in the provision of a benchmark.

#### **4. CONFLICTS OF INTEREST**

- (a) Policies and procedures that address:
  - (i) how current and potential conflicts of interest are or will be identified, recorded, managed, mitigated, prevented and remedied;
  - (ii) the controls put in place in respect of current or potential conflicts of interest, including the controls implemented through information systems, along with any other part of the conflicts of interest management framework;
  - (iii) particular circumstances which apply to the applicant or to any particular benchmark provided by the applicant and which may be used in the Union, in relation to which conflicts of interest are most likely to arise, including where expert judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of a benchmark and where the provider is a participant in the market or economic reality that the benchmark intend to measure.
- (c) The structure of the remuneration policy, specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks.

#### **5. INTERNAL CONTROL STRUCTURE, OVERSIGHT AND ACCOUNTABILITY FRAMEWORK**

- (a) Policies and procedures for monitoring the activities of the provision of a benchmark or a family of benchmarks, including those relating to:
  - (i) the information technology systems
  - (ii) the risk management, together with a mapping of risks which may arise and which may impact the accuracy, integrity and representativeness of the benchmarks provided or the continuity of the activity of provision, along with the respective mitigation measures;
  - (iii) the constitution, role and functioning of the oversight function, as described in Article 5 of Regulation (EU) 2016/1011 and further specified in Regulation [...] [RTS on procedures and characteristics of the oversight function] or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals within the oversight function;



- (iv) the constitution, role and functioning of the control framework, as described in Article 6 of Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework;
  - (v) the accountability framework as described in Article 7 of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.
- (b) Fall-back systems and arrangements for determining and publishing a benchmark on a temporary basis.
  - (c) Procedures for the internal reporting of infringements of Regulation (EU) 2016/1011 by managers, employees and any other natural persons whose services are placed at the provider's disposal or under the control of the provider.

## **6. OUTSOURCING**

If any activity forming a part of the process for the provision of a benchmark or family of benchmarks is outsourced:

- (a) the outsourcing arrangements, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable;
- (b) details of the outsourced functions, unless this information is already included in the relevant contracts;
- (c) policies and procedures regarding the oversight of the outsourced activities unless this information is already included in the relevant contracts.

## **7. OTHER INFORMATION**

- (a) The applicant may provide any additional information relevant to its application that it considers appropriate.
- (b) The applicant shall provide the requisite information in any manner and form stipulated by the competent authority requests.

## **SECTION B – INFORMATION ON THE BENCHMARKS**

### **8. DESCRIPTION OF THE ACTUAL OR PROSPECTIVE BENCHMARKS OR FAMILIES OF BENCHMARKS THAT MAY BE USED IN THE UNION**

- a. A list including all the benchmarks provided that are already used in the Union and, where available, their ISINs.
- b. A description of the benchmark or family of benchmarks provided and that are already used in the Union, including a description of the underlying market or economic reality that the benchmark or the family of benchmarks is intended to measure, along with an indication of the sources used to provide these descriptions, and a description of contributors, if any, to this benchmark or family of benchmarks.
- c. A list including all the benchmarks that are intended to be marketed for their use in the Union and, where available, their ISINs.
- d. A description of the benchmark or family of benchmarks that are intended to be marketed for its use in the Union, including a description of the underlying market or economic reality that the benchmark or the family of benchmarks is intended to measure, along with an indication of the sources used to provide these descriptions, and a description of contributors, if any, to this benchmark or family of benchmarks.
- e. Any documented evidence that a benchmark or family of benchmarks described under points b) and d) may be considered regulated-data benchmarks, according to the definition set out in point (24) of Article 3(1) of Regulation (EU) 2016/1011, and is thus entitled to the exemptions listed by Article 17(1) of the same Regulation.
- f. Any documented evidence that a benchmark or family of benchmarks described under points b) and d) may be considered commodity benchmarks, according to the definition set out in point (23) of Article 3(1) of Regulation (EU) 2016/1011, and that it is not based on submissions by contributors the majority of which are supervised entities, along with any evidence of the implementation of the special regime requirements as set out by Article 19 and Annex II of the Regulation or the corresponding IOSCO Principles for PRAs.
- g. Any documented evidence that a benchmark or family of benchmarks described under points b) and d) may be considered interest-rate benchmarks, according to the definition set out in point (22) of Article 3(1) of Regulation (EU) 2016/1011, along with any evidence of the implementation of the special regime requirements as set out by Article 18 and Annex I of the Regulation.
- h. Any documented evidence that a benchmark or family of benchmarks described under point (b) has a degree of use within the Union territory which qualifies that benchmark or all the benchmarks included in the family of benchmarks

either as significant benchmarks, as defined by point (26) Article 3(1) of Regulation (EU) 2016/1011, or as non-significant benchmarks, as defined by point (27) of Article 3(1) of Regulation (EU) 2016/1011<sup>34</sup>. The information to be provided shall be determined, to the extent possible, on the basis of the provisions in Regulation [.../...][Commission Delegated Act under Article 20(6)]for the assessment of the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds that make reference to the third-country benchmarks, within the Union, including in the event of an indirect reference to any such benchmark within a combination of benchmarks.

- i. The rationale behind the administrator's application of any of the exemptions listed under Article 25(1), for significant benchmarks, and Article 26(1), for non-significant benchmarks, of Regulation (EU) 2016/1011 in respect of the benchmark; the information shall be presented, to the extent possible, on the basis of the format established by Regulation [.../...][ITS on template of the compliance statements for administrators of significant and non-significant benchmarks].
- j. Information on measures to deal with corrections to a benchmark determination or publication.
- k. Information on the procedure to be undertaken by the provider in the event of changes to or the cessation of a benchmark, in compliance with Article 28(1) of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable.

## 9. INPUT DATA AND METHODOLOGY

- (a) For each benchmark or family of benchmarks, policies and procedures with respect to input data, including those relating to:
  - (i) the type of input data used, their priority of use and any exercise of discretion or expert judgment;
  - (ii) any process for ensuring that input data is sufficient, appropriate and verifiable;
  - (iii) the criteria that determine who may contribute input data to the administrator and the selection process of the contributors;
  - (iv) the evaluation of the contributor's input data and the process of validating input data.
- (b) For each benchmark or family of benchmarks, with respect to the methodology:

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<sup>34</sup>

Benchmarks that are not already used as a reference in financial instruments, financial contracts and investment funds in the Union, but that are included in the application for reason of their prospective use in the Union, should be considered as non-significant at the time of the application for recognition.

- (i) a description of the methodology, highlighting the key elements of the methodology in accordance with Article 13 of the Regulation (EU) 2016/1011, and further specified in Regulation [.../...] [RTS on transparency of methodology];
- (ii) Policies and procedures, including those relating to:
  - 1. the measures taken to provide validation and review of the methodology, including any trials or back-testing performed;
  - 2. the consultation process on any proposed material change in the methodology.

