



European Securities and
Markets Authority

Consultation Paper

Draft Regulatory Technical Standards under the Benchmarks Regulation



Responding to this paper

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

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

ESMA will consider all comments received by **9 May 2020**.

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

Publication of responses

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

Data protection

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

Who should read this paper

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

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1 Executive Summary

Reasons for publication

The Benchmarks Regulation (BMR) was published in the Official Journal of the European Union on the 29 June 2016, entered into force the following day and entered into application on the 1 January 2018.

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

ESMA has published a final report on the draft technical standards under the BMR and submitted them to the Commission² on the 30 March 2017. These technical standards were adopted by the Commission³ on the 5 November 2018. The new set of RTS stemming from the ESAs' review relate to provisions of the BMR that were not originally subject to a mandate to deliver draft RTS.

Contents

This CP consists of five chapters, each dedicated to one of the areas for which the ESAs' review mandates ESMA to develop draft technical standards. Each chapter provides first the background information on ESMA's legal mandate to develop the draft technical standards. In a different section, the general ESMA approach and the different proposals for each draft technical standards are outlined. The CP also includes in the annexes a first version of each draft technical standard and a preliminary high-level cost-benefit analysis.

Next Steps

ESMA will consider the feedback it will receive to this consultation in Q2 2020 and expects to publish a final report and submit the draft technical standards to the European Commission for endorsement by 1 October 2020.

¹ Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334, 27.12.2019, p. 1

² [https://www.esma.europa.eu/sites/default/files/library/esma70-145-48 - final report ts_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2018:274:TOC>

2 Governance arrangements (Article 4 BMR)

2.1 Background and legal basis

1. Pursuant to Article 4(1) of the BMR, administrators shall “*have in place robust governance arrangements including clear organisational structure with well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark*”. This paragraph further states that administrators should identify and prevent or manage conflicts of interest between themselves (managers, employees or other persons directly or indirectly linked to them by control, contributors or users) and ensure that where any judgement or discretion in the benchmark determination process is required, it is independently and honestly exercised.
2. Article 5(2) of the ESAs’ review states that “*ESMA shall develop draft regulatory technical standards to specify the requirements to ensure that the governance arrangements referred to in paragraph 1 [of Article 4 of the BMR] are sufficiently robust.*”
3. Robust governance arrangements of the administrator are necessary to prevent manipulation of benchmarks. Recital 1 of the BMR mentions that “[...] *The use of discretion and weak governance regimes, increase the vulnerability of benchmarks to manipulation [...]*”. Recital 21 further elaborates that in order to ensure the integrity of benchmarks, benchmark administrators should be required to implement adequate governance arrangements to control conflicts of interest and to safeguard confidence in the integrity of benchmarks.
4. ESMA believes that the RTS should aim, amongst other, at establishing suitable and well-defined lines of responsibilities for the decision-making and monitoring and control processes.
5. ESMA also considers that the concept of “robust governance arrangements” should be interpreted in accordance with the nature, scale and complexity of the benchmark administrator. One could for instance question whether it would be appropriate to impose the same level of requirements on administrators of non-significant, significant and critical benchmarks. Similarly, the future provisions on “robust governance arrangements” should not jeopardise the operation of smaller administrators with limited resources. In case an administrator administers different types (i.e. non-significant, significant or critical) of benchmarks, the most stringent requirements should apply to them.
6. Regarding the scope of the mandate, ESMA notes that the BMR includes various requirements which relate to the governance of and controls by administrators. Article 4 includes itself specific conflicts of interest requirements. Furthermore, an administrator must have in place an oversight function (Article 5), a control and an accountability framework (Articles 6 and 7), a system of record-keeping (Article 8) and a complaints-handling mechanism (Article 9). An administrator must also comply with specific requirements on outsourcing of functions in the provision of a benchmark (Article 10).

7. It is ESMA's understanding that these requirements and functions are not within the mandate of this RTS, which is limited to the governance arrangements referred to in Article 4(1) of the BMR.
8. ESMA also notes that some administrators can also be subject to organisational requirements deriving from other European legislative frameworks (e.g. CRD IV or MiFID II). This could notably be the case for administrators that are part of a wider group. In this case, ESMA considers that the various requirements should apply cumulatively but also recognises that administrators may leverage internal arrangements already set up in accordance with such other European legislative frameworks in order to comply with any additional requirements applicable under the BMR. Given the nature of the contemplated provisions, ESMA does not foresee any specific situation where the two sets of organisational requirements would be contradictory. If, however, this situation materialises, ESMA will clarify how to implement the conflicting provisions.

2.2 Content of the draft RTS

Clear organisation structure

9. Different organisational and ownership structures may influence an administrator's ability to provide benchmarks and to manage the risks inherent in this activity. Article 4(1) of the BMR requires "*well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark*".
10. To this end, ESMA believes that benchmark administrators should establish, implement and maintain an organisational structure which in a clear and documented manner specifies decision-making procedures, reporting lines allocating unambiguously functions and responsibilities and ensuring accountability for all the decisions taken regarding the provision of benchmarks. These written procedures should focus primarily on the roles and responsibilities of the persons involved in the provision of the benchmark (including the management body as well as the internal and oversight functions) and include at least the following key components:
 - a. the composition, roles and responsibilities of the management body and related committees, if any;
 - b. the structure of the management body;
 - c. an organisational chart of the different functions including the reporting lines;
 - d. the procedures for the appointment of the management body and its members.
11. Consistently with the spirit of the BMR, it is important to adopt in these RTS proportionality regarding some of the requirements depending on the benchmarks provided. Therefore, administrators of non-significant benchmarks may opt not to provide the procedures for the appointment of the management body and its members.

12. The BMR does not set a requirement for an administrator to include a management body as defined in Article 3(1)(20) of the BMR. However, where such management body exists, the governance arrangements established should ensure that its members are subject to effective monitoring and controls. Further, the governance arrangements should clearly design and establish procedures that promote compliance with the management body's decisions.
13. When designing its governance arrangements an administrator should ensure that the performance of multiple functions or involvement in various committees still allow the persons involved in the provision of a benchmark to commit sufficient time to the responsibilities allocated to them and does not or is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally
14. In addition, in order to minimise conflicts of interest, administrators should establish a remuneration framework in order to ensure that the remuneration of the persons involved in the provision of the benchmark are appropriately set and are not subject to conflicts of interest.

Well-defined roles and responsibilities

15. The governance arrangements should clearly state the persons accountable for decisions that could have a significant impact on the provision of the benchmark, in particular, where tasks are subject to delegation.
16. Robust governance arrangements also require to have in place robust procedures to manage the possible risk of conflicts of interest that may arise within a benchmark administrator. The arrangements should in particular include processes to identify, address and manage potential conflicts of interest.
17. The governance arrangements of the administrator should clearly state the persons responsible for the publication or disclosure of potential conflicts of interest pursuant to Article 4(5) of the BMR. Furthermore, the governance arrangements should clearly state the persons responsible for the establishment of specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark pursuant to Article 4(8) of the BMR. The governance arrangements should also specify persons involved in the identification and reporting of any circumstances which may give rise to conflicts of interest that may impede ability of relevant persons in the provision of the benchmark to perform their duties independently and objectively. For example, these could be personal, professional or economic relationships with other persons (including other persons of the administrator's legal entity) or entities; past or present positions held; other economic interests (e.g. loans to the member's or prospective member's company); or other interests, including family interest, that may create actual conflicts of interest.
18. The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a person from being involved in the provision of the benchmark. The administrator should nevertheless identify any circumstance which may give rise to a

perceived conflict of interest or an actual conflict of interest, assess it and decide, where appropriate, on mitigating measures. The governance arrangements should facilitate the disclosure of any new circumstances which may give rise to a perceived conflict of interest or new actual conflicts of interest including the mitigating measures.

19. Pursuant to Article 4(3) of BMR, an administrator that is part of a group, should duly assess any implications of the group structure for its own governance arrangements including whether the administrator has the necessary level of independence to meet its regulatory obligations as a distinct legal person and whether its independence could be compromised by the group structure or by any member of the administrator's management body also being a member of the board of other entities of the same group. Such an administrator should adopt specific procedures for preventing and managing conflicts of interest that may arise from this group structure.
20. Administrators that operate under the umbrella of a parent company should remain capable to seek synergies with the functions that operate at group level including internal and oversight functions. However, this should not prevent those delegated functions to operate in line with the general principles set out in Article 10 of the BMR and in full compliance with all other relevant provisions of the BMR.

Transparency

21. In order for the governance arrangements of an administrator to be sufficiently robust, an administrator should establish lines of responsibility which are clear, consistent and well-documented. To that end, the governance arrangements should be transparent and the persons involved in the provision of a benchmark should be aware of the responsibilities that are allocated to them and the procedures which must be followed for the proper discharge of these responsibilities.
22. The composition, roles and responsibilities of the administrator's management body and any committee should be clearly specified, well-documented and made available on request.

Q1: Do you agree with the governance arrangements set above? Do you have any additional suggestions? Please specify.

Q2: Do you agree that administrators should have in place a remuneration framework?

Q3: Do you agree that the same requirements should apply to an administrator that is a natural person? Please elaborate.

3 Methodology (Article 12 BMR)

3.1 Background and legal basis

23. Article 12 of the BMR specifies the conditions for a methodology to be used by an administrator for determining a benchmark. Recital 17 of the BMR mentions that *“An index is calculated using a formula or some other methodology on the basis of underlying values. There exists a degree of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. Therefore, all benchmarks sharing that characteristic of discretion should be covered by this Regulation [...]”*.
24. Article 5(3) of the ESAs’ review states that *“ESMA shall develop draft regulatory technical standards to specify the conditions to ensure that the methodology referred to in paragraph 1 [of Article 12 of the BMR] complies with points (a) to (e) of that paragraph.”*
25. Pursuant to Article 12(1) of the BMR, the RTS should therefore specify the conditions to ensure that a methodology:
- a. is robust and reliable;
 - b. has clear rules identifying how and when discretion may be exercised in the determination of that benchmark;
 - c. is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data
 - d. is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity
 - e. is traceable and verifiable.
26. Pursuant to Article 13 of the BMR, the administrator should adopt a transparent methodology that ensures the reliability and accuracy of the benchmark. Further, pursuant to Article 5 of the BMR, the oversight function is responsible for the review of the methodology at least annually and overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes.
27. Recital 17 of the BMR specifies that an index is calculated using a formula or some other methodology on the basis of underlying values. There is a level of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. Therefore, the BMR recognises that the construction of a methodology embeds discretion that is to be defined by each administrator. This RTS ensures that the methodology, as defined by the administrator, is sufficiently robust, reliable and when discretion is used an appropriate control system is in place.

