

Discussion Paper

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:

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

ESMA will consider all comments received by 31 March 2016.

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

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Who should read this paper

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

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1 Executive Summary

Reasons for publication

The European Commission originally proposed draft Regulation on indices used as benchmarks in financial instruments and financial contracts¹ (Benchmarks Regulation) in September 2013 in the wake of the alleged manipulation of various benchmarks.

On 24 November 2015, the European Parliament and the Council reached a preliminary political agreement² on a compromise text of the Benchmarks Regulation, an agreement that was confirmed on 9 December 2015 by the Permanent Representatives Committee of the Council of the European Union³. The European Parliament has not yet voted on the text.

This Discussion Paper (DP) is based on the version of the Benchmarks Regulation⁴ following such agreement and seeks the views of interested parties on ESMA's policy orientations and initial proposals for the potential Level 2 measures under the Benchmarks Regulation. These measures should take the form of delegated acts of the Commission and ESMA draft technical standards. However, it should be noted that the Benchmarks Regulation has not yet been published in the Official Journal of the European Union (OJ).

Contents

This DP is organised in thirteen chapters, reflecting the topics of the Benchmarks Regulation for which Level 2 measures are envisaged. Each chapter summarises the relevant provisions and their objectives, provides an explanation of the related policy issues and discusses and / or proposes policy options. For each issue, the DP describes the orientations ESMA is envisaging and / or poses questions on aspects where views of stakeholders are considered to be helpful for the final decision making.

On 11 February 2016 ESMA received a request from the European Commission for technical advice on possible delegated acts⁵. The technical advice should be delivered within four months after the entry into force of the Regulation. This DP covers also the topics that will be included in the technical advice.

According to the Benchmarks Regulation, some of the ESMA technical standards will not be applicable to a subset of benchmarks, namely the non-significant benchmarks. In relation to these provisions, the Benchmarks Regulation provides that ESMA may issue

¹ The press release of the European Commission on the proposal:

http://europa.eu/rapid/press-release_IP-13-841_en.htm?locale=en

² See Commission statement : http://europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm?locale=en

³ See Council statement:

http://www.consilium.europa.eu/press-releases-pdf/2015/12/40802206220_en_635852608200000000.pdf

⁴ The text is publicly available: <http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf>

⁵ The mandate for the technical advice is publicly available: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf

guidelines specifying how such provisions could be applied in the context of non-significant benchmarks⁶. Because the content of the relevant technical standards is not defined yet, this DP is not elaborating on the possible content of the guidelines.

Next Steps

The text of the Benchmarks Regulation⁷ on which this DP is based mandates ESMA to submit draft technical standards to the European Commission within 12 months of the entry into force of the Benchmarks Regulation, while the technical advice should be delivered within four months after the entry into force of the Regulation. However, the exact date of the entry into force is still unknown as the Benchmarks Regulation has not yet been published in the OJ.

ESMA will analyse the responses to this DP in Q2 2016 and on the basis of the relevant input, it plans to publish a Consultation Paper later in 2016.

ESMA will hold an open hearing on this DP. The hearing will take place on 29 February 2016 in Paris and registration for the hearing will be available in the relevant section of the ESMA website in due course.

⁶ The Technical Standards under Articles 5a, 7, 7b, 11 of the Benchmarks Regulation will not apply to non-significant benchmarks. The same Articles foresee that ESMA may develop guidelines concerning only non-significant benchmarks and specifying how the elements of the Technical Standards would apply this specific category of benchmark.

⁷ The text is publicly available: <http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf>

2 Definitions (Article 3 BMR)

2.1 Extract from the Commission's request for advice

ESMA is invited to provide technical advice on how to specify what constitutes making available to the public for the purposes of the definition of an index, taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying what constitutes administering the arrangements for determining a benchmark taking into account different existing business practices.

ESMA is invited to provide technical advice on specifying what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark.

2.2 General remarks

1. Article 3⁸ provides a list of definitions which are pertinent to the Benchmark Regulation (BMR). In the context of the new benchmarks discipline, the appropriateness of definitions is particularly important as in many cases these are provided for the first time and contribute to setting the perimeter for the scope of the BMR.
2. Paragraph 2 of Article 3 of the BMR empowers the Commission to adopt delegated acts to further specify the technical elements of the definitions, taking into account the market or technological developments and the international convergence of supervisory practice in relation to benchmarks. In addition, there is explicit reference in the L1 text to the specification of '*what constitutes making available to the public for the purpose of the definition of an index*' in the empowerment to the Commission which will have to be covered by ESMA in its technical advice (see following section).

2.3 Specification of what constitutes making available to the public for the purpose of the definition of an index

3. A 'benchmark' is any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or defining the asset allocation of a portfolio or computing the performance fees.
4. In turn, an 'index' is defined as any figure:

⁸ The numbering of the Articles referred to in the DP reflects the text of the political agreement reached between the European Parliament and the Council as adopted by COREPER:

- that is published or made available to the public;
 - that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and
 - where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.
5. Given the two-layer definition of 'benchmark', it is possible to derive that an index presenting the three characteristics listed in the previous paragraph but which is not referenced in financial instruments and/or financial contracts and/or investment funds does not qualify as a benchmark and is thus out of the scope of the BMR. At the same time, it is possible to draw from the interlinked definitions that, although an index is referenced in financial instruments and/or financial contracts and/or investment funds, it does not qualify as a benchmark if it is not published or made available to the public or if it is not regularly determined. Against this background, ESMA understands that the technical advice that will elaborate on '*what constitutes making available to the public*' should be with sole reference to those indices that are effectively used as a reference in financial instruments and/or financial contracts and/or investment funds, which represent a subset of all indices⁹.
6. In relation to what constitutes making available to the public for the purpose of the definition of an index, ESMA considered existing EU legislation and found some precedents in Directive 2007/16/EC¹⁰ implementing Directive 2009/65/EC (the UCITS Directive) as regards the clarification of certain definitions, as well as in the Guidelines for competent authorities and UCITS management companies on ETFs and other UCITS issues¹¹ (ESMA/2014/937).
7. Directive 2007/16/EC specifies the conditions that are to be fulfilled for the purpose of the UCITS investments in financial indices. The investment of UCITS in derivatives on financial indices is permitted where, *inter alia*, the financial index is published in an appropriate manner, which entails that the publication process relies on sound procedures to collect prices and to calculate and to subsequently publish the index value, including pricing procedures for components where a market price is not available (see Article 9(1) (c), of Directive 2007/16/EC).
8. In the case of UCITS replicating the composition of an index, Directive 2007/16/EC requires that the financial index is accessible to the public (see Article 50(1)(g), of Directive 2007/16/EC).

⁹ For this reason in the remainder of the discussion paper, 'benchmark' is preferentially used instead of 'index', also in the case reference is made to indices provided by entities that have not been authorised /registered yet or in the case reference is made to pre-existing indices already used as benchmarks, in the meaning of the Regulation, at the time of entry into force of the BMR,..