**COMMISSION IMPLEMENTING REGULATION (EU) No .../..**

**of XXX**

**laying down implementing technical standards with regard to the procedures and forms for exchange of information between competent authorities and ESMA in accordance with Regulation (EU) 2016/1011**

(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<sup>35</sup>, and in particular Article 47(3) thereof,

Whereas:

- (1) Competent authorities may, for the purposes of supervising benchmark administrators in the Union, exchange information relevant for the discharge of their responsibilities under Regulation (EU) 2016/1011 with the European Securities and Markets Authority (ESMA). It is appropriate that competent authorities and ESMA use defined channels of communication, including designated contact persons and standardised forms for the issuing and acknowledgement of receipt of and response to requests for information.
- (2) In order to ensure the accuracy and completeness of the register referred to in Article 36(1) of Regulation (EU) 2016/1011 (the ESMA register) it is important that the procedures and forms for exchange of information as defined in this Regulation govern the submission of relevant information by competent authorities as set forth in point (a),(c) and (d) of Article 36(1) of the Regulation (EU) 2016/1011 and it is appropriate that competent authorities and ESMA specify separately technical details that ensure the accurate and secure transmission of all data relevant for the ESMA register.
- (3) The information competent authorities and ESMA exchange in discharge of their responsibilities under Regulation (EU) 2016/1011 may contain personal data and other sensitive non-public information. It is therefore important that the exchange of information is governed by appropriate safeguards and confidentiality rules.

- (4) ESMA has not conducted open public consultations on the draft implementing technical standards on which this Regulation is based, nor has it analysed potential related costs and benefits of introducing the standard forms and procedures for the relevant competent authorities, as this would have been disproportionate in relation to their scope and impact, taking into account that the addressees of the implementing technical standards would only be the national competent authorities of the Member States and not market participants.
- (5) This Regulation is based on the draft implementing technical standards submitted by the ESMA to the Commission.
- (6) ESMA has requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>36</sup>.

HAS ADOPTED THIS REGULATION:

*Article 1*

*Definitions*

For the purposes of this Regulation, the following definitions apply:

- (a) “Electronic means” are means of electronic equipment for the processing (including digital compression), storage and transmission of data employing wires, radio, optical technologies, or any other electromagnetic means;
- (b) “ESMA transmission procedures” are mechanisms for the transmission of data to ESMA’s website as provided by ESMA to competent authorities;

*Article 2*

*Notification to ESMA for the ESMA register*

1. In order to contribute to the ESMA register, competent authorities shall notify ESMA using the ESMA transmission procedures or electronic means that ensure that completeness, integrity and confidentiality of the information are maintained during the transmission, within five working days of:
  - (a) any decision to authorise or register an administrator according to Article 34(6)(a) of Regulation (EU) 2016/1011;
  - (b) any decision to withdraw the authorisation or registration of an administrator according to Article 35(1) of Regulation (EU) 2016/1011;
  - (c) any decision to recognise an administrator located in a third country according to Article 32(7) of Regulation (EU) 2016/1011;

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<sup>36</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (d) any decision to suspend or withdraw the recognition in accordance with Article 32(8) of Regulation (EU) 2016/1011;
  - (e) any decision to authorise the endorsement of a benchmark or of a family of benchmarks according to Article 33(3) of Regulation (EU) 2016/1011;
  - (f) any decision to require the cessation of the endorsement of a benchmark or a family of benchmarks in accordance with Article 33(6) of Regulation (EU) 2016/1011.
2. Competent authorities and ESMA shall agree on technical terms regarding the submission of information to ESMA's website using the ESMA transmission procedures.

### *Article 3*

#### *Notifications to ESMA of benchmarks by recognised administrators*

Competent authorities shall notify ESMA if they consider that an administrator located in a third country provides a benchmark that fulfils the conditions of a significant or non-significant benchmark according to Article 32(6) of Regulation (EU) 2016/1011 by electronic means ensuring that completeness, integrity and confidentiality of the information are maintained during the transmission. Such notification shall be supplemented by the information required by Article 4 of the Regulation ... / ... [*RTS on Recognition*]

### *Article 4*

#### *Request for information*

1. Any other request for information made in accordance with Regulation (EU) 2016/1011 that is not covered by Articles 2 or 3 of this Regulation, shall be made using the form set out in Annex I. The request shall be transmitted to the requested authority by post, fax, or by electronic means ensuring that completeness, integrity and confidentiality of the information are maintained during the transmission. The request shall be addressed to the contact person designated in accordance with Article 7. It shall specify the information the requesting authority is seeking and identify the confidentiality regime it applies to the information. The requesting authority may supplement the request for information with any supporting documents or material.
2. The requested authority shall acknowledge the receipt of the request for information by post, fax, or by electronic means ensuring that completeness, integrity and confidentiality of the information are maintained during the transmission, within seven days of receipt of the written request referred to in paragraph 1 above and including, if possible at that stage, an estimated date of response. The acknowledgement of receipt shall be sent using the form set out in Annex II and shall be addressed to the contact person designated in accordance with Article 7.

## *Article 5*

### *Reply to a request for information*

1. The requested authority shall reply in writing by post, fax, or by electronic means ensuring that completeness, integrity and confidentiality of the information are maintained during the transmission, and shall address their reply to the contact person designated in accordance with Article 7 unless specified otherwise by the requesting authority.
2. The requested authority shall execute requests for information without delay, taking into account the complexity of the request and the necessity, if any, to involve third parties. The requested authority shall take all reasonable steps within the scope of their powers to obtain and provide the requested information. If the requested authority cannot provide the requested information within the estimated date of response it has provided according to Article 4(2), it shall notify the requesting authority without undue delay and provide a new estimated date of response.
3. Requesting authorities and requested authorities shall consult each other, where necessary, on any clarifications of the type of information requested and on the frequency of updates required, if any.

## *Article 6*

### *Confidentiality and permissible uses of information*

1. The authorities shall keep any non-public information exchanged in accordance with the Regulation (EU) 2016/1011 confidential, including the fact that a request for information has been issued under this Regulation and the content of that request and any matter arising in the course of executing the request, in particular consultations between competent authorities.
2. Where in order to process a request for information according to this Regulation, the requested authority is required to disclose the fact that another authority or entity has issued a request for information, the requested authority shall obtain the written consent of the requesting authority prior to processing such a request. If the requesting authority does not consent to the disclosure, it shall instead have the option to withdraw or keep on hold its request for information.
3. The requesting authority shall use the information received in accordance with Article 47 of Regulation (EU) 2016/1011 and this Regulation solely for the purposes of performing its duties under Regulation (EU) 2016/1011. Unless where disclosure is necessary for legal proceedings, if the requesting authority intends to use or disclose information provided under this Regulation for any purpose other than those stated in this paragraph or in the request for information, it shall obtain the prior written consent of the requested authority, which may be subject to conditions.