3.2 Content of the draft RTS

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

Methodology is robust and reliable

29. The first condition to be verified is for the methodology to be robust and reliable. Indeed, it is of paramount importance for users of benchmarks that the methodology used is robust and can be relied on for the continuous calculation of the benchmark. To that end and in order to ensure that the methodology complies with point a) of Article 12(1) of BMR, the administrator should use a methodology that represents the underlying market or economic reality that it seeks to measure and incorporates all factors including parameters and input data that are deemed relevant in order to continuously represent the underlying market that it is intended to measure.

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

31. A robust methodology is a methodology that uses, where available, transaction data. This is appropriate because those data are less prone to manipulation. Therefore, the methodology should state the nature of the input data used in the methodology, for example transaction data, quotes, expert judgement etc.

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

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

33. Discretion may be exercised in the determination of the benchmark for example when the underlying market the benchmark seeks to measure does not embed enough transaction data or quotes.

34. In the case where discretion in the determination of the benchmark is used, the methodology of the benchmark should clearly state at what step of the calculation the discretion is performed. Furthermore, the administrator should use a methodology that clearly states whether the discretion is based on an algorithm or a pre-defined methodology.

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

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

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

- a. an assessment of the adequacy and appropriateness of the historical values of the benchmark produced by means of that methodology;
- b. reliable inputs, including appropriate size of the data samples, if any.

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

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

39. The aim of the back-testing of the methodology is to validate the outcome of the calculation that results from the application of the methodology to the input data used. The back-testing against available transaction data should be an ex-post back-testing which compares the observed outcome of the level of the benchmark based on transaction data to the expected outcome derived from the use of the methodology. The back-testing frequency should be at least identical to the frequency of the calculation of the benchmark. Furthermore, administrators should consider the most appropriate historical time horizon for their back-testing programme.

40. In order for the back-testing to be meaningful and the methodology to be reviewed, if needed, following the back-testing results, the administrator should consider clear statistical tests to assess the back-testing results. The administrator should have a documented process regarding the action it would take depending on the results of the back-testing on a case by case basis. In particular, the administrator should have in place a process to ensure that systemic anomalies highlighted by back-testing are identified and are appropriately addressed.

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

41. The availability of the benchmark in different market conditions is closely linked to the resilience of its methodology. Users of benchmarks need to have a continued availability of the benchmarks they reference for use in financial instruments in order to avoid any contract frustration that may rise from an outage or cessation of a benchmark. Therefore, it is of paramount importance that an administrator is able to construct a methodology that is resilient to different market conditions and a methodology that enables the calculation of the benchmark in the widest set of possible market circumstances.
42. An administrator should assess the resilience of the benchmark's methodology to various market conditions using historical data from realised stressed market conditions and hypothetical data for unrealised stressed market conditions.
43. Depending on the type of benchmark the administrator should ensure that the methodology uses parameters and assumptions to capture a variety of historical and hypothetical conditions, including the most volatile periods experienced by the markets and correlation between underlying assets.
44. The administrator should ensure that the methodology is resilient to adverse market conditions and therefore the benchmark would not lose representativeness or be ceased in such circumstances.
45. The administrator should also document the action it would take depending on the results of the assessment relating to the resilience of the benchmark's methodology.

Methodology is traceable and verifiable

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

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

48. In some cases, input data are more prone to manipulation, for example when expert judgement or discretion is used in the determination of the benchmark. In these circumstances, the input data used for the calculation should also include an explanation and the reasoning behind its determination. For example, contributors should provide the administrator with a detailed explanation on the determination of the expert judgement and, upon request, demonstrate the underlying calculations. The record keeping requirements under Article 8(1) of the BMR include provisions to that respect.

Q4: Do you think that other conditions should be taken into account to ensure that the methodology complies with the requirements of the BMR? Please specify.

Q5: Do you consider that additional requirements are needed to ensure that the methodology is traceable and verifiable? Please specify.

Q6: Do you think that the back-testing requirements are appropriate? Please specify.

4 Reporting of infringements (Article 14 BMR)

4.1 Background and legal basis

Article 14 BMR

49. Article 14 of the BMR “Reporting of Infringements” provides for different obligations to enable the administrator to identify infringements, especially with regard to benchmark manipulation, and report them to the competent authority.
50. Pursuant to Article 14(1) of the BMR administrators of all benchmarks falling within the scope of Title II are required to “*establish adequate systems and effective controls to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark, under Regulation (EU) No 596/2014*”.
51. Article 14(2) of the BMR sets forth the obligation for the administrator to monitor input data and contributors to be able to notify and provide the relevant information to the competent authority in case of manipulation. Article 14(3) requires the establishment of a whistle blowing procedures regarding any possible infringement of the BMR obligations.
52. Article 5(4) of the ESAs’ review states that “*ESMA shall develop draft regulatory technical standards to specify the characteristics of the systems and controls referred to in paragraph 1 [of Article 14 of the BMR].*”

Other provisions relevant to data integrity in the BMR

53. Recital 30 BMR states “*the integrity and accuracy of benchmarks depends on the integrity and accuracy of the input data provided by contributors*”. Consistently, different provisions of the BMR ensure systems and effective controls are in place on the side of the contributors and of the administrator alike to ensure the integrity of input data.
54. Article 11 BMR on input data lists the requirements input data used for the provision of a benchmark need to meet and Article 11(2)(c) BMR in particular, provides for administrators to perform controls which shall entail validation, against other indicators or data, to ensure the data integrity and accuracy. In addition, Article 11(3) BMR states that, where the input data of a benchmark is contributed from a front office function the administrator shall obtain data from other sources that corroborate the input data.
55. Pursuant to Article 11(5) BMR, Commission Delegated Regulation 2018/1638 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council describes (i) how to ensure that input data is appropriate and verifiable, and (ii) the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark shall ensure are in place where the input data is contributed from a front office function. Pursuant to Article 11(6) BMR the same controls are prescribed for other types of benchmark through guidelines.

56. It is also worth noting that Article 5(3) BMR assigns to the oversight function the responsibility to monitor the input data and contributors and the actions of the administrator in challenging or validating contributions of input data. Further, the oversight function shall report to the relevant competent authorities any misconduct by contributors or administrators, of which the oversight function becomes aware, and any anomalous or suspicious input data.
57. From the combined reading of Article 5 on the Oversight Function and Article 14 on Reporting of infringements emerges a framework where (a) the administrators shall ensure data integrity through systems and controls which enable detection of manipulation, and (b) the oversight function shall monitor, inter alia, the actions of the administrator in respect of such controls and, where necessary (c) the oversight function shall report to the competent authority misconduct by contributors, administrators, and any anomalous or suspicious input data that emerged through the controls.
58. ESMA therefore understands that when anomalous or suspicious input data are identified by the staff involved in the protection of data integrity, it is essential that this is communicated and escalated to the oversight function, in order to enable the report to the relevant competent authority of any potential misconduct linked to manipulation behaviours.
59. As a result, ESMA considers it a necessary part of the arrangements, aimed at ensuring data integrity procedures, to alert the oversight function in order to enable the report of any misconduct to the competent authority.
60. ESMA specifies that it interprets internal communication and related escalation to the oversight function of anomalous or suspicious input data identified through data quality controls as being a separate and different procedure from the whistle blowing procedure described under Article 14(3) BMR. This is because the whistle blowing procedure appears to relate to any event regarding the infringement of the BMR and can be activated by any member of the staff. On the other hand, procedures to alert the oversight function following data integrity controls described under paragraph 1 of Article 14 BMR can be activated only by identified staff members dedicated to data surveillance and only under predefined circumstances.
61. This is why, the draft RTS focuses on the communication and escalation of suspicious data to the internal oversight following data controls, and does not cover whistle blowing.

4.2 Content of the draft RTS

RTS scope

62. Article 17(1) of the BMR excludes the application of Article 14 of the BMR on Reporting of infringements in respect to regulated data benchmark. As specified in Article 3(1)(24) of the BMR regulated data benchmarks are benchmarks based on input data provided by entities that are already subject to regulation and supervision that ensure the integrity and

transparency of the input data and provide for governance requirements and procedures for the notification of infringements.

63. In addition to this, Article 19 of the BMR provides for the requirements laid down in Annex II to replace the requirements of Title II BMR on Benchmark Integrity and Reliability (including Article 14 on Reporting of infringements) for commodity benchmarks. Only commodity benchmarks which are (i) regulated data benchmarks; (ii) based on submissions by contributors the majority of which are supervised entities, and (iii) critical benchmarks and the underlying asset is gold, silver or platinum are not subject to this rule. The specific rule contained in the BMR for commodity benchmarks is due to the sector specific characteristics of such benchmarks which make necessary the application of the specific provisions contained in Annex II instead. Consistently, Annex II provides for some specific obligations to ensure commodity benchmark integrity.
64. As a result, the obligations set forth in Article 14 on Reporting of infringements contained in title II of the BMR are not applicable to commodity benchmarks, which are instead subject to the specific provisions set forth in Annex II BMR in respect to data integrity.