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:079:0011:0019:EN:PDF>

¹¹ http://www.esma.europa.eu/system/files/esma-2014-0011-01-00_en_0.pdf

9. The ESMA Guidelines on ETFs and other UCITS issues provide further guidance on these criteria. In particular, according to paragraphs 56 and 57 of the Guidelines, UCITS should not invest in financial indices for which the full calculation methodology is not disclosed by the index provider and for which the inherent information is not easily accessible, free of charge, by investors and prospective investors (for example, via the internet), along with information on the performance of the index.
10. The rationale behind the rules summarised above is to limit the scope of investment of a UCITS, for investor protection purposes.
11. Conversely, in the BMR context - as it appears from the definition in Article 3 and from the way the mandate for the adoption of delegated acts is framed (see above) - the condition that information on an index is publicly available represents a distinctive feature of the definition of index, rather than a requisite imposed on an index once it falls in the scope of the Regulation. In other words, the scope of application of the BMR is determined also by the way the element of "making available to the public" will be further specified by the Commission delegated acts.
12. Therefore, ESMA is of the view that an exercise of identification of precise and strict conditions for the wider diffusion of an index neither would conform to the empowerment nor it would be useful for the purpose of contributing to setting the scope of BMR, as it could entail the risk of narrowing down the number of benchmarks in scope. Great attention should rather be devoted to mapping the publication channels and modalities of making available to the public of existing benchmarks, in order to determine the characteristics that could be taken into consideration when establishing whether an index is to be considered as made available to the public.
13. According to current market practices some benchmarks are made available to the general public, some are made available only upon subscription, and others are intended to be provided for mere informative purposes but they are nevertheless used as reference in financial instruments. They may be made publicly available either by the administrator itself or through a third party.
14. Besides, it needs to be clarified that the characteristics of publication that are addressed in the definition of an index, and thus of a benchmark, is solely pertinent to the values of the index. Other aspects concerned with the calculation - like the input data, the composition of the panel, or any use of discretion in the calculation - represent elements of a benchmark methodology and, as such, are subject to separate transparency requirements under the BMR.
15. The technical advice to be provided to the Commission should identify some broad characteristics of publication for benchmarks, in order for these to be considered in scope. The technical advice could at least address the area of the channels to be used, taking into account the costs for getting the information as well as the ease of access to the information and the reliability of the publication process (i.e. frequency, contingency plans in case of problems with the channels for diffusion, etc.).

16. Furthermore, the advice could elaborate on the recipients of the values of the index, as these may be provided either to the general public or a restricted group (e.g. the subscribers). On this second aspect, it has to be considered that part of the provisions in the BMR mandate supervised entities to make use only of benchmarks (indices that are referenced in financial instruments and/or financial contracts and/or investment funds) provided by licensed administrators and in compliance with the relevant rules. In order to identify who a 'user' is, within the meaning of the BMR, reference has to be made to the definition of 'use of a benchmark', which means (Article 3 of the BMR):

- issuance of a financial instrument which references an index or a combination of indices,
- determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices,
- being party to a financial contract which references an index or a combination of indices,
- providing a borrowing rate as defined in point j in Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party,
- determination of the performance of an investment fund through an index or a combination of indices for the purposes of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees.

17. In contrast, and also as Recital 3a appears to suggest, the mere holding of financial instruments referencing a certain benchmark does not amount to use of a benchmark for the purpose of the BMR. In other words, final investors do not qualify as users of benchmarks within the meaning of the BMR.

18. For this reason, an index may be deemed as 'made available to the public' also in the case of a limited diffusion to supervised entities¹² that make use of that index/benchmark in the meaning of the Regulation, as above quoted, and even in the case where the values of the index/benchmark are made available to those users upon the payment of a fee.

19. The above conclusion appears to be backed also by Recital 11 of the BMR that, for indices used in the asset management sector, it states "[...] *Some of these benchmarks are published and others are made available, for free or on payment of a fee, to the public or a section of the public and their manipulation may adversely affect investors. This Regulation should therefore cover indices or reference rates that are used to measure the performance of an investment fund*".

¹² See definition of supervised entities in point 14 of Article 3(1) of the BMR.

20. ESMA's proposition appears to be consistent with the main aim of the Regulation, as expressed in Recital 8, stating that: "*The scope of this Regulation should be as broad as necessary to create a preventive regulatory framework.*" based on the consideration that "...*benchmarks that are currently not widely used may be so used in the future, so that, in their regard, even a minor manipulation may have significant impact*". This is also in line with the text included in the request of technical advice by the Commission.

Q1: Do you agree that an index's characteristic of being “made available to the public” should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?

Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?

2.4 Specification of what constitutes administering the arrangements for determining a benchmark

21. Under Article 3, paragraph 1, point (3), the 'provision of a benchmark' is defined as:

- (a) administering the arrangements for determining a benchmark;
- (b) collecting, analysing or processing input data for the purpose of determining a benchmark; and
- (c) determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose.

22. This should be read in conjunction with Recital 14 of the BMR, stating that: "An administrator is the natural or legal person that has control over the provision of a benchmark, in particular administers the arrangements for determining the benchmark, collects and analyses the input data, determines the benchmark and either directly publishes the benchmark or outsources the publication or the calculation of the benchmark to a third party".

23. The European Commission has asked ESMA to specify "what constitutes administering the arrangements for determining a benchmark taking into account different existing business practices".

24. Recital 34 states that the Regulation should take into account the Principles for Financial Benchmarks of July 2013¹³ ("IOSCO Principles") and acknowledges them as a global standard for regulatory requirements for benchmarks. When elaborating on the concept of administering the arrangements for determining a benchmark, ESMA believes that it can be helpful to consider the requirements for administrators the IOSCO Principles have established. In this respect, Principle 2 states that the administrator "should retain primary responsibility for all aspects of the Benchmark determination process" and that the administrator should remain responsible for the integrity of a benchmark.¹⁴

25. In the IOSCO Principles, the overall responsibility of the administrator extends to aspects of development, determination and dissemination, operation and governance. While the actual determination and the operation are covered by the letters (b) and (c) of Article 3(1) point 3 of the BMR, the remaining aspects – most notably the development of the methodology and the establishment of governance arrangements, including oversight and accountability - should in ESMA's view be the core of administering the arrangements for determining a benchmark as set forth in letter (a) of Article 3(1) point 3.

Q3: Do you agree with ESMA's proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator? Which other characteristics/activities would you regard as covered by Article 3(1) point 3(a)?

2.5 Specification of what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark

26. The definition for 'use of a benchmark' that is provided under Article 3(1)(5) is the following:

- (a) issuance of a financial instrument which references an index or a combination of indices;
- (b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;
- (c) being party to a financial contract which references an index or a combination of indices;
- (ca) providing a borrowing rate as defined in point j in Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party,

¹³ Available here: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>

¹⁴ See IOSCO Principles page 9.

- (d) determination of the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees.
27. In the request of technical advice by the Commission, ESMA is asked to specify what constitutes the issuance of a financial instrument for the purpose of defining use of a benchmark. The definition is relevant in the context of the new regulatory framework, as it perimeters the scope for those provisions, within the Regulation, that address the use of benchmarks by supervised entities in the performance of their core regulated activity.
28. "Financial instrument" is defined in Article 3(1), point (13), of the BMR as any instrument listed in Section C of Annex I to MiFID II (Directive 2014/65/EU¹⁵) that is traded on a trading venue or systematic internaliser or for which a request for admission to trading on a trading venue has been made.
29. While issuers of financial instruments are addressed by a variety of Union legislative acts and are for example defined as "a legal entity which issues or proposes to issue securities"¹⁶ or as "natural person, or a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market.[...]"¹⁷ there is no generic definition of issuance. For the purposes of Article 3(1)(5)(a) of the BMR ESMA believes that the concept of issuance of financial instruments should not be limited to securities and should extent to financial instruments that are created for trading also in execution or trading venues other than regulated markets.
30. It should instead more generally cover the act of creating a financial instrument which references an index or a combination of indices (mainly bonds, derivatives and investment funds as further explored in Chapter 8 of the Discussion Paper) for the purpose of offering such instruments to third parties or of entering into reciprocal contracts with third parties, with the aim to seek financial resources or other aims (e.g. seeking coverage for the risk to which a natural person/legal entity is exposed to).

Q4: Do you agree with ESMA's proposal for a definition of issuance of a financial instrument? Are there additional aspects that this definition should cover?

¹⁵ Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=EN>

¹⁶ Article 2(1)(h) of DIRECTIVE 2003/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

¹⁷ Article 2(1)(d) of DIRECTIVE 2013/50/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC

Q5: Do you think that the business activities of market operators and CCPs in connection with possible creation of financial instruments for trading could fall under the specification of “issuance of a financial instrument which references an index or a combination of indices”? If not, which element of the “use of benchmark” definition could cover these business activities?