## *Article 7*

### *Contact persons*

Competent authorities shall designate contact persons and shall communicate to ESMA within 30 days of the entry into force of this Regulation, and without undue delay following any amendments, the details of the contact persons.

## *Article 8*

### *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 1 January 2018.

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]*

**ANNEXES**

**to the**

**COMMISSION IMPLEMENTING REGULATION (EU)**

**laying down implementing technical standards with regard to the procedures and forms  
for exchange of information between competent authorities and ESMA in accordance  
with Regulation (EU) 2016/1011**

**ANNEX I**

**Form for a request for information**

**Request for information**

Reference number: .....

Date: .....

**General information**

**FROM:**

Member State (if applicable):

Requesting Authority:

Legal address:

(Contact details of the designated contact person under Article 7 of the Commission  
Implementing Regulation (EU) No .../...<sup>37</sup>)

Name:

Telephone:

Email:

**TO:**

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<sup>37</sup> Insert the reference of this ITS.

Member State (if applicable):

Requested Authority:

Legal address:

(Contact details of the designated contact person under Article 7 of the Commission Implementing Regulation (EU) No .../...38)

Name:

Telephone:

Email:

Dear [*insert name*]

In accordance with Article 3 of the Commission Implementing Regulation (EU) No .../...39 laying down implementing technical standards [to determine procedures and forms for exchange of information] information is sought in relation to the matter(s) set out in further detail below.

I would be grateful for the above information by [*Insert indicative date for the reply*] or, if that is not possible, for an indication as to when you anticipate being in a position to provide the information which is sought.

**Reasons for the request for information**

.....  
.....  
.....

[*Insert provision(s) of Regulation (EU) 2016/1011 under which the requesting authority is competent to deal with the matter*]

The request concerns information on

.....

<sup>38</sup> Insert reference to this ITS.  
<sup>39</sup> Insert reference of this ITS.

.....  
.....

*[Insert description of the subject matter of the request, the area of benchmark supervision concerned and the purpose for which the information is sought]*

Further

to.....

*[If applicable, insert details of the previous request in order to enable it to be identified]*

The information included in this request shall be kept confidential in accordance with Article 5 of Commission Implementing Regulation (EU) No .../...<sup>40</sup>.

Yours sincerely,

*[signature]*

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<sup>40</sup> Insert reference of this ITS.

## ANNEX II

### Form for the acknowledgment of receipt of a request for information

#### Acknowledgment of receipt of a request for information

Reference number: .....
Date: .....
FROM:
Member State (if applicable):
Requested Authority:
Legal address:
(Contact details of the designated contact person under Article 7 of the Commission Implementing Regulation (EU) No .../...)
Name:
Telephone:
Email:
TO:
Member State (if applicable):
Requesting Authority:
Legal address:
(Contact details of the designated contact person under Article 7 of the Commission Implementing Regulation (EU) No .../...)
Name:
Telephone:
Email:

Dear [*Insert name*]

In accordance with Article 4 of Commission Implementing Regulation (EU) No .../... laying down implementing technical standards [to determine procedures and forms for exchange of information], we hereby acknowledge receipt of your request for information with reference number [*Insert request*]

Estimated date of response (if possible at that stage): .....

Yours sincerely,

[*signature*]

## ANNEX III

### Form for the reply to a request for information

#### Reply to a request for information

Reference number: .....

Date: .....

#### General information

FROM:

Member State (if applicable):

Requested Authority:

Legal address:

(Contact details of the designated contact person under Article 7 of the Commission Implementing Regulation (EU) No .../...)

Name:

Telephone:

Email:

TO:

Member State (if applicable):

Requesting Authority:

Legal address:

(Contact details of the designated contact person under Article 7 of the Commission Implementing Regulation (EU) No .../...)

Name:

Telephone:

Email:

Dear [*Insert name*]

In accordance with Article 4 of Commission Implementing Regulation (EU) No .../... laying down implementing technical standards [to determine procedures and forms for exchange of information] your request for information dated [*dd.mm.yyyy*] with reference number [*insert request reference number*] has been processed by us.

**Information requested**

.....  
.....  
.....

The information provided is confidential and is disclosed to [*insert name of the Requesting Authority*] pursuant to the [*insert provision of the applicable sectoral legislation*] and on the basis that the information shall remain confidential in accordance with Article 5 of Commission Implementing Regulation (EU) No .../... . [*Insert name of the Requesting Authority*] shall observe the requirements of Article 5 of Commission Implementing Regulation (EU) No .../... with respect to confidentiality restrictions and the permissible uses of information.

Yours sincerely,

[*signature*]



## 13.2 Annex II: Opinion of the Securities and Markets Stakeholder Group<sup>41</sup>

ADVICE TO ESMA

### Response to ESMA's Consultation Paper on Draft technical standards under the Benchmarks Regulation

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#### I. Executive summary

*The SMSG considers that indices are fundamental as they may underpin an investment strategy, serve as underlyings or even reflect the state of an economy. The Benchmark Regulation will introduce important rules and requirements and following its implementation, correct supervision and enforcement will be essential in order to avoid future cases of benchmark manipulation.*

*Overall, the SMSG compliments ESMA on its work and agrees to the draft technical standards. It recommends to ESMA to consider the following issues:*

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- 1. Oversight function: ESMA should reconsider whether two independent members of the oversight function is sufficient.*
- 2. Transparency of Methodology: ESMA should further assess how administrators should consult on material changes to the benchmark's methodology in case of sudden market events.*
- 3. Governance and control requirements: ESMA is asked to reconsider whether all submitters, should have to demonstrate their understanding and knowledge on an annual basis, independently of the characteristics of the benchmarks.*
- 4. Benchmark Statement: ESMA should consider allowing the possibility for non-significant benchmarks to cross-reference the methodology under Article 13 for the purpose of its benchmark statements requirements.*
- 5. Recognition of an administrator located in a third country: ESMA should provide as of 1st January 2018 a quarterly progress report on third-country benchmark recognition.*
- 6. Pricing of critical Benchmarks: While the SMSG is cognisant that there is no clear mandate in Level 1 to empower ESMA in this area, nevertheless a majority of the SMSG voiced their concerns that given the stickiness of the use of some benchmark providers and a market structure environment that doesn't encourage multiple providers, that pricing and price changes should be made transparent.*
- 7. The SMSG recommends ESMA to review its guidelines on ETFs and other UCITS issues so that the level of due diligence required from asset managers on index methodology is consistent*

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<sup>41</sup> Full text of the response of the SMSG is available here: [https://www.esma.europa.eu/sites/default/files/library/2016-smsg-022\\_benchmarks\\_smsg\\_advice\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-smsg-022_benchmarks_smsg_advice_0.pdf)

*with the level of transparency of methodology benchmark administrators are required to provide by the technical standards under the Benchmark Regulation.*

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## **II. Background**

### **The role of the SMSG**

1. The Securities and Markets Stakeholder Group (SMSG) advises ESMA on all regulatory and supervision matters. In compliance with EU Law, it is composed of expert representatives of financial market participants operating in the Union, of their employees, of consumers, of users of financial services and of independent top-ranking academics.