Adequate systems and effective controls to ensure the integrity of input data

65. ESMA interprets the “adequate systems” and “efficient controls” described under Article 14 of the BMR to be the arrangements, comprising hardware, programmes and procedures, that the administrator is required to have in place in its organisation to ensure data integrity and manipulation detection.
66. ESMA understands “integrity of input data” to be the protection of data from unauthorised and unlawful changes, which is essential to ensure accuracy and consistency of data. Integrity of input data appears therefore to be an essential pre-requisite to meet all the data requirements set forth in Article 11 BMR on input data and a condition the administrator needs to guarantee at all times through controls described under Article 11(2) BMR and further specified by the Commission Delegated Regulation 2018/1638 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council.
67. For the concept of “manipulation” Article 14 BMR refers to the definition of manipulation or attempted manipulation of a benchmark under Regulation (EU) No 596/2014⁴ (‘MAR’). Pursuant to Article 12(1)(d) of MAR, Market manipulation of benchmarks relates to “*transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark.*”

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

68. Recital 44 of the MAR specifies attempts to engage in market manipulation occur where the activity aimed at committing market manipulation has started but has not been completed, for example as a result of failed technology or an instruction which is not acted upon.
69. Considering the direct reference to market manipulation, ESMA reads the provision contained in Article 14 of the BMR as providing for specific controls aimed at detecting behaviours able to jeopardise data integrity through data manipulation. As a result, the provision at matter on reporting of infringements provides an additional obligation for the administrator, in respect to the data integrity controls described under Article 11 BMR, to establish and maintain appropriate systems and procedures addressed specifically to detect any manipulation or attempted manipulation which may compromise data integrity.
70. As benchmark manipulation necessarily affects the integrity of input data, the systems and controls required under Article 14(1) BMR in order to be able to identify conduct that may involve manipulation or attempted manipulation of a benchmark, have synergies with the controls implemented to ensure data integrity.

Risk Assessment

71. In order to ensure a benchmark administrator has adequate systems and controls to satisfy the requirements under Article 14(1) of BMR, an administrator should undertake an assessment to evaluate the risks related to data integrity that its benchmark may be subject to. Such assessment should take into account the nature of the benchmark, such as the vulnerability of the input data and the nature of the contributors. Taking into consideration the particular features of the benchmark the assessment should be aimed at evaluating, the origin, nature, particularity and severity of the risk of manipulation. The outcome of the assessment can then be taken into account to (i) determine which are the appropriate technical measures to reduce the risk (prevention) and (ii) determine the controls that need to be carried out on the risk sources which have been identified.
72. For example, where a benchmark is based on input data from contributors, part of the process entails the transmission of data from contributors to the administrator and also feedback from the administrator to the contributors for notification purposes.
73. Administrators should consider the extent to which communication channels used for the transmission of input data are vulnerable in terms of allowing for data alteration. Enhanced supervision of these channels, or other additional security measures, may be necessary to reduce these risks and to allow for the identification of potential misconduct.
74. When the transmission of data is performed manually, additional checks should also be ensured such as four-eye controls.

Surveillance

75. At the core of the RTS is the obligation for the benchmark administrators to establish and maintain adequate and effective arrangements, systems and procedures aimed at preventing and detecting market manipulation and attempted market manipulation.
76. ESMA acknowledges that such obligation applies to a very broad range of entities and that the adequacy and proportionality of the systems and controls are likely to depend on the nature, scale and complexity of the benchmark. In particular, an automated surveillance system may not appear to be necessary or proportionate to achieve market manipulation prevention for smaller entities.
77. Provided that the level of monitoring is appropriate for and proportionate to the nature, scale and complexity of the benchmark, administrators should not necessarily be required to have an automated system to detect potential manipulation. For complex and sophisticated activities an automated system for monitoring may seem necessary. Administrators should also be able to explain upon request why the level of automation chosen is appropriate in respect to their benchmark production.
78. Regardless of the type of system used, the controls should cover the full range of operations undertaken by the administrator to produce the benchmark which involve data management. In addition, controls should enable alerts anytime there is the suspicion that false or misleading information in relation to the benchmark may jeopardize the benchmark's integrity.
79. Human analysis will also play an important role in the detection of manipulation. The most effective form of surveillance will likely be a combination of automated and human controls. Human controls, in particular, may be deployed to discern whether suspect input data may be linked to manipulation behaviours.
80. ESMA clarifies that regardless of the presence of an automated surveillance system, part of the staff involved in the protection of data integrity pursuant to Article 6 of the BMR on control framework shall be in charge of the controls and procedures aimed at detecting any conduct that may involve manipulation or attempted manipulation.
81. The administrator should also have the option to delegate the performance of the controls and procedures aimed at protecting data integrity and detecting manipulation to dedicated service providers. In such a case, the administrator should comply at all times with the requirements sets forth on outsourcing in Article 10 BMR and should remain fully responsible for discharging the obligations at matter.

Process to notify to the oversight functions attempts to alter data

82. Administrators should maintain procedures to notify immediately any attempted or actual manipulation or failure to comply with data control procedures.
83. The procedures for the transmission of the incident ticket should ensure direct and quick communication between the staff involved in the protection of data integrity and the

members of the oversight function. Incident reporting should occur as soon as practicable, once there is a reasonable suspicion that a benchmark manipulation has occurred. The communication channels should allow for a high level of security. Administrators are also responsible to ensure that appropriate individuals have been named as contacts for the report, and to ensure these contacts are up to date.

84. Members of the oversight functions may require more information from the staff involved in the protection of data integrity regarding suspicious data, which may involve convening a physical meeting with the dedicated resources reporting an infringement. Such meeting can be recorded in a durable and retrievable form, or written minutes of the meeting should be signed by the reporting person.
85. Communication channels between the staff involved in the protection of data integrity and the oversight team should be segregated from the public complaints system and should ensure a high level of security and durable evidence to allow for further investigations and full confidentiality. Incident tickets should be recorded in a durable and retrievable form.

Training

86. Effective monitoring is not limited to a surveillance system being in place but also includes comprehensive training and a culture within an entity dedicated to monitoring suspicions of manipulation. Training, in particular, plays a key role in staff's ability to detect suspicious behaviours.
87. Entities should ensure that staff involved in securing integrity of input data should undergo specific training. Such training programmes should reflect the need to ensure that dedicated staff are aware of the features of proper input data submission and of discrepancies in data potentially caused by manipulation or attempted manipulation. Furthermore, the training programme should make staff dedicated to data integrity able to promptly initiate the procedures to alert the oversight function in case of identification of suspicious input data. As a result, staff involved in the protection of data integrity should be confident in its ability to identify suspicious behaviour, and initiate the procedures to alert the oversight function if necessary. It is recommended that this result is achieved also through specific training for staff newly responsible for data management.
88. In order to increase awareness of manipulation risk and importance of market integrity, administrators may consider providing more general market abuse training to a wider staff population than those directly involved in surveillance, where it appears appropriate to the nature, scale size and complexity of the benchmark.
89. ESMA also considers it would be inappropriate to be specific with regards to training and adopt a one size fits all approach due to the variety of business structures. ESMA confirms that it does not deem it appropriate to provide granular details of training programmes content or structure, as effective training will need to be tailored to the administrator structure, system and size.

Data integrity policy

90. The production of a data integrity policy, describing the adequate and effective arrangements, systems and procedures adopted by the administrator to ensure data integrity and detect potential manipulation appears to be a useful tool for the administrator to demonstrate its compliance with the requirements set forth by Article 14 of the BMR.
91. To achieve this aim the minimum content of the policy should entail: (i) the assessment of manipulation risk based on the benchmark's features; (ii) the description of the safeguards adopted by the administrator to prevent and detect risk; (iii) the explanation of why systems and controls adopted are deemed to be adequate and effective in respect to the risk assessed; (iv) the indication of training activities performed; (v) an organigram of the administrator's surveillance function, setting out who will be conducting surveillance activities. Administrators should ensure that staff undertaking surveillance functions have the appropriate skills to undertake the work.
92. Where administrators already provided the competent authority with the information listed above, a mere indication of where such information can be found may be considered sufficient.

Q7: Do you agree with the requirements set out above? Do you have any additional suggestions? Please specify.

Q8: Do you agree with the systems suggested for the surveillance of market manipulation? In particular, do you think that an automated system should be required only when it appears to be adequate according to the nature, scale and complexity of the benchmark? Please specify.

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

5.1 Background and legal basis

93. Article 5(6)(b) of the ESAs' review adds to Article 21 of BMR, Mandatory administration of a critical benchmark, a new paragraph 5 stating that: “*ESMA shall develop draft regulatory technical standards to specify the criteria on which the assessment referred to in point (b) of paragraph 2 [of Article 21 of BMR] is to be based.*”
94. The BMR considers the cessation of the administration of a critical benchmark as a matter of financial stability. For this reason, Article 21 “Mandatory administration of a critical benchmark” provides competent authorities of critical benchmarks with a specific power that can be used when an administrator of a critical benchmark intends to cease providing such benchmark. In this scenario, the relevant competent authority can compel the administrator of the critical benchmark to continue publishing the benchmark until one of the conditions in Article 21(3) occurs and for a maximum period of five years (this five-year period was introduced by the amendments to BMR made by Regulation (EU) 2019/2089⁵). The authority should take the decision following two sequential assessments analysing either how the benchmark is to be transitioned to a new administrator or ceased to be provided.
95. The first assessment must be produced and submitted by the administrator of the critical benchmark within four weeks of it having notified its competent authority about the intention to cease the provision of the critical benchmark. The second assessment must be produced by the authority itself, within four weeks following the receipt of the first assessment. Both assessments must analyse either how the benchmark is to be transitioned to a new administrator or how the benchmark should be ceased to be provided. For the cessation of the provision of the critical benchmark the assessments of both the administrator and the competent authority must take into account the procedure published by the administrator according to Article 28(1) of BMR. This procedure must include the actions to be taken by the administrator in the event of changes to or the cessation of the benchmark(s) provided by the same⁶.
96. Following completion of its assessment, in accordance with Article 21(3) of BMR the competent authority has the power to compel the administrator to continue publishing the benchmark until such time as:

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

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

- the provision of the benchmark has been transitioned to a new administrator;
- the benchmark can cease to be provided in an orderly fashion; or
- the benchmark is no longer critical.