3 Oversight function requirements (Article 5a BMR)

3.1 Mandate

Article 5a

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

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

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

3.2 General remarks

31. Article 5a requires benchmark administrators to establish a permanent and effective oversight function for all aspects of the provision of its benchmarks. This requirement forms part of a broader set of governance arrangements necessary for administrators to control conflicts of interest and to safeguard confidence in the integrity of benchmarks.
32. The text allows the oversight function for all benchmarks to take the form of a separate committee within the organisational structure of the administrator or another appropriate type of arrangement, with ESMA empowered to determine a non-exhaustive list of appropriate governance arrangements.
33. Critical benchmark administrators and administrators of significant benchmarks are required to comply with the full requirements of Article 5a and will be subject to the RTS regarding the procedures for the oversight function, as well as the standards on the composition of an oversight function and the positioning within the organisation. Administrators of non-significant benchmarks are required to establish a function but

according to Article 14d(1) can waive some of the detailed requirements regarding responsibilities, procedures and the form the oversight function should take as well as its positioning within the organisational structure.

34. Another exception from the above framework is that of interest rate benchmarks, which are exempt from paragraphs 4 and 5 of Article 5a, meaning that they do not fall within the scope of the RTS. In accordance with Annex I however, administrators of such benchmarks are required to establish an independent oversight committee.
35. It is important that administrators have an appropriate function to oversee the implementation and effectiveness of the governance arrangements that provide effective oversight, as even where effectively managed, many administrators are subject to some conflicts of interest and may have to make judgements and decisions which affect a diverse group of stakeholders.
36. Once established, an oversight function should operate with integrity and is responsible for at least some of the following, which can be adjusted for the complexity, use and vulnerability of the benchmark:
 - An annual review of the benchmark methodology and definition;
 - Overseeing changes to a methodology and the consultation on such changes;
 - Overseeing the benchmark control framework, and its management and operation;
 - Reviewing and approving cessation procedures and associated consultations for the benchmark;
 - Overseeing any third party involved in benchmark provision such as calculation or dissemination agents;
 - Assessing internal/external audits or reviews and monitoring implementation of relevant remedial actions; and
 - Where the benchmark is based on contributions:
 - taking action for breaches of the code of conduct;
 - Monitoring input data and contributors and the action of the administrators in challenging or validating the contributions; and
 - Reporting administrator/contributor misconduct to the Competent Authority, including anomalies in input data.

3.3 Oversight function

37. The main purpose of an oversight function is to ensure there is an effective challenge to the Board or equivalent management of the benchmark administrator. In determining the appropriate composition and positioning of an oversight function, it is necessary to consider which structure would be best placed to offer this challenge, free of unmanageable conflicts of interest.
38. The BMR requires ESMA to consider the different types and sectors of benchmarks set out in the BMR in determining the appropriate composition and positioning within the administrator's organisation of an oversight function. "Types" of benchmarks thereby means regulated-data benchmarks (Article 12a), interest rate benchmarks (Article 12b) and commodity benchmarks (Article 14a)¹⁸. Recitals 29 and 29a of the Regulation explain that these different types and sectors have different characteristics, vulnerabilities and risks and as such, certain provisions must be further specified. It may be necessary to establish different oversight functions for different classes of benchmarks or families of benchmarks, due to the varied competencies required for each asset class. For this reason, the type of benchmark being overseen should be taken into consideration in determining the structure of the oversight function.
39. It should be noted that, in the case of interest rate benchmarks under Annex I, an independent oversight committee is mandatory. These benchmarks cannot be deemed significant or non-significant and are all therefore subject to the requirements of Article 5a(1), (2) and (3). Article 5a(4) and (5) do not apply however and as such, interest rate benchmarks are exempt from the RTS, and the requirements relating to their procedures, composition and positioning etc. being set out in Annex I.
40. For commodities benchmarks falling within the scope of Annex II, the RTS will not apply, as these benchmarks are not covered by Article 5a.
41. Additionally, ESMA is required to take into consideration the nature, scale and complexity of the provision of the benchmark, and the risk and impact of the benchmark. In other words, ESMA will have to apply a proportional approach. In that respect, ESMA may give consideration to the prominence of critical benchmarks as opposed to other benchmarks provided by the administrator.
42. More fundamental to the determination of the appropriate form of oversight function however, is the potential for conflicts of interest within the structure of the administrator.

3.4 Composition of the oversight function

43. An administrator must establish an oversight function, which in ESMA's view should be appropriate to its ownership and control structure as well as to the nature, scale and

¹⁸ This interpretation of "types of benchmarks" is consistently applied throughout this Discussion Paper.

complexity of the benchmark. This oversight function may be subject to challenge by the relevant competent authority. The following list of possible structures for oversight functions is non-exhaustive. Where benchmark administrators have a different organisational or membership structure, they should take the examples of the list into account to find an appropriate solution that fulfils the same requirements of the BMR (as set by Article 5a) as a similar solution in the list:

- In accordance with Article 5, where conflicts of interests arise within the administrator due to its ownership structure, controlling interests or other activities conducted by any entity owning or controlling the administrator or by an entity that is owned or controlled by the administrator or its affiliates, that cannot be adequately mitigated, the relevant competent authority may require the administrator to establish an independent oversight function with respect to that benchmark which would include a balanced representation of stakeholders, including users and contributors.
- Where the administrator is wholly owned or controlled, either by contributors or by users, an independent committee may be established with respect to that benchmark, the composition of which would ensure a balance of the users and the contributors with other relevant stakeholders including market infrastructure providers and, where appropriate/possible, independent non-executive directors (INEDs). Where the administrator is owned or controlled by contributors, contributors should not constitute the majority of the committee members. Where the administrator is owned or controlled by users, users should not constitute the majority of the committee members. The committee could also include persons involved in the provision of the relevant benchmarks in a non-voting capacity, for example as the committee secretariat.
- Where the administrator is not wholly owned or controlled by its contributors or users, an internal board or committee may be established to operate as an oversight function with respect to that benchmark. The committee could include persons involved in the provision of the relevant benchmarks in a non-voting capacity, for example as the committee secretariat. A balance of stakeholders should be included in the committee and, where appropriate, it should also include INEDs.
- In certain cases, depending on the nature, scale and complexity of the provision of a benchmark, and the risk and impact of that benchmark, a natural person may perform the oversight function with respect to that benchmark. Any natural person performing the oversight function should not be directly involved in the day to day provision of any benchmark they oversee.
- Where an administrator provides multiple benchmarks based on different underlyings, or based on varying methodologies, it may establish an overarching oversight function, with respect to all benchmarks, with sub-functions reporting into it. This would allow the administrator to centralise its oversight function while allowing for varying types of competencies, depending on the benchmark. The principal oversight function could also delegate responsibilities to sub-functions.

- Where an administrator has in place a pre-existing function, carrying out the activities of an oversight function, that function may be deemed sufficient to fulfil the requirements of the BMR if the governing procedures, its composition as well as its positioning within the organisational structure of the administrator conform to the specific requirements of Article 5a and inherent technical standards.
44. In the context of Article 5 of the BMR – according to which the competent authority can require an independent oversight function to be established whenever conflicts of interests cannot be adequately mitigated – ESMA considers that the term “independent” with reference to an oversight committee should be interpreted as a committee that includes natural persons who are not otherwise directly affiliated with the administrator. These persons could also include independent non-executive directors.
45. Where a benchmark is based on submissions and the oversight function takes the form of a committee, it may be important for representatives of the contributors to participate in the committee. Where a benchmark is not based on submissions, the administrator should consider including representatives from the data sources used to determine the benchmark on any committee. All members of such committees should have equal standing, except for non-voting members such as official sector observers or staff of the administrator.
46. Where an administrator provides a number of different benchmarks, the oversight function could exercise oversight of more than one benchmark provided that it otherwise complies with the other requirements of Article 5a. It is however important that the oversight function has the appropriate competencies to provide effective challenge to the administrator’s management. To achieve this aim, it may be necessary to have different oversight functions for different benchmarks or families of benchmarks.

Q6: Do you agree with the proposed list of appropriate governance arrangements for the oversight function? Would you propose any additional structure or changes to the proposed structures?

Q7: Do you believe these proposals sufficiently address the needs of all types of benchmarks and administrators? If not, what characteristics do such benchmarks have that would need to be addressed in the proposals?

Q8: To the extent that you provide benchmarks, do you have in place a pre-existing committee, introduced through other EU legislation, or otherwise, which could satisfy the requirements of an oversight function under Article 5a? Please describe the structure of the committee and the reasons for establishing it.