### **Purpose of this Advice**

2. The SMSG wishes to use the opportunity of the publication of ESMA's Consultation Paper on draft technical standards under the Benchmarks Regulation to provide a high-level advice to ESMA.
3. The SMSG considers that indices are fundamental as they may underpin an investment strategy, serve as underlyings or even reflect the state of an economy. Therefore indices should be underpinned by universally agreed principles of good governance, sound methodology and transparency, in order to provide investors with the adequate level of protection and to limit risks of conflicts of interests and manipulation.
4. The Benchmark Regulation will introduce important rules and requirements and following its implementation, correct supervision and enforcement will be essential in order to avoid future cases of benchmark manipulation. Rules alone will not prevent abuses, but supervision and enforcement will be key to strengthen consumer protection.

## **III. Summary of ESMA SMSG views on technical standards of the Benchmarks Regulation**

### **1. Oversight function**

5. The SMSG agrees with the proportionality ESMA has developed for the oversight function as critical benchmarks and benchmarks more susceptible to manipulation should be subject to stronger oversight arrangements.
6. For critical benchmarks, ESMA should reconsider whether two independent members of the oversight function is sufficient. The SMSG considers that a bigger involvement of independent members, e.g. a proportional minimum threshold and/or at least three independent committee members would be beneficial for the quality of oversight.

### **2. Input Data**

7. In principle, the SMSG considers ESMA's approach for input data appropriate. The administrator should assess the appropriateness of data to measure the market or economic reality and administrators should keep clear and complete records to ensure that data can be verified, evaluated and validated. The SMSG also supports ESMA's overall simplification of the record keeping requirements and the proportional approach taken on verifiability to different types of

data. The SMSG considers it appropriate that benchmarks more vulnerable to manipulation are subject to stricter requirements.

### **3. Transparency of methodology**

8. The SMSG supports the suggested key elements of the methodology as developed by ESMA. The SMSG also supports ESMA's proposal to leave some discretion to administrators in setting the frequency of reviews. This approach is appropriate since the frequency of reviews is dependent on the nature of the benchmark and its related market.
9. However, the SMSG considers that ESMA should further assess how administrators should consult on material changes to the benchmark's methodology in case of sudden market events. ESMA currently states that no exceptions can be made regarding the obligation to consult, not even in sudden market conditions, but this approach risk resulting in benchmarks not correctly measuring the related market reality. The SMSG would support a simplified procedure or an emergency procedure that could be used when 'sudden market events' have been demonstrated.

### **4. Code of conduct of contributors**

10. The SMSG supports the elements of the code of conduct developed by ESMA.

### **5. Governance and control requirements**

11. The SMSG supports the ESMA proposal regarding measures to manage conflicts of interests for the process of contribution of input data. It is important that internal procedures are adequate and that submitters are separated from other employees.
12. However, ESMA is asked to reconsider whether all submitters, should have to demonstrate their understanding and knowledge on an annual basis, independently of the characteristics of the benchmarks for which they act as submitter and their respective levels of experience.

### **6. Criteria for significant benchmarks**

13. The SMSG supports the criteria developed by ESMA.

### **7. Compliance statement for administrators of significant and non-significant benchmarks**

14. The SMSG supports the proportional ESMA proposal, whereby non-significant benchmarks can submit less extensive compliance statements compared to significant benchmarks.

### **8. Benchmark statement**

15. The SMSG supports the ESMA proposal for benchmark statements requirements. However, in the interests of proportionality, ESMA should consider allowing the possibility for non-significant benchmarks to cross-reference the methodology under Article 13 for the purpose of its benchmark statements requirements.

### **9. Authorisation and registration of an administrator**

16. The SMSG supports the ESMA proposal for information required to apply for authorisation and registration. In particular, the SMSG supports that information can be provided on the level of family of benchmarks, subject to certain conditions.

#### **10. Recognition of an administrator located in a third country**

17. The SMSG supports ESMA's proposal to allow recognition through demonstration of compliance with the Benchmarks Regulation by applying IOSCO principles in a manner consistent with the Regulation as certified by an independent external auditor. The SMSG also supports that the application should be in one of the EU official languages and comply with the International Financial Reporting Standards or with Generally Accepted Accounting Principles. In order to monitor progress on the availability of third-country benchmarks in the EU, the SMSG recommends that ESMA should provide as of 1st January 2018 a quarterly progress report on third-country benchmark recognition and ideally provide transparency to the market on pending approvals before that date.

#### **11. Pricing of critical Benchmarks**

18. While the SMSG is cognisant that there is no clear mandate in Level 1 to empower ESMA in this area, nevertheless a majority of the SMSG voiced their concerns that given the stickiness of the use of some benchmark providers and a market structure environment that doesn't encourage multiple providers, that pricing and price changes may not be in line with Art. 22 of the regulation, which states for critical benchmarks that they need to be provided on a fair, reasonable, transparent and non-discriminatory basis. The majority of the SMSG would recommend:
19. Benchmark providers as part of their authorization or re-authorization application should be expected to clearly explain their initial pricing and the parameters/process for price changes during the authorization period.
20. The parameters/process for price changes should form part of the contractual agreements between the benchmark provider and customers of the benchmark providers.

#### **12. ESMA guidelines on ETFs and other UCITS issues**

21. The SMSG recommends ESMA to review its guidelines on ETFs and other UCITS issues so that the level of due diligence required from asset managers on index methodology is consistent with the level of transparency of methodology benchmark administrators are required to provide by the technical standards under the Benchmark Regulation.

### 13.3 Annex III: Cost-benefit analysis

#### Cost-benefit analysis

349. The cost-benefit analysis (CBA) is composed by separate sections, corresponding to the different draft technical standards. In order to prepare the CBA, ESMA has sought assistance from an external consultant, Europe Economics, that has published a detailed report<sup>42</sup> based on the draft standards included in ESMA Consultation Paper. The report by Europe Economics has considered both the direct compliance costs to market participants, in both qualitative and, where possible, quantitative terms, and also includes a qualitative analysis of the potential benefits and other — what can be termed ‘indirect’ — costs. The evidence for this report comes from interviews with a range of different stakeholders including administrators, contributors, and users.