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

98. Article 21(1) of BMR indicates that, where an administrator intends to cease providing a critical benchmark, there are two alternative options to be assessed. In the first option, the administrator assesses the transition of the critical benchmark to a new administrator which is already identified by the current administrator, and produces an analysis explaining how this would happen. In the second option, the administrator assesses instead how the benchmark ceases to be provided. According to Article 28(1), each administrator of benchmarks must produce and publish a procedure concerning the actions it would take in the event of changes to or the cessation of a benchmark which may be used in the EU in accordance with Article 29(1) of the BMR. The assessment by the administrator under the second option must take into account the aforementioned procedure that the administrator has already published but should also consider additional factors.

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

5.2 Content of the draft RTS

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

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

101. In relation to the transition of the provision of the critical benchmark to a new administrator, a number of criteria should be considered.

102. The characteristics of the entity that the assessment of the current administrator proposes as the new administrator of the critical benchmark should be checked against all the applicable requirements of BMR. Most importantly, the new administrator should be able to ensure the continuity of the provision of the critical benchmark, in a way that EU supervised entities can continue to use such critical benchmark without interruption and in compliance with BMR. If it cannot do so, then either the competent authority should mandate continued publication by the current administrator until such continuity can be assured (up

to the maximum period permitted), or the transition should be treated as an intention to cease the provision of the benchmark, as it will cease to be provided to users in the EU.

103. The capability of the administrator to provide a critical benchmark should be analysed. BMR applies additional obligations to administrators of critical benchmarks, compared to administrators of benchmarks that are significant and / or non-significant. For candidates that are already authorised under BMR, the authority should assess their ability to cope with the requirements that do not apply to significant and non-significant benchmarks. New authorisation would not be needed in the case of an authorisation already granted and reflected in the ESMA register, however the relevant authority should be satisfied that the administrator has all internal arrangements ready for the provision of a critical benchmark.
104. In cases in which the proposed administrator is not authorised, even if it is already registered, the proposed administrator must apply for an authorisation. BMR does not foresee any process for upgrading a registered administrator to an authorised administrator, so in this scenario the proposed administrator will have to submit an application to be authorised for the provision of the critical benchmark.
105. It is a pre-condition to the transition of the provision of a critical benchmark that the proposed new administrator is authorised under the BMR before transition is completed: in no case should the provision of the benchmark transit to an entity located within the EU that is not authorised under BMR. The only exception to this is the case in which candidate(s) are exempted from the BMR under Article 2(2) (e.g. central banks). In these cases, BMR authorisation is not required.
106. It is be noted that if the candidate administrator is located in a Member State that is not the one of the competent authority producing the assessment, a different competent authority would be responsible for the supervision of the new administrator. The assessment should consider the effect of this situation on the supervision of the critical benchmark. In these cases, cooperation with the new competent authority will be necessary. Cooperation among the two authorities will also be needed in the preparation of the assessment, as the authority of the proposed new administrator would have access to relevant information for the production of the assessment, in particular if the administrator is already registered, authorised or supervised in that Member State.
107. Besides the analysis focusing on the candidate administrator, the assessment of the competent authority should analyse the operational way in which the provision of a critical benchmark moves from the current administrator to the new administrator. For this purpose, the following criteria should be considered:
 - a. whether the administrator engaged and or informed contributors (if any), users and other stakeholders about the possible transition of the critical benchmark to a new administrator;
 - b. The way in which the new administrator intends to calculate the benchmarks. Assessment on whether any of the following procedure of the critical

benchmarks are intended to be amended by the new administrator, and in which way they would comply with BMR: the methodology (including quality of input data), contingency computation methodology, policies for handling data errors, republication policy, transparency policy, review of methodology, code of conduct.

- c. Whether the new administrator will have access to the same input data as the previous administrator. If there is a panel, an additional criterion is how the new administrator will interact with panellists (will panellists accept to be part of a panel managed by a different administrator?) and more generally if the proposed administrator still fulfil article 11(1)(d) of BMR: “*Where a benchmark is based on input data from contributors, the administrator shall obtain, where appropriate, the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure*”.
- d. The way in which the new administrator will publish the critical benchmark: standard daily publication arrangements, frequency, website, accessibility (whether upon payment of a fee or free of charge).
- e. Whether a detailed plan for the switch date has been produced, and if so whether it deals with all possible issues stemming from the change of administrator.
- f. Legal risks involved in the transition, including risk of contract frustration, and the accounting and tax implications for end-users (if any) because of the new administrator.
- g. Impact (if any) of the transition to a new administrator on market infrastructures, notably CCPs.

Q9: Do you think that other criteria should be considered in relation to the transition of the provision of the critical benchmark to a new administrator? Please specify.

Assessment of how the benchmark ceases to be provided

108. In relation to the cessation of the provision of the critical benchmark, taking into account the procedure established by the administrator according to BMR Article 28(1), the following criteria should be considered by the competent authority:
 - a. The dynamics of the market or economic reality the critical benchmark intends to measure and whether the underlying market is inactive, or almost so. In relation to this, it should also be considered whether there exists input data of quality and quantity sufficient to represent the underlying economic reality with precision. This should be analysed having in mind the fact that, being a critical

benchmark, it is one of the most used benchmarks in the EU. It is possible that even in cases where the critical benchmark is no longer representative of the underlying market, mandatory administration is necessary to ensure the cessation of the provision of the benchmark in an orderly fashion.

- b. The appropriateness and effectiveness of the procedure established by the administrator according to Article 28(1) of BMR for the purposes of terminating the provision of the critical benchmark. The procedure can be tested against some pre-defined questions, such as: Does its content precisely define the actions and steps to be taken to cease the provision of the critical benchmark in an orderly fashion? Can that procedure still be considered feasible under the circumstances in which the use of the power of mandatory administration is being considered by the relevant authority? It is possible that the procedure has been drafted a considerable time before the application of Article 21: the surrounding landscape may have changed in a way that some steps of the procedure are no more viable. The appropriateness of the procedure established by the administrator according to BMR Article 28(1) in light of the prevailing circumstances and landscape at the time of the proposed cessation of publication may also be tested against various criteria, i.e.:
- the availability of appropriate alternatives to the relevant benchmark; the level of preparedness of users of the relevant benchmark for the cessation of the relevant benchmark or family of benchmarks;
 - the volume and value of financial instruments and financial contracts referencing the benchmark, and of investment funds using the benchmark for measuring their performance;
 - the term, duration, maturity or expiry date of any financial instruments, financial contracts and other documents entered into for a purpose set out at Article 3(1)(7)(e) of BMR and which refer to the relevant benchmark, and whether the benchmark will continue to be provided for use by the existing users for an appropriate period of time and whether the plan provides for such changes to the benchmark (including but not limited to changes to its input data, contributors or methodology) as may be necessary to ensure it is appropriate and sufficiently robust as to be sustainable throughout this period; and
 - the likelihood that any such financial instrument, financial contract or other document entered into for a purpose set out at Article 3(1)(7)(e) of BMR, would be frustrated in the event of the cessation of the relevant benchmark.
- c. The application of Article 28(2) of BMR by supervised entities using the critical benchmark. Article 28(2) of BMR requires supervised entities that use a benchmark to ensure that their written plans, where feasible and appropriate,

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

- d. Alternative / fallback benchmark. An important element to be considered is whether the supervised entities using the critical benchmarks have identified a fallback benchmark to the critical benchmark. Have the different supervised entities adopted the same fallback benchmark? Has the same fallback benchmark been adopted in different asset classes? This is particularly relevant in the case of related contracts (e.g., derivatives and cash products, or loans, securitisations and derivatives). Is this fallback benchmark BMR-compliant? I.e. is the administrator of the fallback rate authorised, registered, recognised or benefitting from an equivalence decision under the BMR? Cooperation with the competent authority of administrators of these benchmarks is envisaged. If the fallback benchmark is not BMR compliant, can the mandatory administrator provide for the necessary period of time to allow the fallback benchmark to become BMR compliant?
- e. Analysis of whether the cessation of the benchmark or its provision on the basis of input data or of a panel of contributors no longer representative of the underlying market or economic reality would have an adverse impact on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the EU. For this end reference can be made to points (a), (b) and (c) of Article 20(3) of BMR, as well as the detailed criteria specified in Commission Delegated (EU) 2018/64 for the impact of cessation on market integrity, financial stability, consumers, the real economy, or the financing of households⁷.
- f. Additional factors to be considered: legal risks involved in cessation, including contract frustration, and the accounting and tax implications for end-users of cessation of the critical benchmarks.
- g. Impact of the cessation on market infrastructures, notably CCPs, should also be taken into account.

⁷ COMMISSION DELEGATED REGULATION (EU) 2018/64:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0064>



Q10: Do you think that other criteria should be considered in relation to the cessation of the provision of a critical benchmark? Please specify.

6 Non-significant benchmarks (Article 26 BMR)

6.1 Background and legal basis

109. The BMR includes a proportionate regime depending on the usage of a benchmark in the EU. Thus, benchmarks are considered critical, significant or non-significant depending in particular on the total value of the financial contracts, instruments or investment funds referencing those benchmarks. Non-significant benchmarks are benchmarks that are used directly or indirectly within a combination of benchmarks as a reference for financial instruments or for financial contracts or for measuring the performance of investment funds having a total average value below EUR 50 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, over a period of six months and that do not meet the conditions for critical benchmarks in Article 20(1) of the BMR and the condition for significant benchmarks in Article 24(1)(b) of the BMR. Therefore, administrators of non-significant benchmarks are subject to a less demanding regime. In particular, Article 26(1) of BMR lists the requirements that administrators of non-significant benchmarks may choose not to apply. In case an administrator of non-significant benchmarks chooses not to apply one or more of the provisions listed in that Article, then it must publish a compliance statement explaining why it is appropriate not to comply with those provisions.
110. Pursuant to Article 26(4) of BMR, the relevant competent authority must review the compliance statement and may request additional information from the administrator in accordance with Article 41 of BMR and may require changes to ensure compliance with the BMR.
111. Article 5(8) of the ESAs' review states that "*ESMA shall develop draft regulatory technical standards to specify the criteria under which competent authorities may require changes to the compliance statement as referred to in paragraph 4 [of Article 26 of the BMR].*"
112. The provisions that administrators of non-significant benchmarks may not apply are the following:
- a. Article 4(2), points (c), (d) and (e) of Article 4(7) and Article 4(8) of BMR relating to the governance and conflict of interest requirements. An administrator of a non-significant benchmark may choose not to apply the requirement that the provision of the benchmark must be operationally separated from any part of the administrator's business that may create an actual or potential conflict of interest. In addition, it may choose not to apply certain requirements related to its employees and any other natural person whose services are placed at its disposal or under its control and who is directly involved in the provision of the benchmark. Those requirements are that the employees and natural persons concerned must (i) not have interests or business connections that compromise the administrator's activities, (ii) be prohibited from contributing to a benchmark determination by way of engaging in bids, offers and trades on a personal basis

or on behalf of market participants, except where such way of contribution is explicitly required as part of the benchmark methodology and is subject to specific rules therein, and (iii) be subject to effective procedures to control the exchange of information with other employees involved in activities that may create a risk of conflict of interest or with third parties, where that information may affect the benchmark. Finally, an administrator of non-significant benchmarks may choose not to establish specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, including sign-off by management before the dissemination of the benchmark.