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

Q10: If an administrator provides more than one critical benchmark, do you support the approach of one oversight function exercising oversight over all the critical benchmarks? Do you think it is necessary for an oversight function to have sub-functions, to account for the different needs of different types of benchmarks?

Q11: Where an administrator provides critical benchmarks and significant or non-significant benchmarks, do you think it should establish different oversight functions depending on the nature, scale and complexity of the critical benchmarks versus the significant or non-significant benchmarks?

Q12: In which cases would you agree that contributors should be prevented from participating in oversight committees?

Q13: Do you foresee additional costs to your business or, if you are not an administrator, to the business of others resulting from the establishment of multiple oversight functions in connection with the different businesses performed and/or the different nature, scale and type of benchmarks provided? Please describe the nature, and where possible provide estimates, of these costs.

3.5 Positioning within the organisational structure of the administrator

47. In ESMA's view, an oversight function could be embedded within an administrator's organisational structure in order to operate effectively and could include members that were not otherwise directly affiliated with the administrator. This would be the case even when an independent oversight function was required by a competent authority under Article 5(2a). A fully external committee could not always be expected to have the same knowledge and access to the confidential business details of a benchmark administrator in order to influence and effectively challenge the management body (as defined in Article 3(1)(17)). A comparable governance function is the risk or the remunerations committee. Separation may be ensured by operational separation from the parts of the administrator structure dealing with the provision of benchmarks (i.e. by controlling any possible overlap of tasks, persons or non-authorised information flows).

48. The core role of the oversight function is not to oversee the management body but rather to provide effective challenge to the decisions of the management body – similar to the functioning of audit committees.

49. Each oversight function, whether a committee or a natural person, should operate as a consultative body of the administrator, interacting directly with the management body. Besides this reviewing and monitoring function (Article 5a(3)(a) to (h)) it independently reports any misconduct by contributors or administrators, of which it becomes aware, to the relevant competent authorities (Article 5a(3)(i)).

Q14: Do you agree that, in all cases, an oversight function should not be responsible for overseeing the business decisions of the management body?

Q15: Do you support the proposed positioning of the oversight function of an administrator? If not, please explain your reasons why this positioning may not be appropriate.

Q16: Do you have any additional comments with regard to the procedures for the oversight function as well as the composition and positioning of the oversight function within an administrator's organisation?

3.6 Procedures regarding the oversight function

50. An administrator, subject to Article 5a(2), should draw up adequate procedures for the proper functioning of the oversight function.

51. The main elements of the procedures should include:

- the terms of reference of the oversight function;
- criteria to select members of the oversight function;
- the summary details of membership of any board or committee charged with the oversight function;
- declarations of conflicts of interest; and
- processes for election, nomination or removal and replacement of committee members.

52. Conflicts of interest may arise due to the involvement of a person(s) in an oversight function, for example, where a contributor sits on an oversight committee which is tasked with monitoring contributions to the benchmark, or where a user of that benchmark sits on an oversight committee. Any such conflicts of interest should be clearly disclosed and effectively managed, where possible. In the case of the example of contributors, the oversight committee could propose excluding representatives of contributors from committee meetings dealing with monitoring, and redacting the published minutes accordingly.

Q17: Do you agree with the proposed list of elements of procedures required for all oversight functions? Should different procedures be employed for different types of benchmarks?

Q18: Do you agree with the proposed treatment of conflicts of interest arising from the composition of an oversight function? Have you identified any additional conflicts which ESMA should consider in drafting the RTS?

4 Input data (Article 7 BMR)

4.1 Mandate

Article 7

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

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

4.2 General remarks

53. Within the framework of the BMR, the main objective of Article 7 is to ensure the integrity and accuracy of input data provided by contributors, as it is a key condition for ensuring the integrity and accuracy of any benchmark.

54. In this regard, the BMR expresses a preference for the use of transaction data as input data, as it is considered less susceptible to manipulation than non-transaction data. Therefore, if available and appropriate, input data should be transaction data. Article 7 of the BMR allows the use of non-transaction data, provided that it accurately and reliably represents the market or economic reality that the benchmark is intended to measure, in a situation where transaction data is insufficient or its use is not appropriate.

55. Moreover, when based on contributions, in order to ensure the benchmark is reliable and representative of the market or economic reality the benchmark is intended to capture, the panel or sample contributing input data to the administrator must also be reliable and representative. These obligations of reliability and representativeness are not only evaluated at a benchmark's inception but hold true throughout its entire life cycle. An administrator should therefore adapt its selection of input data, of contributors, and its methodology to ensure the input data is representative of the market it aims to measure. Alternatively, an administrator may elect to cease providing a benchmark.

56. To this end, for benchmarks based on contributions, administrators shall establish a code of conduct specifying the obligations of the contributors in respect of input data. They are obliged to use input data only from contributors who adhere to this code of conduct.
57. For critical and significant benchmarks, administrators should have further controls for input data in place. The BMR applies the same requirement of control of input data to non-significant benchmarks under a comply-or-explain system.
58. Additional controls apply where input data is contributed to critical benchmarks from the front office of the contributor. The BMR applies the same requirement of additional controls to significant and non-significant benchmarks under a comply-or-explain system for many of them.
59. Please note that the comply-or-explain system of the BMR differentiates between significant and non-significant benchmarks. The difference lies in the competence of the National Competent Authority (NCA) to veto an administrator's decision not to apply one or more requirements (see the chapter below on critical and significant benchmarks).
60. Article 7 calls on ESMA to draft regulatory technical standards (RTS) on :
 - The appropriateness and verifiability of input data;
 - Internal oversight and verification procedures for the contributor, to be checked by the administrator [especially when input data is provided by the front office].
61. In doing this ESMA must take into account the different types of benchmarks and sectors as well as the principle of proportionality, the vulnerability of the benchmark to manipulation, the nature of input data, the characteristics of the underlying market or economic reality, as well as international convergence of supervisory practice in relation to benchmarks. Moreover, the RTS should not apply to administrators of non-significant benchmarks.

4.3 Appropriateness and verifiability of input data

4.3.1 General considerations

62. Article 7 mentions in several instances that input data should be appropriate and verifiable. Nevertheless, according to Article 14d(1) BMR, administrators of non-significant benchmarks may elect not to apply the condition of verifiability, provided they notify their competent authority and publish and maintain a statement on why they consider it appropriate for them not to comply with this requirement (comply or explain). Moreover, it calls on ESMA to draft RTS to ensure both characteristics in input data.
63. Input data is defined in paragraph 10 of Article 3(1) of the BMR as the data in respect of the value of one or more underlying assets, or prices, including estimated prices, quotes, committed quotes or other values, used by the administrator to determine the benchmark.

Although the definition of input data is not restricted to data provided by a panel of contributors, Article 7(1)(b) specifies that where it is, the administrator should obtain the input data from a reliable and representative panel or sample of contributors. Therefore, the following sections of this discussion paper focus on input data provided by contributors.

64. When transaction data are contributed, such data should be considered to be more objective and more easily verifiable than other types of data. Nevertheless, transaction data remain subject to the same verifiability requirements as other types of input data.
65. Appropriateness of input data refers to its ability to reflect the underlying market or economic reality the benchmark is intended to measure. As such, it must be evaluated in conjunction with a benchmark's chosen methodology, as input data and methodology need to be compatible in order for a benchmark to reflect the underlying market or economic reality. It is a relative concept to be analysed on a case by case basis.

4.3.2 Transaction data vs. non transaction data

66. The BMR concedes that transaction data may not always be sufficiently available or appropriate to provide a continuous, representative and reliable benchmark.¹⁹ This may notably be the case for benchmarks due to market characteristics (illiquidity and the associated volatility or capacity of single transactions to influence price fixture). Non-transaction data, ranging from bids and offers, quotes (comprising executed quotes, indicative quotes or estimates) surveys, auction price systems, market reports, and judgements, shares the characteristic of containing at least an element of discretion, which may lie with either the contributor, the administrator, or the calculation agent.²⁰ This has traditionally been the case for many money market benchmarks. By nature, a measure relying on expert judgement is more susceptible to idiosyncrasies reflected in individual contributions, and therefore also to conflicts of interest and deliberate manipulation (cf. BMR, Recital 23). The issue is compounded by the characteristic that contributions not relying on transaction data are less easily verifiable than contributions reporting observable market behaviour.