350. The following sections cross-refer to the relevant chapters of report prepared by Europe Economics.

#### Section 1: Draft regulatory technical standards for the procedures and characteristics of the oversight function

351. ESMA is mandated by Article 5(5) to develop draft regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition, along with its positioning within the organisational structure of the administrator, so as to ensure the integrity of the benchmark and the absence of conflicts of interest. ESMA proposes certain requirements for oversight functions, with a non-exhaustive list of optional structures. Regarding the positioning, ESMA establishes the relationship between the oversight function and the management body of the administrator, as well as the instances in which the oversight function could be expected to act independently of the administrator. The procedures proposed are the minimum expected, allowing for proportionality depending on the size and nature of the benchmark.

	<i>Qualitative description</i>
<i>Benefits</i>	The main benefit of the proposed draft regulatory technical standards is to further specify key aspects of the oversight function, such as its functioning, its positioning in the administrator’s organization and its composition. In this way the draft standards expand the general procedures and characteristics of the oversight function to provide administrators with a practical indication on how to implement Article 5 of the BMR in their organisations.

<sup>42</sup> [http://europe-economics.com/publications/ee\\_bmr\\_final\\_report\\_9-02-2017.pdf](http://europe-economics.com/publications/ee_bmr_final_report_9-02-2017.pdf)

	<p>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 an appropriate oversight function that is established in compliance with the draft standards. They also consider, subject to the administrators' discretion, a possible role for users as members or observers on the oversight function.</p> <p>In general, the proposed standards have the advantage to further define the content of Article 5 of the BMR while, at the same time, leaving administrators with a balanced level of flexibility so as to adapt the oversight function to their individual situation. The list of governance arrangements included in the draft standards is non-exhaustive in the case of composition and the standards set out a minimum expectation with regards to the procedures of the oversight function. Administrators will be able to adjust them to their size and the nature of the benchmark(s) they provide.</p> <p>As requested by the mandate, the Annex to the draft standards include a non-exhaustive list of governance arrangement of the oversight function, composed of five types of arrangements. Although the list is non-exhaustive, it should represent a very useful tool for administrators in order to define the structure of their oversight function appropriate to their benchmarks. The elements included in the list represent different organizational solutions to which most of the administrators should be able to relate their own specific situation. Thereby administrators should be able to gain direct benefit from the implementation of the proposed draft standards. Without the non-exhaustive list of appropriate governance requirements there is a risk that administrators would apply Article 5 of the BMR in significantly diverging ways.</p> <p>In particular, the list defines a spectrum of possible structures of oversight functions that reaches from a basic form, in which the oversight function is composed by a single natural person, to a structured form where a function is composed of multiple committees performing a subset of the oversight tasks. Administrators of critical benchmarks will be able to decide whether each benchmark would need a separate committee or not operating within the overall structure of the oversight function.</p> <p>Investors and consumers should also benefit from the proposed draft standards, because it allows administrators to establish an appropriate oversight function which will enhance the integrity of the benchmarks and will therefore directly benefit the ultimate users. In this context, the possibility of having independent members, external stakeholders, and</p>
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	<p>also observers in the oversight function should improve even further the effectiveness of the oversight function and the quality of its decisions.</p>
<p>Costs</p>	<p>Potential additional costs will be borne by administrators only.</p> <p>Depending on the structure of the oversight function chosen by the administrator, cost will vary. An independent oversight committee or an oversight function consisting of multiple committees possibly represent the costliest form of oversight function, as opposed to the oversight function composed by a single natural person. The proposed draft standards allow administrators to embed the oversight function within their organization rather than to create an external committee: this flexibility should substantially minimise costs for administrators.</p> <p>Potential larger costs would be borne by administrators of critical benchmarks, as the proposed standards clarify that for them a single natural person, as the simplest form of oversight function, is not a viable organizational form (see Article 1(2) of the draft standards).</p> <p>Specific costs for administrators could arise from Article 3 of the proposed draft standards that sets out “procedures governing the oversight function”. The Article specifies Article 5(2) BMR that requires administrators to develop and maintain robust procedures regarding their oversight function, and Article 3 of the proposed standards identifies some 14 elements to be included. In particular, those relating to disclosure and the ones requiring the administrator to create new policies could incur costs at the administrator level as they may have to adopt existing structures to the new requirements, although these would likely be one-off costs.</p> <p>Another source of cost, mostly in staff time, could be the requirement to record decisions and to notify the management body (see Article 2(2) and (3) of the proposed draft standards).</p> <p>There can be detrimental effects on benchmarks users as administrators would likely pass on costs to the users through increased license fees. Finally, for some benchmarks additional costs may not be economically bearable which may lead to a reduction of variety in the benchmarks market and thereby both reduce the investors’ choice and concentrate benchmark activity on fewer administrators which may in turn increase the impact of individual benchmarks.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.1 of the same. While that analysis is based on draft RTS as published in the Consultation Paper, the considerations therein</p>

	will apply unchanged to the draft standards as presented in this Final Report.
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## Section 2: Draft regulatory technical standards on input data

ESMA is mandated by Article 11(5) of the Regulation (EU) 2016/1011 to specify further how to ensure that input data is appropriate and verifiable as well as the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where the input data is contributed from a front office function. ESMA proposes, in its draft technical standards, organisational and procedural requirements that the administrator must fulfil to ensure what required by the level 1 provisions.

	Qualitative description
Benefits	<p>The proposed approach for ensuring appropriateness and verifiability of input data as well as ensuring the internal oversight and verification procedures within a contributor would promote a common and consistent control framework across different administrators of benchmarks to the benefit of users.</p> <p>The different checks to be conducted on input data aim at strengthening the reliability of the benchmark through ensuring the integrity and accuracy of the input data and reducing the opportunity to its manipulation.</p> <p>Further, the internal oversight and verification procedures where input data are contributed from a front office function would allow to mitigate the specific risk of conflicts of interest that arises in this particular case, and to reduce the opportunity to manipulate data by implementing a robust internal oversight at the contributor level.</p>
Costs	<p>Potential costs arising from these draft technical standards will be borne by administrators and contributors of critical and significant benchmarks.</p> <p>The incremental costs stemming from the proposed approach in relation to input data are not expected to be significant. Indeed, the draft regulatory technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the appropriateness and verifiability of input data and the internal oversight and verification procedures of contributors.</p> <p>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 type of the benchmark and the nature,</p>

	<p>size and activities of the contributor e.g., the internal oversight may be simplified depending on the size of the contributor.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.2 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards within ESMA's final report include less requirements than the draft standards of the Consultation Paper: the requirements to check that input data is appropriate and verifiable have been considerably reduced, the internal oversight and verification procedures have also been reduced, e.g. the requirement regarding the training has been deleted. Therefore, the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation</p>
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### Section 3: Draft regulatory technical standards on transparency of methodology