- b. Article 5(2), (3) and (4) of BMR relating to the oversight function requirements. While administrators of non-significant benchmarks must establish an oversight function, they may be exempted from (i) developing and maintaining robust procedures regarding the oversight function, (ii) ensuring that the oversight function complies with the responsibilities mentioned in Article 5(3) of the BMR, and (iii) complying with the requirements related to the appropriate governance arrangements of the oversight function.
- c. Article 6(1), (3) and (5) of BMR relating to the control framework requirements. Administrators of non-significant benchmarks may be exempted from putting in place a control framework that ensures that their benchmarks are provided and published or made available in accordance with the BMR. Furthermore, such administrators are not required to include in their control framework (a) management of operational risk; (b) adequate and effective business continuity and disaster recovery plans; (c) contingency procedures that are in place in the event of a disruption to the process of the provision of the benchmark. Finally the control framework is not required to be documented, reviewed and updated.
- d. Article 7(2) of BMR relating to the accountability framework requirements. An administrator of non-significant benchmarks is not required to designate an internal function with the necessary capability to review and report on the administrator's compliance with the benchmark methodology and the BMR.
- e. Point (b) of Article 11(1), points (b) and (c) of Article 11(2) and Article 11(3) of BMR relating to input data. The input data is not required to be verifiable. An administrator of non-significant benchmarks is not required to include in its controls in respect of input data (i) a process for evaluating a contributor's input data and for stopping the contributor from providing further input data or applying other penalties for non-compliance against the contributor, and (ii) a process for validating input data. Finally, no obligation to obtain data from sources that corroborate the input data and no internal oversight or verification procedures are mandatory when input data is contributed from a front office function.

- f. Article 13(2) of BMR relating to the transparency of the methodology of the benchmark. While administrators of non-significant benchmarks are required to consult on any proposed material change of the methodology and establish corresponding procedures, they are not required to include in the procedures an advance notice of the consultation and make accessible after any consultation the responses to it.
- g. Article 14(2) of BMR relating to the reporting of infringements. While administrators of non-significant benchmarks are required to establish systems and effective controls to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark under MAR, they are not required to monitor the input data and contributors in order to be able to notify to the NCA any suspected misconduct.
- h. Article 15(2) of BMR relating to the code of conduct. While administrators of non-significant benchmarks which are based on input data from contributors are required to establish a code of conduct, they may be exempted from the minimum elements to be included in the code of conduct
- i. Article 16(2) and (3) of BMR relating to the governance and control requirements for supervised contributors. Where an administrator of non-significant benchmarks chooses not to comply with those requirements, supervised contributors to its non-significant benchmarks do not have to have in place systems and controls for input data which include the elements listed in Article 16(2) of BMR and policies guiding any use of judgement or exercise of discretion in case the input data relies on expert judgement.

6.2 Content of the draft RTS

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

Conflicts of interest

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

Oversight function

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

Control framework requirements

117. When an administrator decides to opt out from some of the control framework requirements, it should provide in the compliance statement an explanation regarding:
- a. its exposure to operational risk and if so whether it is correctly managed. for example, whether the calculation of the benchmarks requires to have in place a manual process and if so whether it is subject to adequate controls;
 - b. its exposure to the risk of business discontinuity, for example by stating its geographical location and the administrator's business continuity plan that would allow the provision of benchmark continuously and without disruption.

Accountability framework requirements

118. When an administrator decides to opt out from the accountability framework requirement regarding the designation of an internal function to review and report on its compliance with the benchmark methodology, it should state why it is appropriate for the administrator to opt out from this provision taking into account the complexity of the benchmark's methodology and the size of the administrator. For example, the administrator

could state that it has already put in place a process for reviewing the methodology by a person with no conflicts of interest and therefore do not need to establish an internal function.

Input data

119. When an administrator decides to opt out from some of the requirements on input data, it should state clearly the nature of the input data. In case the input data is provided by contributors, whether the input data is provided with a sufficient level of control.
120. In addition, the administrator should explain how the accuracy and integrity of input data is ensured and therefore that additional controls are not needed such as a process for validating the data. For example, if the input data is already subject to controls or to other regulations then this input data is accurate and does not require additional validation process.
121. An administrator that has decided to opt out from the requirement relating to the input data contributed from a front office function should clearly state whether the input data used is contributed from a front office function, and in this case whether appropriate verification procedures are in place to ensure the accuracy of the input data.

Transparency of the methodology

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

Contributors' requirements

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

Q11: Do you agree with the criteria under which competent authorities may require changes to the compliance statement? Please specify

Q12: Do you agree with the criteria under which competent authorities may require changes to the control framework requirements? Please specify

7 Annexes

7.1 Annex I - Summary of questions

Q1: Do you agree with the governance arrangements set above? Do you have any additional suggestions? Please specify.

Q2: Do you agree that administrators should have in place a remuneration framework?

Q3: Do you agree that the same requirements should apply to an administrator that is a natural person? Please elaborate.

Q4: Do you think that other conditions should be taken into account to ensure that the methodology complies with the requirements of the BMR? Please specify.

Q5: Do you consider that additional requirements are needed to ensure that the methodology is traceable and verifiable? Please specify.

Q6: Do you think that the back-testing requirements are appropriate? Please specify.

Q7: Do you agree with the requirements set out above? Do you have any additional suggestions? Please specify.

Q8: Do you agree with the systems suggested for the surveillance of market manipulation? In particular, do you think that an automated system should be required only when it appears to be adequate according to the nature, scale and complexity of the benchmark? Please specify.

Q9: Do you think that other criteria should be considered in relation to the transition of the provision of the critical benchmark to a new administrator? Please specify.

Q10: Do you think that other criteria should be considered in relation to the cessation of the provision of a critical benchmark? Please specify.

Q11: Do you agree with the criteria under which competent authorities may require changes to the compliance statement? Please specify

Q12: Do you agree with the criteria under which competent authorities may require changes to the control framework requirements? Please specify

7.2 Annex II - Draft technical standards

7.2.1 Governance arrangements

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the governance arrangements

(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 596/2014⁸, and in particular Article 4(9) thereof,

Whereas:

- (1) Article 4(1) of Regulation (EU) 2016/1011 requires administrators of benchmarks to have in place robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark.
- (2) Different organisational and ownership structures may influence an administrator's ability to provide benchmarks and to manage the risks inherent to this activity. Administrators should establish, implement and maintain an organisational structure which clearly and in a documented manner specifies decision-making procedures, reporting lines allocating unambiguously functions and responsibilities and ensuring accountability for all the decisions taken regarding the provision of benchmarks.
- (3) Robust governance arrangements imply to have in place robust procedures to manage the possible risk of conflicts of interest that may arise within the organisational structure of the administrator. It is important that the governance arrangements include processes to identify, address and manage potential conflicts of interest.
- (4) The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a person from being involved in the provision of the benchmark. The administrator should nevertheless identify any circumstance which may give rise to

⁸ OJ L 171, 29.6.2016, p. 1

a perceived conflict of interest or an actual conflicts of interest assess them and decide, where appropriate, on mitigating measures. The governance arrangements should facilitate the disclosure of any new circumstances which may give rise to a perceived conflict of interest or new actual conflicts of interest should be disclosed and the mitigating measures.

- (5) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators with respect to significant and non-significant benchmarks by allowing administrators of significant and non-significant benchmarks to opt out from some requirements regarding the organisational structure and in particular the remuneration framework.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) 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 1095/2010⁹,

HAS ADOPTED THIS REGULATION:

Article 1

Organisational structure

1. Administrators shall establish, implement and maintain an organisational structure which clearly and in a documented manner specifies decision-making procedures, reporting lines allocating unambiguously functions and responsibilities and ensuring accountability for all the decisions taken regarding the provision of benchmarks.
2. The procedures referred to in paragraph 1 shall include at least the following key components:
 - a. the composition, roles and responsibilities of the management body and related committees, if any;
 - b. the structure of the management body;
 - c. an organisational chart including the reporting lines of the different functions;
 - d. the appointment of the management body and its members;
 - e. the implementation of the management body's decisions.

⁹ 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).

3. Administrators of non-significant benchmarks may choose to omit the requirement in point (d) of paragraph 2.

4. Administrators shall ensure that, where persons perform multiple functions or are involved in various committees, such relevant persons are able to commit sufficient time to the responsibilities allocated to them and do not or is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally.

5. Administrators shall establish a remuneration framework to ensure that the remuneration of the persons involved in the provision of the benchmark is appropriately set and is not subject to conflicts of interest.

Article 2

Well-defined roles and responsibilities

1. The governance arrangements of administrators shall clearly state at least:

- a. the persons accountable for decisions that could have a significant impact on the provision of the benchmark in particular where tasks are subject to delegation;
- b. the persons responsible for the publication or disclosure of potential conflicts of interest pursuant to Article 4(5) of Regulation (EU) 2016/1011;
- c. the persons responsible for the establishment of specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark pursuant to Article 4(8) of Regulation (EU) 2016/1011;
- d. the persons involved in the identification and reporting of any circumstances which may give rise to conflicts of interest.