4.3.3 Verifiability – Record keeping

67. A precondition for verification of input data is that clear and complete records are available. As part of the verifiability requirement, which is imposed on the administrator, the obligation of record keeping is on the administrator as well. In order to ensure effective verifiability, the administrator needs a range of information it can only obtain from contributors. Therefore, contributors should transmit records of all relevant aspects

¹⁹ Cf. IOSCO BM principles, which state "Principle 7 does not mean that every individual Benchmark determination must be constructed solely from transaction data. Provided that an active market exists, conditions in the market on any given day might require the Administrator to rely on different forms of data tied to observable market data as an adjunct or supplement to transactions."

²⁰ In case bids and offers are used as input data, the expert judgement lies in the selection of those bids and offers as a relevant proxy for transaction prices.

of the contribution process to the administrator, who must store it, with the overall goal of being able to reconstruct a given contribution based on recorded information. In line with Article 5d(2) BMR, the administrator should keep these records for a period of at least five years.

68. Administrators of regulated data benchmarks, pursuant to Article 12a(1), are exempt from a number of requirements regarding input data, but not from the verifiability requirement in Article 7(1)(aa). Notably, such administrators do not have to keep records of input data (Article 5d(1)). However, in view of the specific type of input data used, verifiability in this case must be understood as checking the provenance and transmission of the input data used.
69. Since the administrator depends on information transmitted by contributors to be able to verify input data, it is a precondition that the list of information of which the administrator is required to keep records is communicated to the contributors via the code of conduct²¹.
70. These records, to be kept by the administrator, should include, but need not be limited to:
 - Deviations from procedures and practices governing contributions and the underlying data, as stipulated in the code of conduct
 - Past contributions
 - Whether the contribution was determined in accordance with specified input data hierarchy, and, if the primary type of input data was not used, the reason for this decision and the alternate data type used.
 - In case of non-transaction data, which data were used, along with underlying variables, criteria, and assumptions.
 - Names and role of the individuals responsible for submissions and approval
 - Material transactions or market data which were deliberately excluded from contribution
 - Relevant communication:
 - of contributors with the administrator and the calculation agent
 - among submitters and approvers

²¹ Supervised contributors in particular, who are subject to autonomous governance and control requirements pursuant to Article 11, are required to keep records themselves, covering, among other things, the communications in relation to provision of input data, as well as all information used to enable the contributor to make each submission.

- between staff in the panel entities units that deal in benchmark-referenced instruments or derivatives and internal or external third parties involved in the benchmark's contribution process
- Substantial exposures of individual traders or trading desks to benchmark related instruments, as well as changes therein
 - Remedial actions taken in response to audit findings and progress in their implementation.
71. ESMA is of the view that this information, although it is to be transmitted by the contributors to the administrator, does not need to be subject to the same timing requirements as input data itself (i.e. it is not crucial that it is submitted everyday by a given time). In view of reducing the financial and operational burden imposed on contributors, and in order not to encroach on the timely submission of contributions, weekly transmission of the said information is considered sufficient.
72. In addition to the list of records identified above, the administrator should be able to request additional information with a view to input data verification where needed.
73. Records should be retained in a medium that allows the storage of information in a way accessible for future reference and in such a form and manner that it must not be possible for the records to be manipulated or altered. Records should be kept in a transparent, easily comprehensible and readily available format. There should not be any barriers to check verifiability.
- Q19: Do you agree with the list of records to be kept by the administrator for input data verification? If not, please specify which information is superfluous / which additional information is needed and why.**
- Q20: Do you agree that, for the information to be transmitted to the administrator in view of ensuring the verifiability of input data, weekly transmission is sufficient? Would you instead consider it appropriate to leave the frequency of transmission to be defined by the administrator (i.e. in the code of conduct)?**
- #### 4.3.4 Appropriateness
74. The matter of appropriateness of input data is linked to the methodology of a benchmark. It is up to the administrator, when establishing the methodology, to specify in which circumstances and using what quantity and quality of input data the methodology yields a meaningful and representative result.
75. On a daily basis, appropriateness of input data cannot be verified except by comparison with the criteria put forward in the methodology. The following checks may help the administrator in determining the appropriateness of input data:

- Comparison of the quantity and quality of input data with relevant thresholds required by the methodology
- Comparison of the type of input data provided with input data required by methodology (was the hierarchy respected? Was input data correctly qualified?)
- If non-transaction data was used, was the use of such data justified in light of the methodology? In such cases, ensuring appropriateness requires that the administrator knows the underlying sources and assumptions on which a contributor bases an estimate. Failing this, the administrator has no means to ascertain whether the input data accurately reflects the underlying market or economic reality.
- If transaction data from a related market is used, was the selection of this related market justified as relevant, e.g. by demonstrating its compatibility with the methodology and by proving a sufficiently high degree of comparability²²?
- In case expert judgement is relied upon, was the use of such judgement documented? Did the contributor prove that the expert judgment was based upon reasonable criteria and that it took into account transaction data, and that it was applied in an objective, consistent, and transparent way?
- In case of selective reporting of input data or other use of discretion, does the administrator possess sufficient information on the applied discretion and the grounds on which it was made?
- Finally, ESMA believes it is appropriate that an administrator keeps records of the analyses performed to ascertain the appropriateness of the input data, in order to be able to reconstruct the whole process before coming to a final judgment, as a basis for possible subsequent proof, which could be necessary and which could be conducted either by the administrator itself or by the competent authority.

Q121: Do you agree with the concept of appropriateness as elaborated in this section?

Q22: Do you see any other checks an administrator could use to verify the appropriateness of input data?

Q23: Would you consider it useful that the administrator maintains records of the analyses performed to evaluate the appropriateness of input data?

²² In the case of interest rate benchmarks, the possibility of use of contributor's transactions in related markets is expressly contemplated under Annex I, point 4(a), whereas for other types of benchmarks it essentially depends on the input data hierarchy embedded in the methodology that the administrator defines for a specific benchmark/family of benchmarks.

4.3.5 Input data scrutiny

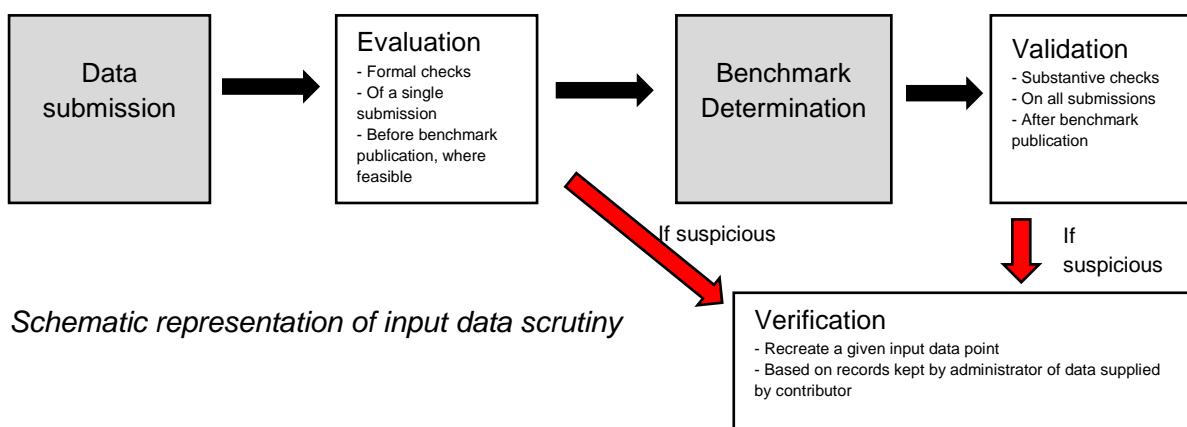
76. In the process of ensuring reliability and accuracy of benchmark provision, the quality of input data is a primary concern. Therefore, input data is reviewed in three separate stages: evaluation, validation, and, where necessary, verification.
77. Evaluation and validation of input data are ongoing obligations for administrators of critical and significant benchmarks with the aim of ensuring accuracy and integrity of input data on a daily basis. The BMR applies the same requirements to non-significant benchmarks under a comply-or-explain system – although the RTS to be drafted by ESMA will not apply to these administrators in any case. Where evaluation or validation of input data raises questions or concerns, administrators may proceed to verification and request additional information from contributors.
78. **Evaluation** of input data consists in formal checks on each individual submission received from a single contributor. These checks are to be carried out prior to the publication of the benchmark where feasible. In the evaluation stage, the administrator checks the following aspects:
 - Is the information supplied by the competent / authorised person?
 - Are the contributions received of the quantity / volume expected (e.g. number of executed transactions)?
 - Is the information provided on time?
 - Is the information provided of the type expected (i.e. transaction data if transaction data is expected)?
 - If not, which type of alternate input data was provided?
 - Has the appropriate hierarchy / procedure for the selection of alternate input data been followed, and has the selection of such data been justified?
79. A second step, called **validation**, consists in a posteriori substantive controls on the aggregate of input data received from all contributors. For this step, the administrator relies solely on the input data contributed for each benchmark value determination. Validation consists of:
 - Comparison of input data against earlier contributions
 - Identifying outliers in input data
80. **Verification**, as a possible third stage where input data has raised interest during evaluation or validation stages, consists of an in-depth examination of questionable input data and the process of its creation. To this end, an administrator relies on the records