ESMA is mandated by Article 13(3) of Regulation (EU) 2016/1011 to specify further the information to be provided by an administrator in compliance with the requirements in relation to the transparency of the methodology of the benchmark. ESMA proposes in its draft RTS a minimum list of key elements to be disclosed by the administrator of the benchmark. Further, ESMA is specifying the procedure for internal review and approval of the methodology and also the one to apply in case of material changes to the methodology of the benchmark.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The proposed minimum list of key elements to be disclosed by administrators of benchmarks would promote common and consistent transparency principles across different administrators of benchmarks, to the principal benefit of users and potential users. This could turn out to prove beneficial also for administrators, as it has the potential to create a fairer competitive environment.</p> <p>The key elements of the methodology would be available to all markets participants who would have access to the minimum list of information required regarding all benchmarks and thus achieve a global and complete view on the possibilities of investments available in the market.</p> <p>As the procedure for internal review of the methodology is aimed at allowing administrators to ensure the continuous accuracy and representativeness of a benchmark, a common approach for the internal review of the methodology of benchmarks would facilitate national competent authorities' checks in relation to the function that conducts the internal review and to the correct management of conflicts of interest. This would also give comfort to market participants regarding the reliability of the benchmark concerned and would help to ensure investors protection in the EU.</p> <p>Finally, the specific procedure to be applied in the case of a material change to the benchmark's methodology would ensure a common approach by all administrators of benchmarks that would consult market participants and in particular users of benchmarks before imposing any material change. This consultation would allow users to comment on these material changes and express any concern that they might have, thus contributing to increasing investors' protection.</p>

<p><i>Costs</i></p>	<p>Potential costs arising from these draft RTS will be borne by administrators of critical and significant benchmarks.</p> <p>The incremental costs stemming from the proposed transparency of the methodology are not expected to be significant. Indeed, the draft RTS specify further the requirements already included in Regulation (EU) 2016/1011 regarding the publication of the key elements of the methodology, reviewing the methodology and having a specific procedure for any material change to the methodology.</p> <p>Moreover, most of the already established index providers are already familiar with providing transparency of the methodology applied.</p> <p>Additionally, the draft RTS have been designed in a way to minimise the administrative burden of administrators, in accordance with the principle of proportionality which is a general requirement under Regulation (EU) 2016/1011. Only the necessary information to be disclosed has been included in these draft RTS.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.3 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards within ESMA final report include less requirements than the draft standards of the Consultation Paper: some of the key elements of the methodology and the elements of the internal review of the methodology requested under ESMA Consultation Paper have been deleted. Therefore, the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation.</p>
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#### Section 4: Draft regulatory technical standards on elements to be included in the code of conduct

ESMA is mandated by Article 15(6) of the Regulation to develop draft regulatory technical standards to further specify the elements of the code of conduct referred to in paragraph 2 of Article 15. For each criterion of Article 15(2), ESMA in its draft technical standards proposes more detailed aspects to it.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The code of conduct sets out the expectations that the administrator has for the behaviour of the contributors, so it is essential for maintaining integrity of the benchmark. In particular, the provisions of the code of conduct are designed to ensure that the right people are acting to be submitters to the benchmark, that those persons who are not permitted to do so do not submit input data to the administrator and that minimum standards of behaviour are implemented and maintained within the business that contribute to the benchmark. Therefore, these provisions are beneficial to the integrity and robustness of the benchmark which is beneficial to users and consumers as well as the administrator and contributor.</p> <p>The code of conduct RTS should also help improve transparency and clarity of the contributions made, and their consistency over time.</p> <p>Competent authorities would also benefit from the application of the proposed technical standards as they include the reporting of actual and suspected infringements to the administrator's competent authority and because the provisions in the code help distinguishing the responsibilities of the administrator and of contributors within the provision process. This will aid them in their duties where they supervise the contributors.</p>
<i>Costs</i>	<p>In terms of the costs to administrators, they are likely to incur human resource costs in developing the various elements required in the code of conduct — and embedding this code into its organisation. The materiality of these costs would depend on the extent to which such documentation is already produced, and on the extent to which the administrator has to adapt the code of conduct for different benchmarks. That said, it is likely that the code of conduct would share a lot of common elements across different benchmarks (despite some variations) and, therefore, these one-off costs are likely to be less significant on a per benchmark basis for those administrators operating a large number of benchmarks.</p>

	<p>Contributors could also face costs as a result of the code of conduct RTS. They are likely to incur people costs in understanding the new requirements, which could be exacerbated if the contributor contributes to several different benchmarks, and/or several different administrators, each of which has a slightly different code of conduct. Especially for contributors contributing to multiple benchmarks, it may impose higher resource costs, if the contributor has to read across the requirements of the various codes of conduct in order to develop practices and procedures that are simultaneously compliant with all the codes of conduct.</p> <p>These RTS do not imply cost for national competent authorities and users.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.4 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards included in ESMA final report include less requirements than the draft standards of the Consultation Paper: the Article on training is no more part of these RTS, requirements on record keeping policies have been simplified (e.g. the requirement to record substantial exposures to benchmark-related instruments have been deleted), the Article on the consistency of the process of contribution of input data has been deleted. Therefore the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation</p>
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**Section 5: Draft regulatory technical standards on governance and control requirements for supervised contributors**

ESMA is mandated by Article 16(5) of the Benchmarks Regulation to specify further the requirements applying to supervised contributors concerning governance, systems and controls, and policies set out in paragraphs 1-3 of the same Article. ESMA in its draft technical standards proposes more detailed aspects to further clarify the requirements, including in relation to submitters of input data, and use of expert judgement.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>There will be benefits from the further specification of the requirements on supervised contributors both for supervised contributors, and for the administrators to which the contributors provide input data.</p> <p>The main benefit of the further level of specification of the requirements will be to ensure consistent application of the requirements throughout the Union. Without such further clarification, each supervised contributor would have to make its own judgement of the way in which it should comply with the high level requirements in the Benchmarks Regulation.</p> <p>Different interpretation of the requirements by different supervised contributors within a Member State would mean that each national competent authority would have to establish for itself criteria for judging compliance of contributors it supervised with the requirements. Even if each national competent authority established consistent application, a benchmark administrator could find that its contributors in different Member States were working to different standards.</p>
<i>Costs</i>	<p>The incremental costs of these draft RTS are minimal for two main reasons.</p> <p>First, the draft RTS just specifies the elements already included in Article 16 of the Benchmarks Regulation, and therefore the main source of costs is the text of the Regulation.</p> <p>Second, supervised contributors already have established system and controls in relation to contribution of input data, and therefore the additional costs should be limited and focused on the adjustment of the already existing systems to the requirements of the RTS.</p>

	<p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.5 of the same.</p>
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**Section 6: Draft regulatory technical standards on criteria to be assessed by competent authorities when deciding to apply certain provisions to significant benchmarks**