2. Administrators shall have adequate staff to meet their obligations under Regulation (EU) No 1011/2016. Administrators that are part of a group shall not share staff or function with other group entities, unless under the terms of a written outsourcing arrangement in accordance with Article 10 of Regulation (EU) No 1011/2016.

Article 3

Transparency

1. Administrators shall ensure that the relevant persons within the entity are aware of the responsibilities that are allocated to them and the procedures which must be followed for the proper discharge of these responsibilities.
2. The composition, role and responsibilities of the administrator's management body and any related committee should be clearly specified, well-documented and made available on request.

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 [date].

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

Done at Brussels,

For the Commission
The President
[...]

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

On behalf of the President
[...]
[Position]

7.2.2 Methodology

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the 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 596/2014¹⁰, and in particular Article 12(4) thereof,

Whereas:

- (1) Article 12(1) of Regulation (EU) 2016/1011 requires administrators of benchmarks to use a methodology that is robust and reliable, has clear rules identifying how and when discretion may be exercised in the determination of that benchmark, is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data, is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity, is traceable and verifiable.
- (2) A benchmark is calculated using a formula or some other methodology on the basis of underlying values. There exists a degree of discretion in constructing the formula, performing the necessary calculation and determining the input data which creates a risk of manipulation. This Regulation ensures that the methodology as defined by the administrator is sufficiently robust, reliable and when discretion is used an appropriate control system is in place.
- (3) Regulation (EU) 2016/1011 recognises that the construction of a methodology may embed discretion that is to be defined by each administrator. It is important that the methodology includes clear rules identifying how and when this discretion may be exercised and in particular whether discretion is based on an algorithm or pre-defined methodology. Furthermore, in which circumstances transaction data in the underlying market would be considered as not sufficient. The priority of use of input data should be as following: eligible transactions in the underlying market that a benchmark intends

¹⁰ OJ L 171, 29.6.2016, p. 1

to measure; not eligible transactions in the underlying market that the benchmark intends to measure; transaction data in related markets specifying which type of related markets are to be considered appropriate.

- (4) The availability of the benchmark in different market conditions is closely linked to the resilience of its methodology. Users of benchmarks need to have a continued availability of the benchmarks they reference for use in financial instruments in order to avoid any contract frustration that may rise from an outage or cessation of a benchmark. It is important that an administrator is able to construct a methodology that is resilient to different market conditions and a methodology that enables the calculation of the benchmark in the widest set of possible market circumstances.
- (5) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators with respect to non-significant benchmarks by allowing administrators of non-significant benchmarks to opt out from some requirements regarding the methodology and in particular on the results of the back-testing.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) 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 1095/2010¹¹,

HAS ADOPTED THIS REGULATION:

Article 1

Methodology is robust and reliable

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

1. is capable of representing the underlying market or economic reality that it seeks to measure and incorporates all factors including parameters and input data that are relevant to measure the underlying market;
2. is subject to an assessment of the relationship between the key assumptions used and the sensitivity of the benchmark computed by that methodology over time;
3. states the nature of the input data used in the methodology and uses transaction data where available.

¹¹ 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

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

1. In order to ensure that the methodology complies with point b) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that has clear rules identifying how and when discretion may be exercised in its determination, which include at least the following elements:
 - a. at which step of the calculation of the benchmark discretion is performed.
 - b. the methodology used for the determination of the expert judgement if any;
 - c. the input data to be taken into account when discretion is used;
 - d. in which circumstances transaction data in the underlying market would be considered as not sufficient and the use of transaction data in related markets is needed;
 - e. which type of related markets are to be considered appropriate, where relevant.

Article 3

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

1. In order to ensure that the methodology complies with point c) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that is rigorous and continuous that includes at least the following:
 - a. an assessment of the adequacy and appropriateness of the historical values of the benchmark produced by means of that methodology;
 - c. reliable inputs, including appropriate size of the data samples, if any.
2. In order to ensure that the methodology complies with point c) of Article 12(1) of Regulation (EU) 2016/1011, an administrator shall use a methodology for determining a benchmark that is capable of validation and that includes where appropriate at least the following:
 - a. an ex-post back-testing of the methodology against available transaction data.
 - b. the most appropriate historical time horizon for its back-testing programme;
 - c. clear statistical tests to assess the back-testing results;
 - d. documentation of the actions to be taken following the results of the back-testing that includes a process to identify and address systemic anomalies;
 - e. the back-testing frequency shall be identical to the frequency of the calculation of the benchmark

3. Administrators of non-significant benchmarks may opt out from the provision referred to in paragraph 2 point c) and d).

Article 4

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

1. In order to ensure that the methodology complies with point d) of Article 12(1) of Regulation (EU) 2016/1011, administrators shall use a methodology that is resilient by assessing the impact on the benchmark's methodology of various market conditions using historical data from realised stressed market conditions and hypothetical data for unrealised stressed market conditions.
2. In order to ensure that the methodology complies with point d) of Article 12(1) of Regulation (EU) 2016/1011, administrators shall use in the methodology parameters and assumptions to capture a variety of historical and hypothetical conditions, including the most volatile periods experienced by the markets and correlation between underlying assets.
3. Administrators shall document the action it would take following the assessment in paragraph 1.
4. Administrators of non-significant benchmarks may opt out from the provision referred to in 2.

Article 5

Methodology is traceable and verifiable

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

Article 6

Entry into force

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

It shall apply from [date].

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



Done at Brussels,

For the Commission
The President
[...]

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

On behalf of the President
[...]
[Position]

7.2.3 Reporting of infringements

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for reporting of infringements

(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 596/2014¹², and in particular Article 14(4) thereof,

Whereas:

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

(2) Pursuant to Article 3(1)(24) of Regulation (EU) 2016/1011, regulated data benchmark are already subject to regulation and supervision ensuring integrity and transparency of the input data. In reason of the more verifiable character of the input data used, administrators of regulated data benchmark are not subject to this Regulation. Similarly, pursuant to Article 19 of Regulation (EU) 2016/1011, commodity benchmarks which are not regulated data benchmark, or based on submission by contributors the majority of which is supervised entities, or critical benchmark whose underlying asset is gold silver or platinum, are subject to specific provisions provided for commodity benchmarks in Annex II of Regulation (EU) 2016/1011 which apply to such type of benchmarks instead of Title II of Regulation (EU) 2016/1011.

¹² OJ L 171, 29.6.2016, p. 1

(3) In order to ensure that the detection of benchmark manipulation is effective and appropriate, systems and controls should be proportionate to the scale, size and nature of the administrator.

(4) In order for systems and controls to be adequate and efficient, the administrator, should evaluate the likelihood and severity of the risk of manipulation by reference to the features of the benchmark, such as the level of volatility in the underlying market the benchmark seeks to measure, the vulnerability of the input data and the nature of the contributors. Risk should be evaluated on the basis of an objective assessment, by which it is established whether data processing of operations related to the benchmark provision involve a risk or a high risk. Such risk assessment should analyse the origin, nature, particularity and severity of the manipulation risk. The administrator should take into account the results of such assessment when determining the appropriate measures to be adopted in order to demonstrate that the processing of data complies with this Regulation.

(5) In order to ensure that the detection of the manipulation is effective automated system may appear to be necessary to monitor input data. Such system should provide for human analysis carried out by appropriately trained staff. The system for monitoring should be capable of producing alerts in line with predefined parameters in order to allow for further analysis to be conducted on potential benchmark manipulation.

(6) Once a reasonable suspicion that a benchmark manipulation has occurred, the relevant persons involved in the protection of data integrity should inform the oversight function of the administrator without undue delay. Where such notification is not made as soon as the reasonable suspicion of manipulation occurred, the reasons for the delay should accompany the notification and information may be provided in phases without undue further delay.

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

(8) There might be circumstances when a reasonable suspicion of manipulation is formed some time after the suspected activity occurred, due to subsequent events or available information. This should not be a reason for not reporting to the oversight function the suspected activity. In order to demonstrate compliance with the reporting requirements in those specific circumstances, the person submitting the report should be able to justify the time discrepancy between the occurrence of the suspected activity and the formation of the reasonable suspicion of manipulation or attempted manipulation.

(9) The communication of any manipulation should describe the manipulation occurred and any measures taken or which are proposed to be taken to limit the effects of the manipulation.

(10) Training of the staff members in charge of data surveillance is necessary to ensure staff ability to analyse as to whether or not a given data input is to be considered suspicious and initiate the procedures to alert the oversight function if necessary. Specific training should therefore be provided to staff members in charge of data surveillance, when they have not already the relevant skill. The programmes should reflect the need to ensure that dedicated staff are aware of the features of proper input data submission and of discrepancies in data potentially caused by manipulation or attempted manipulation and procedures to alert the oversight function in case of identification of suspicious input data. Effective training will need to be tailored to the administrator structure, system and size.

(11) The administrator should be required to demonstrate to the competent authorities compliance with the obligation set forth in this Regulation to establish adequate and effective arrangements, systems and procedures to ensure data integrity and detect potential manipulation for example, the outcome of the risk assessment, the consequent safeguards adopted and how the administrator ensures that the data surveillance team has the necessary skills to perform its tasks.

(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 1095/2010¹³,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation does not cover or apply to administrators of

- a. regulated-data benchmarks and
- b. commodity benchmarks unless the commodity benchmark in question is based on submission by contributors the majority of which are supervised entities, or a critical benchmark whose underlying asset is gold, silver or platinum.

¹³ 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

General Requirements

1. Administrators shall ensure adequate systems and effective procedures ensuring the integrity of input data for the purpose to detect and identify manipulation or attempted manipulation of the benchmark, which are
 - a. appropriate and proportionate in relation to the nature, scale and complexity of the benchmark provision;
 - b. regularly assessed, at least through an annual review, and updated when necessary to ensure they remain appropriate and effective;
 - c. clearly documented in writing, including any changes or updates to them and that the documented information is maintained for a period of five years.
2. Administrators shall, upon request, provide the competent authority with the information referred to in point (b) and (c) of this Article.