received from the contributor (cf. section 4.3.3), and to reconstruct a given input data point on the basis of this information.

81. Verification techniques may include:

- Comparison against historic series of data from underlying or related markets/economic realities (e.g. input data for benchmark X is compared against multiple related rates from markets of different maturities and in different currencies)
- Possible back testing to corroborate input data when transaction data become available (cf. BMR, Recital 21).

82. As evaluation of input data should, to the extent possible, take place before input data is used to determine a benchmark, administrators should be able to avoid using questionable input data in determining a benchmark.



Q24: Do you see other possible measures to ensure verifiability of input data?

Q25: Do you agree with the identification of the concepts and underpinning activities of evaluation, validation and verifiability, as used in this section?

4.4 Front office contributions

83. Article 7(5) empowers ESMA to draft RTS to further specify the internal oversight and verification procedures of a contributor that an administrator shall seek for, in order to ensure the integrity and accuracy of input data when data is contributed from the front office function within a contributor organisation. Administrators of significant and non-significant benchmark are not bound by this requirement, provided they inform their NCA and publish and maintain a statement explaining why it is appropriate for them not to comply. In any case, administrators of non-significant benchmarks will not be covered by the RTS.

Obligations at administrator level – data integrity and accuracy

84. The BMR suggests that data integrity and accuracy of input data can only be assured where contributors have adequate oversight and verification procedures. To this extent, the administrator should ensure that at a minimum, the safeguards presented in the following sections exist where front office members contribute input data to critical benchmarks. To this end, the administrator specifies these safeguards in the code of conduct.

Skills and training of staff working in functions related to benchmark contribution

85. Clearly accountable, named individuals at the appropriate level of skill and seniority within the firm should be responsible for input data contribution. Moreover, staff involved in input data submission must be aware of all procedures which should be followed for proper discharge of their responsibilities.
86. Staff involved in input data contribution²³ should undergo compulsory appropriate training and development programmes. Completion of training should be documented. Training should be refreshed periodically.
87. For front office staff who primarily deals in products exposed to the benchmark to which their organisation contributes, there should be mandatory, more frequent, and specific training. Such training should address i.e. the impropriety of attempting to influence the determination of input data contributions and the need to report any such attempt.

Q26: Do you agree that all staff involved in input data submission should undergo training, but that such training should be more elaborate / should be repeated more frequently where it concerns front office staff contributing to benchmarks?

Internal oversight at contributor level

88. ESMA's suggestion for effective internal oversight is to ensure clearly defined roles exist for a first, second, and third line of defence. The first line of defence refers to risk mitigation and control by front office staff itself. Firms need to ensure that the front office is aware of the standards they are expected to adhere to. There should be clear procedures for input data contribution. Input data should be prepared by an authorised submitter. Data should be reviewed for reasonableness, accuracy, and completeness by an authorised approver prior to submission. The actual transmission of data should be subject to a four-eye process, to avoid data errors and manipulation.
89. The second line of defence refers to the activity of control functions such as compliance, legal, and risk as well as other independent control functions such as financial control.

²³ This includes submitters as well as approvers.

90. The third line of defence refers to the activity of internal audit. Controls should include comparisons with actual, transaction-based, verifiable data. Where actual data is not available, documentation by the contributor of a verifiable basis for their qualitative assessment should be required and scrutinised for appropriateness. Effective oversight functions should ensure challenges and formal sign-off around decisions relating to benchmarks.
91. The control framework should be transparent. This includes communicating it to administrators and authorities. Its effectiveness should be subject to an internal or an external audit, and to checks by the administrator.
92. To this end, contributors should ensure that administrators have full visibility of:
 - The organisational arrangements and roles and responsibilities for daily input data contribution processes
 - The identity of all submitters and, where applicable, approvers involved in a daily benchmark determination.
 - Periodic external audit of contribution procedures may be necessary.
93. This type of measure is to be implemented proportionally to the size of the contributor organisation, and whether contributors are regulated entities. For smaller or non-regulated contributors, having three functionally separate lines of defence may not be feasible or necessary.
94. To assist internal oversight functions in detecting activities affecting the integrity of the benchmark, a whistleblowing procedure should exist.
95. Ultimately, the effectiveness of controls and verification processes will depend on the existence and complexity of underlying data that can be used to corroborate inputs, the availability of supporting records and an adequate audit trail. The question of oversight and controls is thus intimately linked to input data verifiability (cf. supra section 4.3) and record keeping (Article 5d BMR).

Q27: Do you agree to the three lines of defence-principle as an ideal type of internal oversight architecture?

Q28: Do you identify other elements that could improve oversight at contributor level?

Conflict of interest policy

96. A specific risk that arises where input data is contributed from the front office of a contributor is that of conflicts of interest. This is notably the case when contributors have discretion regarding contributed data while at the same time they or their clients have an exposure against the benchmark, or if they work closely with colleagues who do. The risk

is also reflected in IOSCO Principle 14(g)(xi)²⁴, which generally prohibits front office contributions, unless the administrator is satisfied that there are adequate internal oversight and verification procedures.

97. In this regard, ESMA is of the opinion that front office contributors should establish, implement and maintain a conflict of interest policy covering at least the following topics:

- Disclosure of actual or potential conflicts of interest of benchmark contributors or individual staff members
- Clear segregation of duties between staff involved in contributing input data and other front office staff
- Physical separation between submitters / approvers and other units in order to discourage improper or inadvertent communication
- Automation of contribution process wherever possible
- Effective procedures to prevent or control the exchange of information between staff engaged in activities involving a risk of conflict of interest where the exchange of that information may affect the input data contributed (e.g. creation of separate reporting lines)
- Measures to prevent any person from exercising inappropriate influence over the way in which staff involved in input data submission carry out activities
- Contingency provisions in case of temporary inefficiency of the envisaged controls of the flow of information
- The removal of any direct link between the remuneration of staff involved in input data contribution and the remuneration of, or revenue generated by, different staff principally engaged in another activity, where a conflict of interest may arise in relation to those activities.

98. This conflicts of interest policy should be publicly available and the Contributor should outline how it intends to monitor its implementation.

Q29: Do you agree with the list of elements contained in a conflict of interest policy? If not, please state which elements should be added / which elements you consider superfluous and why.

²⁴ IOSCO Financial Benchmark Principles: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>

Record keeping policy (cf. also Article 5 BMR)

99. In addition to record keeping requirements set out in section 4.3.3, and in view of the specific risk of conflicts of interest presented by their position, front office data contributors must transmit to the administrator records of potentially relevant material transactions or market data which was deliberately excluded from contribution.