ESMA is mandated by Article 25(9) of the Regulation (EU) 2016/1011 to specify further nine criteria referred to in paragraph 3 of the same Article. Competent authorities should take into account these criteria when they assess whether it is appropriate to require an administrator of a significant benchmark to apply one or more of the provisions listed in Article 25(1) of the Regulation (EU) 2016/1011 although the administrator has chosen not to. For each criterion of Article 25(3), ESMA in its draft regulatory technical standards (RTS) proposes more detailed aspects to further clarify it and to give guidance for its assessments.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>Both administrators of significant benchmarks and national competent authorities would benefit from the application of the proposed RTS.</p> <p>The draft RTS contain a set of aspects to be taken into account by competent authorities: the application of these elements by competent authorities in their assessment would ensure that Article 25(3) of the Regulation (EU) 2016/1011 is applied consistently throughout the Union. Without such further clarification, competent authorities would have to base their assessment on the broader nine criteria alone. These criteria are very general in nature, and different competent authorities would possibly apply them differently in practice. Through the further specification of the nine criteria in the draft RTS, the competent authorities will have a pre-defined detailed framework based on which they can develop their assessment more easily and more rapidly, as they will not need to further specify the criteria of Level 1 by themselves.</p> <p>Also administrators of 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 significant benchmarks to prepare a sound notification to the competent authority, including all the relevant information, to have their own assessment confirmed.</p> <p>An additional benefit is a fairer competition among administrators located in different Member States through increased consistency of the approaches followed by competent authorities.</p>

<p><i>Costs</i></p>	<p>The draft RTS concern activities to be performed by competent authorities only, so they would not create additional costs for administrators of significant benchmarks or market participants. The information required under Article 25(3) of the Regulation (EU) 2016/1011 is only intended to corroborate the administrator’s assessment and hence should not have to cover all criteria and the elements specified in these draft regulatory technical standards, so no additional burden or cost for administrators will result therefrom.</p> <p>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 prepare an assessment under Article 25(3). The draft RTS merely further specify the nine criteria already included in that provision.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.6 of the same.</p>
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## Section 7: Draft implementing technical standards on compliance statement for administrators of significant and non-significant benchmarks

ESMA is mandated by Article 25(8) to develop a template for the compliance statement that administrators of significant benchmarks have to publish if they decide not to apply any of the requirements listed in Article 25(1). Similarly, ESMA is mandated by Article 26(5) to develop a template for the compliance statement that administrators of non-significant benchmarks have to publish and provide to the relevant NCA if they decide not to apply any of the requirements listed in Article 26(1). ESMA is proposing a template aiming at providing a detailed explanation regarding the decision of not applying some BMR requirements, while limiting the administrative effort that administrators will bear when developing and updating their compliance statement.

	Qualitative description
<i>Benefits</i>	<p>The main benefit in proposing, through the draft ITS, a common template for compliance statement to be used by administrators is to increase the clarity of the document published, the transparency of the reasons why the administrators have not applied some requirements of the BMR and comparability of compliance statements over different administrators/benchmarks.</p> <p>In relation to clarity, the use of a common template will facilitate the analysis of the compliance statements by NCAs as well as by users and other interested parties, and will enhance the comparability of information among different benchmarks with the objective of choosing the most appropriate one for the intended use.</p> <p>In addition, without a common template, administrators would be left with no guidance on how to publish the information about the decision of not applying some BMR requirements, in line with Articles 25(1) and 26(1). Under this scenario, each administrator would draft its own template which would entail the risk of omitting necessary information. Moreover, under the situation in which each administrator uses its own template, comparison between compliance statements of different administrators would be more difficult, as it is not sure that the same types of information are included by different administrators that are not required to use the same template. All these issues are solved by the use of a common compliance statement as the one proposed by ESMA.</p> <p>In relation to transparency, it is important that a compliance statement provides the public and NCAs with a comprehensible</p>

	<p>and exhaustive motivation of the appropriateness of not applying the provisions referred to in the compliance statement. This can be achieved by an organisation of the content of the statement that is clear and unambiguous. For this reason, the template proposed by ESMA is organised into sections that are internally divided into specific items. In particular, using the proposed template, three crucial factors would be immediately clear to the reader: (i) which requirements have been not applied by the administrator; (ii) for the provision of which benchmarks the requirements have not been applied; (iii) what are the exact reasons why the decision was taken by the administrator. Without a template to be used by administrators, there would be the risk that each administrator applies the provisions in the BMR differently, including different information in the compliance statement and / or organising it differently.</p>
<p><i>Costs</i></p>	<p>Potential additional costs will be borne by administrators of significant and non-significant benchmarks only.</p> <p>The incremental costs stemming from the proposed template for the compliance statement are minimal, if any. Indeed, it is the Benchmarks Regulation requiring the publication of a compliance statement. The draft ITS just provide a template for such publication. Moreover, the template has been designed in a way to minimise the administrative burden of administrators, in accordance with the general requirement under the Benchmarks Regulation. The modular approach embedded in the template ensures the administrative work needed to draft the template will be limited to only strictly necessary information. In this context, it should be noted that duplications within the proposed template are completely avoided.</p> <p>Some compliance costs could be generated where the listings of individual benchmarks issued by an administrator change frequently.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.7 of the same.</p>

## Section 8: Draft regulatory technical standards on the benchmark statement

ESMA is mandated by Article 27(3) of the BMR to specify further the contents of a benchmark statement and the cases in which an update of such statement is required. ESMA proposes to specify the items included in Article 27(1) and (2) through the definition of more specific requirements, in terms of information to be included in the benchmarks statement, and criteria to be considered by the administrators when preparing the statement. The proposed draft RTS also differentiates the applicable requirements in terms of types of benchmarks.

	Qualitative description
Benefits	<p>The main benefit of proposing, through the regulatory technical standards (RTS), a further specification of the content of the benchmark statement to be published by administrators is to increase the clarity of the statement published, and comparability of benchmarks statements produced by different administrators. Users of benchmarks and consumers will be the category of market participants who will benefit the most from the application of the draft RTS, but also administrators, required to publish the statement, will benefit as well.</p> <p>As Recital 43 explains, the goal of the benchmarks statement is to provide users of benchmarks with information in relation to what a given benchmark intends to measure and its susceptibility to manipulation, so that they can understand the risk profiles of different benchmarks and choose appropriately among them.</p> <p>Thanks to the requirements included in the RTS, the benchmark statements of different administrators will include the same types of information, making the comparability of the statement much easier. In particular, benchmark statements will have to provide a set of information in relation to any form of discretion in calculation of a benchmark. This information on discretionary elements of the benchmark's calculation is key to ensure transparency and investor/consumer protection because the susceptibility of the benchmarks to manipulation much depends on the level of discretion embedded in its calculation.</p> <p>Administrators should benefit as well from the RTS. Indeed, thanks to the RTS, the application of Article 27 of the Benchmarks Regulation should be easier for them, as it leaves less room for “wrong application” of the requirements they have to apply under Article 27.</p>