Article 3

Benchmark Manipulation Assessment

1. Administrators shall carry out an assessment of the risk of manipulation referring to the features of the benchmark.
2. The assessment shall contain at least:
 - a. a description of the envisaged processing operations to provide the benchmark;
 - b. a description of potential origin, nature, particularity and severity of manipulation risk of the benchmark; and
 - c. the measures envisaged to address the risk of manipulation, including safeguards, security measures and procedures that appear to be adequate considering the nature, scale and complexity of the benchmark provision.

Article 4

Adequate systems

1. Administrators shall, to a degree which is appropriate and proportionate in relation to nature, scale and complexity of the benchmark provision, employ systems and have in place procedures which assist the prevention and detection of the benchmark manipulation.
2. The systems and procedures referred to in the first subparagraph shall include, where appropriate, software capable of deferred automated reading, replaying and analysis of data.

3. Administrators shall put in place and maintain arrangements and procedures that ensure an appropriate level of human analysis in the monitoring, detection and identification of potential benchmark manipulation.
4. Administrators can delegate the performance of data analysis and the generation of alerts necessary to conduct monitoring detection and identification of behaviours that could constitute manipulation to a third party ('provider'). The administrator delegating those functions shall remain fully responsible for discharging these obligations under this Regulation and shall comply at all times with the following conditions:
 - a. it shall retain the expertise and resources necessary for evaluating the quality of the services provided and the organisational adequacy of the providers, for supervising the delegated services and for the management of the risks associated with the delegation of those functions on ongoing basis;
 - b. it shall have direct access to all the relevant information regarding the data analysis and the generation of alerts.
 - c. the written agreement shall contain the description of the rights and obligations of the person delegating the functions and those of the provider. It shall also set out the grounds that allow the person delegating the functions to terminate such agreement.

Article 5

Reporting to oversight function

1. In the case a reasonable suspicion that a benchmark manipulation has occurred, the staff involved in the protection of data integrity shall without undue delay, notify the potential breach to the person in charge of the oversight function competent in accordance with the administrator policy to receive such notification. Where the notification to the oversight function is not made as soon as a reasonable suspicion that a benchmark manipulation has occurred, it shall be accompanied by reasons for the delay.
2. The notification referred to in paragraph 1 shall at least:
 - a. describe the nature of the data integrity breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of data records concerned;
 - b. communicate the name and contact details of the person who detected the potential manipulation or other contact point where more information can be obtained;
 - c. describe the likely consequences of the manipulation;
 - d. describe the measures taken or proposed to be taken by the relevant person within the administrator to address the manipulation, including, where appropriate, measures to mitigate its possible adverse effects.
3. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.

4. The oversight function shall document any manipulation report, comprising the facts relating to the data integrity breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

Article 6

Training

1. Administrators shall organise and provide effective and comprehensive training to the staff involved in the protection of data integrity to ensure its ability to
 - a. detect and identify any suspicious data that could be the result of benchmark manipulation or attempted manipulation; and
 - b. promptly report to the oversight function potential manipulation.
2. Such training shall take place on a regular basis and shall be appropriate and proportionate in relation to the nature scale and complexity of the provision of the benchmark.

Article 7

Data integrity policy

1. Administrators shall adopt a data integrity policy containing:
 - a. the assessment of benchmark manipulation risk described under Article 3 of this Regulation;
 - b. a general description of systems and procedure adopted by the administrator to ensure the integrity of input data in order to be able to identify and report to the competent authority any conduct that may involve manipulation or attempted manipulation of the benchmark and an explanation of why they appear to be adequate and effective in respect to the risk assessed;
 - c. a general description of training for the staff involved in the protection of data integrity and detection of benchmark manipulation described under Article 6 of this Regulation; and
 - d. the name and contact details of person responsible for the controls described in this Regulation.
2. Where administrators already provided the competent authority with such information, a mere indications of where such information can be found may be considered sufficient.

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 [date].

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

Done at Brussels,

For the Commission

The President

[...]

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

On behalf of the President

[...]

[Position]

7.2.4 Mandatory administration of a critical benchmark

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the mandatory administration of a critical benchmark

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014¹⁴, and in particular Article 21(5) thereof,

Whereas:

- (1) In view of the general nature of the assessment referred to in Article 21(2)(b) of Regulation (EU) 2016/1011 and the need to ensure a consistent application by competent authorities of such provision, it is appropriate to specify on which criteria competent authorities should base their assessments under Article 21(2)(b) of Regulation (EU) 2016/1011.
- (2) Because competent authorities of critical benchmarks should assess how the benchmark is to be transitioned to a new administrator or be ceased to be provided, these technical standards define two sets of criteria to be considered by competent authorities, depending on whether they are assessing either how the benchmark is to be transitioned to a new administrator or be ceased to be provided.
- (3) In the case of assessing how the benchmark is to be transitioned to a new administrator, the competent authority should be satisfied that the proposed administrator is able to ensure the continuity of the provision of the critical benchmark in a way that EU supervised entities can continue to use such critical benchmark without interruption and in compliance with BMR. The criteria detailed in these regulatory technical standards provide the competent authority with the elements to be considered to analyse if this is the case.

¹⁴ OJ L 171, 29.6.2016, p. 1

- (4) If the proposed new administrator is supervised in a Member State different from the one of the competent authority producing the assessment, the competent authority should determine whether exchanges of information with the relevant competent authority of the proposed administrator are needed to produce the assessment and, if so, which information are needed.
- (5) The criteria included in these regulatory technical standards in relation to the assessment on how the benchmark is to be ceased to be provided further specify how competent authority should take into account the procedure established by the administrator of the critical benchmarks in accordance with Article 28(1) Regulation (EU) 2016/1011, as well as other criteria to assess whether the critical benchmark can be ceased to be provided in an orderly fashion.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) 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 1095/2010¹⁵,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation covers or applies to competent authorities of administrators of critical benchmarks.

Article 2

Criteria for assessment on transition to a new administrator

1. A competent authority shall, for the purpose of point (b) of Article 21(2) of Regulation (EU) 2016/1011, base its assessment of how the benchmark is to be transitioned to a new administrator at least on the following criteria:
 - a. whether the new administrator proposed by the assessment of the current administrator:
 - i. is located in the same Member State of the current administrator; if it is located in a different Member State, the competent authority shall determine whether the supervision of the critical benchmark would be ensured throughout the transition to the new administrator;

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

- ii. is a supervised entity and, if so, for which activities it is supervised, and if conflict of interest with existing activities of the proposed administrator could take place;
 - iii. is a user of the benchmark and, if so, whether there are plans to mitigate the conflict of interest;
 - iv. is authorised or registered under Article 34. In case the proposed administrator is authorised, the competent authority shall be satisfied that the administrator has all internal arrangements ready for the provision of a critical benchmark before the transition takes place. In case the proposed administrator is not authorised, the competent authority shall be satisfied that the administrator can be authorised and has all internal arrangements ready for the provision of a critical benchmark before the transition takes place;
 - v. already provides benchmarks, and whether these benchmarks are critical, significant, non-significant, commodity or interest rate benchmarks.
- b. whether the current administrator of the critical benchmark engaged or informed contributors, if any, users and other stakeholders about the possible transition of the critical benchmark to a new administrator.
- c. the way in which the new administrator intends to calculate the benchmarks, and whether any of the following procedures of the critical benchmark are intended to be amended by the new administrator and, if so, how they would comply with BMR: the methodology (including quality of input data), contingency computation methodology, policies for handling data errors, republication policy, transparency policy, review of methodology, code of conduct.
- d. whether the new administrator will have access to the same input data as the previous administrator.
- e. if there is a panel, how the proposed administrator intends to fulfil point (d) of Article 11(1) of Regulation (EU) 2016/1011 and whether the current panellists will accept to be part of a panel managed by the proposed administrator.
- f. the way in which the new administrator intends to publish the critical benchmark: standard daily publication arrangements, frequency, website, accessibility (whether upon payment of a fee or free of charge);
- g. whether a detailed plan for the switch date has been produced, and if so whether it deals with all possible contractual issues stemming from the change of administrator.
- h. legal risks involved in the transition, including risk of contract frustration, and the accounting and tax implications of the critical benchmark being provided by a new administrator.

- i. impact of the transition to a new administrator on market infrastructures, including clearing houses.

Article 3

Assessment on cessation of provision

1. A competent authority shall, for the purpose of point (b) of Article 21(2) of Regulation (EU) 2016/1011, take into account at least the following criteria when assessing how the benchmark is to be ceased to be provided:
 - a. the effectiveness of the procedure established by the administrator according to BMR Article 28(1), including:
 - i. whether its content precisely defines the actions and steps to be taken to cease the provision of the critical benchmark in an orderly fashion;
 - ii. whether the authority considers the plan a viable plan under the circumstances in which Article 21 has been triggered; and
 - iii. when the procedure was produced and last updated.
 - b. the appropriateness of the procedure established by the administrator according to BMR Article 28(1). For this end the competent authority may consider also the following criteria:
 - i. the volume and value of financial instruments and financial contracts referencing the critical benchmark, and of investment funds using the critical benchmark for measuring their performance;
 - ii. the term, duration, maturity or expiry date of any financial instruments, financial contracts and other documents entered into for a purpose set out at Article 3(1)(7)(e) of Regulation (EU) 2016/1011 and which refer to the critical benchmark. Taking account of this: whether the benchmark will continue to be provided for use by these existing users for an appropriate period of time, and whether the procedure provides for such changes to the benchmark (including but not limited to changes to its input data, contributors or methodology) as may be necessary to ensure the critical benchmark is reliable and representative of the underlying market or economic reality throughout this period;
 - iii. the likelihood that any such financial instrument, financial contract or other document entered into for a purpose set out at Article 3(1)(7)(e) of Regulation (EU) 2016/1011, would be frustrated in the event of the cessation of the critical benchmark; and
 - iv. the availability of appropriate alternatives to the critical benchmark and the level of preparedness of users of the critical benchmark for the cessation of the critical benchmark.