Miscellaneous

100. Contingency measures should be in place at contributor level to ensure provision of input data during conditions of market stress. Contributors should inform the administrator of these fall-back arrangements along with the triggers for their use. They must also mention the extent to which expert judgement will fill part or all of the inputs.
101. Emergency procedure: where contributors become aware of attempted or actual manipulation or failure to comply with benchmark-related policies and procedures, the contributors should notify the administrator and all relevant competent authorities.

4.5 Elements justifying differentiation

102. The ultimate goal of the BMR is the same for all benchmarks: ensuring the accuracy, robustness and integrity of benchmarks and the benchmark setting process (cf. Recital 1 BMR). These principles hold for all benchmarks, irrespective of their type, their domestic or international economic impact, the underlying market/economic reality or other characteristics. Therefore, ideally, the principles of verifiability and appropriateness of input data should apply to all benchmarks with a view to ensuring a level playing field among benchmarks and to ensure uniform protection of investors and consumers. The BMR has elected to implement the principles proportionately, imposing them for critical and significant benchmarks and adopting a comply-or-explain system for non-significant benchmarks, and exempting the latter from application of the RTS. Moreover, ESMA is mandated to *"take into account the different types of benchmarks and sectors as set in this Regulation, the nature of input data, the characteristics of the underlying market or economic reality and the principle of proportionality, the vulnerability of the benchmarks to manipulation as well as the international convergence of supervisory practice in relation to benchmarks."*

Verifiability of input data

103. ESMA is of the opinion that verifiability, whether it is applied to critical, significant or non-significant benchmarks (i.e. for those non-significant benchmarks that have chosen to comply rather than to explain), is not amenable to being implemented differentially. Indeed, even benchmarks lacking the systemic importance of critical benchmarks, if they serve as a basis for financial products (e.g. ETF), may raise issues of transparency, market confidence, conflicts of interest, and investor protection.

104. ESMA believes that verifiability may be applied differently to the different types of input data. As already described in the preceding sections, the use of transactional as input data for benchmark determination provides better guarantees of accuracy and reliability of the resulting benchmark, since it is by nature less susceptible to manipulation. In addition, transaction data by nature more easily meets the verifiability requirement of the BMR. Therefore, measures to ensure verifiability of input data should be imposed depending on the extent to which input data relies on expert judgement or the use of discretion. This is reflective of the BMR's preference for transaction data. Regulated data benchmarks present an extreme case in this regard. As stated above, they are exempt from input data record keeping, which ESMA considers the only tool for input data verifiability. As a result, ESMA believes that input data verifiability must be understood as limited to checking the provenance and transmission of the data used.

Q30: Do you agree that where expert judgement is relied on and/or discretion is used additional appropriate measures to ensure verifiability of input data should be imposed? If not, please specify examples and reasons why you disagree.

Front office contributions

105. The BMR contains an important degree of proportionality in the way it imposes safeguards for front office contributions. Article 7(3a) is compulsory for critical benchmarks in its entirety. For significant benchmarks, Article 7(3a)(b) applies on a comply-or-explain basis while Article 7(3a)(a) remains compulsory. For non-significant benchmarks, Article 7(3a) in its entirety applies on a comply-or-explain basis, with the RTS not being applicable to these administrators in any case.

106. In addition, ESMA believes that in applying Article 7(3a)(b), there is room for differentiated application according to three distinct criteria: the type of input data used, size and characteristics of the contributors.

the type of input data used

107. As specified in section above for the concept of verifiability, ESMA is of the opinion that the nature of input data used is a key determining factor of a benchmark's susceptibility to manipulation. Therefore, the stringency of internal oversight and verification procedures should be modulated in function of the type of input data, with benchmarks relying exclusively on transaction data requiring less stringent checks than others.

Size of contributor organisation

108. Secondly, the size of contributors may constitute a practical impediment to broadening the application of the oversight measures imposed for front office contributions to all contributors. Although this variation may in large part be captured by the comply-or-explain mechanism to which Article 7(3a)(b) is subject, it is included here for those cases where small contributors would contribute to critical benchmarks or

significant benchmarks not applying the exemption. In such cases, the size of contributors may, in ESMA's opinion, be considered part of the underlying market or economic reality (which the mandate under Article 7(5) BMR requires ESMA to take into consideration).

Supervised vs. non-supervised contributors

109. Finally, supervised contributors are subject to direct regulatory obligations. In such cases, the differing legal status of contributors may, in ESMA's opinion, be considered, as the size of the contributors, part of the underlying market or economic reality.

110. Differentiation may be applied in regard of the following measures:

- Establishment of a second and third line of defence
- Contingency measures
- Physical separation to avoid conflicts of interest
- Degree of training required for front office staff
- Content and specificity of conflict of interest policy
- Content and specificity of record keeping policy

111. ESMA is however of the opinion that, in the cases where Article 7(3a)(b) applies, differentiation may not be invoked to deviate from the following principles:

- First line of defence
- Clear segregation of duties
- Establishment of conflict of interest policy
- Establishment of record keeping policy
- Disclosure of actual or potential conflicts of interest of benchmark contributors or individual staff members
- Effective procedures to prevent or control the exchange of information
- The removal of any direct link between the remuneration of staff involved in input data contribution and the remuneration of, or revenue generated by, different staff principally engaged in another activity, where a conflict of interest may arise in relation to those activities.



Q31: Do you agree to the list of criteria that can justify differentiation? If not, please specify why you disagree.

Q32: Do you agree to the list of elements that are amenable to proportional implementation? If not, please specify why you disagree.

Q33: Do you agree to the list of elements that are not amenable to proportional implementation? If not, please specify why you disagree.

5 Transparency of methodology (Article 7b BMR)

5.1 Mandate

Article 7b

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

5.2 Information on methodology to be provided by an administrator

112. The accuracy and reliability of a benchmark in measuring the economic reality it is intended to track depends on the methodology and input data used. It is therefore necessary to adopt a transparent methodology that ensures the benchmark's reliability and accuracy.

113. It may be necessary to change the methodology to ensure the continued accuracy of the benchmark – Article 7b(i)(ii)) imposes an obligation on administrators to specify the frequency of internal review of methodology - but any material changes in the methodology have an impact on the users and stakeholders in the benchmark. It is therefore necessary to specify the procedures to be followed when changing the benchmark methodology, including the need for consultation, so that users and stakeholders can take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes.

114. Article 7b(1), which is compulsory for all categories of benchmarks, imposes three topics on which the administrator is to publish or make available information:

- Key elements of the methodology
- Information regarding the internal review
- Procedure to consult on any proposed material change.

115. Article 7b(2) specifies the content of the consultation procedure. It is compulsory on critical and significant benchmarks and applies to non-significant benchmarks on a comply-or-explain basis. Article 7b(3) mandates ESMA to develop RTS to specify the information to be provided by an administrator in respect of the three topics in Article 7b(1), with the understanding that these RTS will not apply to administrators of non-significant benchmarks in any case.

5.2.1 Key elements of methodology

116. A precondition for sound understanding of a benchmark is its definition, including its objective (i.e. what it aims to represent), although this is not part of the methodology in a strict sense. The definition of a specific benchmark should be precise in order to avoid subjective interpretation of key concepts. The methodology should ensure that the benchmark adequately represents the market or economic interest to which it refers and measure the performance of a representative group of underlyings in a relevant and appropriate way, and it should specify, as a basic information, the currency of the benchmark. In ESMA's opinion, the definition of a benchmark should be considered an integral part of its methodology.

117. In their 2013 Principles for Benchmark-setting processes in the EU²⁵, ESMA and EBA recommend that the administrator disclose to the public the full methodology of a benchmark, along with historical records, whenever possible, to make it fully replicable. This position is also reflected in ESMA's 2014 Guidelines for competent authorities and UCITS management companies, which states that "*UCITS should not invest in financial indices for which the full calculation methodology to, inter alia, enable investors to replicate the financial index is not disclosed by the index provider.*"²⁶

118. However, there is an apparent contradiction between complete transparency of benchmark methodology and the intellectual property of benchmark providers. This point was raised in the ESMA-EBA principles consultation process. ESMA-EBA was indeed of the opinion that transparency may be limited only in exceptional circumstances based on legal provisions safeguarding confidentiality and intellectual property rights. In addition, when a benchmark's methodology is fully disclosed, and input data is publicly available, there could be a risk of front-running.