<p>Costs</p>	<p>Potential additional costs will be borne by administrators of benchmarks.</p> <p>The incremental costs stemming from the proposed RTS for the benchmark statement are considered limited. Indeed, it is the BMR requiring the publication of a benchmark statement, and Article 27 of the Regulation already includes the main elements that the administrator has to publish as part of the statement. It is the obligation in Article 27 that is the main source of cost for administrators (i.e. the original obligation to publish a benchmark statement with a pre-defined content). The RTS <i>per se</i> does not include additional elements in the benchmark statement, but rather specifies how the elements in Article 27 must be incorporated in practice in the published benchmark statement.</p> <p>As the draft RTS takes into account the principle of proportionality and distinguishes different types of benchmarks, incremental costs are likely to be higher for administrators of interest rate benchmarks and commodity benchmarks, and administrators of critical benchmarks.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.8 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards included in ESMA final report include less requirements than the draft standards of the Consultation Paper: requirements under Articles on “general disclosure requirements”, “commodity benchmarks”, “critical benchmarks”. Administrators are now also allowed to cross-refer in the benchmark statement to published documents accessible free of charge. Therefore the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation.</p>
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**Section 9: Draft regulatory technical standards on the information to be provided in the application for authorisation and in the application for registration**

ESMA is mandated in accordance with Article 34(8) of the Regulation (EU) 2016/1011 to specify further the information to be provided in the application for authorisation and in the application for registration. ESMA proposes in its draft technical standards the set of documents, data and information that the applicants located in the Union and that intend to act as administrators should include in their application for authorisation and in their application for registration.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The draft regulatory technical standards specify the set of information to be submitted in the application for authorisation and in the application for registration to the competent authority of the Member State in which the administrator is located to demonstrate compliance with the requirements of Regulation (EU) 2016/1011. This specification of all information to be provided in the application for authorisation and in the application for registration would promote a common and consistent process throughout the Union.</p> <p>These draft technical standards would benefit competent authorities in the different Member States who will have a pre-defined and common framework to conduct their assessment in accordance with Article 34(8) of the Regulation (EU) 2016/1011. This assessment will not be based solely on the provisions of the mentioned Article of the Regulation, which do not include the specific information to be provided for an applicant to be authorised or registered. Without this further clarification, each competent authority would define different requirements to be satisfied by applicants.</p> <p>In close connection, applicant entities would also benefit from these draft technical standards as they will know in advance which is the information to be submitted in order to obtain authorisation or registration.</p> <p>Finally, the specification of common and consistent information to be provided for authorisation or registration purposes would also increase investor protection as the final investors would be ensured that the benchmarks provided by an authorised or registered administrator throughout the Union have applied the same process and provided the same information for assessment by competent authorities.</p>

<p>Costs</p>	<p>The draft technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the information to be provided in the application for authorisation and in the application for registration. Therefore, additional costs stemming from the application of the proposed technical standards are not expected to be material.</p> <p>Moreover, in drafting the draft technical standards ESMA tried to minimise the burden on administrators, in accordance with the principle of proportionality which is a general requirement under the Regulation (EU) 2016/1011. Where possible, the requirements in the draft technical standards have been reduced depending on the type of the benchmark. For example, for critical benchmarks an inventory of actual and potential conflict of interests is to be included in the corresponding policies and procedures while for significant and non-significant benchmarks only the conflicts of interests which could most likely arise would be included.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.9 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards within ESMA final report include less requirements than the draft standards of the Consultation Paper: in particular, it does no longer refer to financial information to be provided by the applicant, also the requirements regarding the organisational structure and governance have been significantly reduced. Therefore, the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation.</p>
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**Section 10: Draft regulatory technical standards on the form and content of the application for recognition of a third-country benchmarks provider**

ESMA may, in accordance with Article 32(9) of the Regulation (EU) 2016/1011, specify the form and content of the application of a third-country provider to obtain recognition as envisaged in the mentioned Article 32. ESMA has decided to draft the regulatory technical standards in this context. Applicants from third countries should therefore conform to the requirements further developed by ESMA in this context.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The draft regulatory technical standards specify the set of documents, data and information to be submitted to the competent authority of the Member State of reference to demonstrate compliance with the requirements of Regulation (EU) No 2016/1011 or with the applicable IOSCO Principles, the nature and relevance of the benchmarks intended for offer in the Union territory, details of the legal representative established in the Member State of reference and the criteria applied to determine the Member State of reference.</p> <p>The specification of all pieces of information to be provided in the application for recognition would ensure that the process envisaged by Article 32 of the Regulation (EU) 2016/1011 is undertaken consistently throughout the Union. Without such further clarification, competent authorities in the different Member States will have to individually set the form and content of an application for recognition, based on the solely Level 1 provisions. As a consequence of the adoption of the regulatory technical standards, competent authorities will instead have a pre-defined detailed framework, based on which they can conduct their assessments, as required by Article 32, paragraphs 5 and 6, more easily and more rapidly and with less uncertainty about comprehensiveness of received information.</p> <p>Also third-country providers would benefit from the application of the draft technical standards as they will know in advance which are the documents, data and information to be submitted in order to obtain the recognition, irrespective of the Member State of reference and thus with no incentive to forum shopping.</p> <p>An additional indirect benefit is connected with the enhanced protection offered to final investors and consumers, as the benchmarks provided in third-countries by a recognised</p>

	<p>administrator will be all scrutinised on the basis of a consistent set of information.</p>
<p><i>Costs</i></p>	<p>The draft regulatory technical standards are aimed at detailing the contents of an application for recognition, on the basis of the requirements already provided for in the Level 1, but with a view to standardisation of an application contents. As the required information should nevertheless be provided, in order for the applicant to be granted the recognition in accordance with Article 32 of the Regulation (EU) 2016/1011, limited administrative burden or costs for administrators are foreseeable as a direct result of the application of these draft regulatory technical standards. The draft standards may have a larger impact in terms of costs for small third-country index providers, and for third-country index providers that produce a large number of benchmarks, because in the during the application process, third-country administrators would need to indicate the nature and characteristics of the benchmarks provided, as well as an indication of the relevant underlying market or economic reality.</p> <p>From the perspective of EU competent authorities, there are no foreseeable incremental costs stemming from the application of the draft regulatory technical standards, as the latter would nonetheless be required to conduct the assessments, as required by Article 32, paragraphs 5 and 6, of the Regulation (EU) 2016/1011, after the request of applicant third-country providers.</p> <p>For a more detailed cost-benefit analysis, including a quantitative description, please refer to Europe Economics cost-benefit analysis, in particular Section 4.10 of the same. It should be noted that Europe Economics analysis is based on the draft standards as included in ESMA Consultation Paper. The revised draft standards included in ESMA final report include less requirements than the draft standards of the Consultation Paper: the sub-section “financial information” in Section A of the Annex, and the sub-section on the organisational structure has been simplified. Therefore the estimate of costs for applicants included in Europe Economics analysis should be considered as an over-estimation.</p>