- c. to the extent that such details are available to the competent authority, the application of Article 28(2) of Regulation (EU) 2016/1011 by supervised entities using the critical benchmark, considering whether:
- i. the written plans nominate alternative benchmarks that could be referenced to substitute the critical benchmark no longer provided and, if so, whether they nominate the same or different alternative benchmarks;
 - ii. whether the same alternative benchmark has been adopted in different asset classes;
 - iii. whether the trigger events included in the written plans are homogenous among the plans produced by supervised entities using the critical benchmark.
- d. if one or several alternative benchmarks are known by the competent authority to be nominated in the written plans required by Article 28(2) of Regulation (EU) 2016/1011, whether the administrators of such benchmarks are authorised or registered. If this is not the case, the authority shall assess whether the alternative benchmarks can be subject to authorisation or registration and, if so, whether a period of mandatory administration is necessary to allow for authorisation or registration.
- e. analysis of whether the cessation of the benchmark would have an adverse impact on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the EU. For this end reference shall be made to points (a), (b) and (c) of Article 20(3) of Regulation (EU) 2016/1011, as well as the criteria specified in Commission Delegated (EU) 2018/64 for the impact of cessation on market integrity, financial stability, consumers, the real economy, or the financing of households.
- f. analysis of whether the cessation of the benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund, which references the critical benchmark. For this end reference shall be made to the criteria specified in Commission Delegated Regulation (EU) 2018/67.
- g. the dynamics of the market or economic reality the critical benchmark intends to measure and whether there exists input data of quality and quantity sufficient to represent the underlying economic reality with precision. Where this is not the case, consideration shall be given to whether there is merit in the use of alternative input data, and if necessary an alternative methodology, to facilitate cessation of the critical benchmark in an orderly fashion.
- h. legal risks involved in the transition, including risk of contract frustration, and the accounting and tax implications of the critical benchmark no longer being provided.
- e. Impact of the cessation of the critical benchmarks on market infrastructures, including clearing houses.

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 [date]

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

Done at Brussels,

For the Commission

The President

[...]

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

On behalf of the President

[...]

[Position]

7.2.5 Non-significant benchmarks

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014¹⁶, and in particular Article 26(6) thereof,

Whereas:

- (1) Article 26(4) of Regulation (EU) 2016/1011 requires the relevant competent authority to review the compliance statement published by an administrator of non-significant benchmarks and enables the competent authority to request additional information from the administrator and to require changes to ensure compliance with Regulation (EU) 2016/1011.
- (2) The criteria that a competent authority is required to consider should take into account the nature of the provisions under Regulation (EU) 2016/1011 that administrators of non-significant benchmarks may choose not to apply. These requirements could be either considered at the level of the administrator, for example the organisational structure. Or, at the level of the benchmark or family of benchmarks such as the methodology and input data requirements.
- (3) When taking into account the criteria on the control framework, competent authorities should consider for the exposure to operational risk whether the calculation of the benchmarks require manual processes and if so whether those are subject to adequate controls. For the business continuity risk, whether the geographical location and the administrator's contingency plans allow the provision of benchmark continuously and without disruption.

¹⁶ OJ L 171, 29.6.2016, p. 1

- (4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (5) 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 1095/2010¹⁷,

HAS ADOPTED THIS REGULATION:

Article 1

Criteria at the level of the administrator

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

1. the organisational structure of the administrator and the potential conflicts of interest that may arise as a result of its internal structure;
2. the identification and management of the potential conflicts of interest related to the employees of the administrator and the persons involved in the provision of benchmarks;
3. the process of oversight of the provision of the benchmarks taking into account the vulnerability of the benchmark and the size of the administrator;
4. the control framework for the provision and publication of benchmarks including the administrator's exposure to operational risk or business continuity risk.

Article 2

Criteria at the level of the benchmark

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

1. the level of control related to the provision of the input data is sufficient to ensure the accuracy and integrity of input data taking into account the nature of the input data;

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

2. the code of conduct includes elements to safeguard the integrity of the input data provided taking into account the nature of the input data;
3. the process for reviewing the methodology taking into account the complexity of the methodology and nature of input data of the benchmarks provided and whether the designation of an internal function to that purpose is needed;
4. the transparency of the procedures for consulting on any material change of the methodology taking into account the complexity of the methodology and nature of input data of the benchmarks provided;
5. a supervised contributor contributes input data to the administrator with appropriate systems, controls, and policies to ensure the accuracy, integrity and reliability of input data taking into account the nature of the input data;
6. an explanation of the reporting of infringements process of the administrator and whether the monitoring of input data and contributors is relevant.

Article 3

Entry into force

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

It shall apply from [date].

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

Done at Brussels,

For the Commission
The President
[...]

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

On behalf of the President
[...]
[Position]

7.3 Annex III - Preliminary high-level Cost Benefit Analysis

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

ESMA is mandated by Article 5(2) of the ESAs' review to develop draft regulatory technical standards to specify the requirements to ensure that the governance arrangements referred to in Article 4(1) of the BMR are sufficiently robust. ESMA proposes requirements for the clear organisational structure and with well-defined and transparent roles and responsibilities for all persons involved in the provision of a benchmark. The procedures proposed are the minimum expected, allowing for proportionality depending on the size and nature of the benchmark.

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

	<p>useful tool for administrators in order to define the governance structure appropriate to their benchmarks. Thereby administrators should be able to gain direct benefit from the implementation of the proposed draft standards. Without this draft standards of appropriate governance arrangements there is a risk that administrators would apply Article 4(1) of the BMR in significantly diverging ways.</p> <p>Investors and consumers should also benefit from the proposed draft standards, because it allows administrators to establish appropriate governance arrangements which will enhance the integrity of the benchmarks and will therefore directly benefit the ultimate users.</p>
<p><i>Costs</i></p>	<p>Potential additional costs will be borne by administrators only.</p> <p>Specific costs for administrators could arise from the proposed draft standards that sets out procedures governing the organisational structure. The draft standards specifies further Article 4(1) BMR that requires administrators to develop and maintain robust governance arrangements, and the proposed standards identifies some elements to be included. In particular, those relating to the management body structure and composition and the ones requiring the administrator to create new policies could incur costs at the administrator level as they may have to adapt existing structures to the new requirements, although these would likely be one-off costs and are not expected to be material.</p> <p>There can be detrimental effects on benchmarks users as administrators would likely pass on costs to the users through increased license fees.</p>

Section 2: Draft regulatory technical standards for the methodology

ESMA is mandated by Article 5(3) of the ESAs' review to develop draft regulatory technical standards to specify the conditions to ensure that the methodology referred to in Article 12(1) of the BMR complies with points (a) to (e) of that paragraph. ESMA proposes conditions to ensure that the methodology (i) is robust and reliable, (ii) includes clear rules identifying how and when discretion may be exercised, (iii) is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data, (iv) is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity and (v) is traceable and verifiable.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The proposed approach for ensuring that the methodology complies with the requirements of Article 12(1) of the BMR would promote a consistent methodological framework across different administrators of benchmarks to the benefit of users.</p> <p>The different conditions that the methodology would need to comply with aim at strengthening the reliability of the benchmark through ensuring the robustness and reliability of the methodology used to calculate the benchmark and thus reducing the opportunity to its manipulation.</p> <p>Further, other conditions aim at ensuring the continuous calculation of the benchmark in the widest set of possible circumstances limiting the risk of discontinuation or cessation of a benchmark and also mitigates the specific risk of conflicts of interest that arises when discretion is used.</p>
<i>Costs</i>	<p>Potential costs arising from these draft technical standards will be borne by administrators.</p> <p>The incremental costs stemming from the proposed approach in relation to the methodology are not expected to be significant. Indeed, the draft regulatory technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the methodology that an administrator should use for determining a benchmark.</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 classification of the benchmark as significant or non-significant. For example, administrators of non-significant benchmarks have the possibility to opt out from some back-testing requirements.</p>

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

ESMA is mandated by Article 5(4) of the ESAs' review to develop draft regulatory technical standards to specify the characteristics of the systems and controls referred to in Article 14(1) of the BMR. ESMA proposes certain characteristics for the systems and controls to ensure the integrity of input data in order to be able to identify to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark under Regulation (EU) No 596/2014.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The proposed approach for the characteristics for the systems and controls to ensure the integrity of input data in order to be able to identify to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark would promote a consistent reporting of infringements framework across different administrators of benchmarks to the benefit of users.</p> <p>The different systems and controls to ensure the integrity of 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 reporting to the competent authority of any conduct that may involve manipulation or attempted manipulation of a benchmark will ensure the robustness of benchmarks provided in the market to the benefit of users.</p>
<i>Costs</i>	<p>Potential costs arising from these draft technical standards will be borne by administrators.</p> <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 14 of the BMR, and therefore the main source of costs is the text of the BMR.</p> <p>Second, administrators already have established systems in relation to the integrity of input data, and therefore the additional costs should be limited and focused on the adjustment of the already existing systems to the requirements of the RTS.</p>

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

Article 5(6)(b) of the ESAs’ review adds to Article 21 of BMR, Mandatory administration of a critical benchmark, a new paragraph 5 stating that: “ESMA shall develop draft regulatory technical standards to specify the criteria on which the assessment referred to in point (b) of paragraph 2 (of Article 21 of BMR) is to be based.”

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

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

	authority should consider, but do not enlarge the scope of the assessment.
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Section 5: Draft regulatory technical standards for the non-significant benchmarks

ESMA is mandated by Article 5(8) of the ESAs' review to develop draft regulatory technical standards to specify the criteria under which competent authorities may require changes to the compliance statement as referred to in Article 26(4) of the BMR. Competent authorities should take into account the criteria set in this draft RTS when assessing whether changes to the compliance statement should be required.

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

	<p>significant benchmarks, however this additional cost burden or cost for administrators should be minimum as administrators should already have such information at their disposal.</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 review the compliance statement under Article 26(4). The draft RTS merely further specify that provision.</p>
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