119. In this respect, it has to be noted that, according to Recital 24 of the BMR, transparency of the methodology should not be meant as the publication of the formula applied for the determination of a certain benchmark, but rather as the disclosure of the elements sufficient to allow stakeholders to understand how this benchmark is derived and to assess its representativeness, relevance and appropriateness for the inherent uses.

²⁵ ESMA-EBA Principles for Benchmark-Setting Processes in the EU:
https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-658_esma-eba_principles_for_benchmark-setting_processes_in_the_eu_-_final_report.pdf

²⁶ ESMA Guidelines for competent authorities and UCITS management companies, 1 August 2014, at point 56.

120. Concretely, transparency should be sufficient to allow interested parties to understand how a benchmark is derived, what it measures and therefore understand the suitability of the benchmark for their purposes and any limitations or risks of the methodology.

121. Transparency of methodology is especially important when assessments are based on a mix of both transactional inputs and non-transactional ones.

122. At a minimum, the following elements of the methodology shall be disclosed:

- If the administrator has discretion in the selection and composition of inputs and, where applicable, when the composition of inputs is rebalanced. If this is the case, the administrator must disclose the criteria applied to select input data as well as the triggers for rebalancing
- The type of input data used or, if multiple types are admissible, hierarchy among types of input data
- Minimum quantity and quality of input data required
- Verification procedures on input data, including but not limited to when contributors exercise discretion in input data contributed to the administrator
- Where applicable, the composition of the panel, along with the eligibility criteria to accede to the panel
- Where applicable, whether the administrator may interpolate or extrapolate between discrete data inputs in order to provide a continuous benchmark time series
- Whether third parties play any part in the data collection, computation, or dissemination of data. In this case, there shall be a clear division of roles between parties.
- Whether the benchmark requires periodic changes in composition to remain representative. The criteria and frequency of changes shall be disclosed.
- Error management procedures
- The contingency measures during conditions of market stress along with arrangements ex-ante, including the triggers for their use, the extent to which expert judgement will fill part or all of the inputs and the relevant governance processes.

Q34: Do you consider the proposed list of key elements sufficiently granular “to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts”?

Q35: Beyond the list of key elements, could you identify other elements of benchmark methodology that should be disclosed? If yes, please explain the reason why these elements should be disclosed.

Q36: Do you agree that the proposed key elements must be disclosed *to the public* (linked to Article 3, para 1, subpara 1, point (a))? If not, please specify why not.

5.2.2 Information regarding the internal review and approval of methodology

123. The general goal of the BMR is to ensure that financial benchmarks are reliable, accurate, and representative of the underlying market or economic reality. In this regard, Recital 25 of the BMR states that it may be necessary to change the methodology to ensure the continued accuracy of the benchmark, but any changes in the methodology have an impact on the users and stakeholders in the benchmark.

124. BMR Article 7(4) specifies that it is possible that an administrator considers that the input data is no longer reflective of the market it intends to measure. If this is the case, administrators should change the input data, the contributors, or the methodology to remedy this deficiency or should cease to provide it.

125. More concretely, the methodology for the calculation of a benchmark, including information on the way in which contributors are determined and corroborated, should be documented by the administrator and be subject to regular scrutiny and controls to verify their reliability. This requirement of periodic internal review of benchmark methodology is repeated in Article 7b(1)(ii).

126. The frequency of the internal review of the methodology should be determined by the administrator in light of the characteristics of the benchmark (such as the type of input data, evolution of the related market, characteristics of the underlying market or economic reality).

127. The procedure for internal review and approval of methodology is strongly linked to the requirements of governance stated in Article 5 of the BMR. Specifically in the context of methodology, governance considerations include procedures for selecting members of those functions involved in determining and reviewing benchmark methodology. Beyond knowing how methodology is reviewed, it is important to know who reviews it. Special attention must be paid to possible conflicts of interest. Against this background, ESMA believes that membership of above-mentioned bodies or functions, as well as the procedures for appointment and removal to or from these bodies should be made public in addition to the frequency of the reviews – as already required under Article 7b(1)(ii) of the BMR.

Q37: Do you agree with ESMA's proposal about the information to be made public concerning the internal review of the methodology? Please suggest any other information you consider useful to disclose on the topic.

5.2.3 Procedure for material change of methodology

128. If internal review of methodology reveals that the representativeness of a benchmark could be improved, an administrator may elect to do so by carrying out material changes to its methodology. Such changes affect users, and stakeholders more in general, who therefore deserve to be informed in advance and consulted. For this reason, the BMR requires administrators to publish or make available the procedure they will follow to consult on proposed material changes in their methodology along with the rationale for such changes, including a definition of what constitutes a material change and when it will notify users of such changes. The BMR further specifies some procedural elements of this obligation in Article 7b(2).

129. ESMA is of the opinion that the procedure as described in Article 7b(2) is sufficiently detailed, but would like to highlight the following practical aspects regarding the implementation of the above-mentioned procedure.

130. The BMR requires administrators to define what a material change is. Pursuant to Article 5a(3)(b), overseeing changes in benchmark methodology is a responsibility of the oversight function, as is being able to request consultation on such changes. ESMA therefore understands that the oversight function is endowed with the competence to effectively challenge the qualification of a change in methodology as material or non-material by the administrator.

131. Regarding practical aspects of the consultation procedure, ESMA is of the opinion that this is to be determined on a case by case basis by administrators in a manner to ensure their useful effect, i.e. so as to ensure that:

- the advance warning provides investors with sufficient time to take stock of the changes and take any appropriate steps, such as divesting the financial instrument or starting to use another benchmark
- after a material change to a benchmark's methodology, users have at least as much information on the methodology as they did before the change.

132. Moreover, if ESMA is of the view that the rationale behind a material change should be communicated to benchmark stakeholders at least in such detail that it allows them to assess whether a material change of a benchmark's methodology improves its representativeness, relevance and appropriateness for its intended use.

133. The comments received by stakeholders in response to the consultation on the material changes to the methodology may be subject, on request by the respondents, to confidentiality. In all other cases, it would be opportune that those comments are published along with the explanation, by the administrator, of what could be or could not be taken into consideration in making the final choice about any proposed material change to the methodology.

134. Finally, ESMA considers relevant that the consultation procedure for material changes in benchmark methodology, as well as material changes in benchmark methodology themselves and the elaboration of comments received, be published on the administrator's / the benchmark's website, with hard copies available upon request.

Q38: Do you agree with the above proposals to specify the information to be provided to benchmark users and, more in general, stakeholders regarding material changes in benchmark methodology?

Q39: Do you agree, in particular, on the opportunity that also the replies received in response to the consultation are made available to the public, where allowed by respondents?

5.3 Elements justifying differentiation

5.3.1 Key elements of methodology / procedure for internal review of methodology

135. The goal of disclosing methodology is to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance for particular users and its appropriateness as a reference for financial instruments and contracts. This is in order to enable individual benchmark users to understand the benchmark setting process adequately. This statement holds true irrespective of the categorisation of benchmarks. For this reason, ESMA is of the opinion that it cannot be varied in proportion to the type or sector to which a benchmark belongs.

136. Similarly, ESMA does not believe the type or sector to which a benchmark belongs is a pertinent criterion to determine the amount of information to be provided on the procedure for internal review and approval of methodology

5.3.2 Procedures for material change

137. In contrast to the previous section, the BMR has an element of proportionality built into the Level 1 text on the procedure for material change of benchmark methodology, in the sense that administrators of non-significant benchmarks may opt out of the requirements for the material change procedure in 7b(2) on a comply-or-explain basis. Furthermore, administrators of non-significant benchmarks are exempt from these RTS. ESMA is of the opinion that this proportionality within the L1 text is sufficient to capture the variety of benchmarks. ESMA believes that further variation of the information to be provided according to the category of a benchmark is unnecessary.

Q40: Do you agree that the publication requirements for key elements of methodology apply regardless of benchmark type? If not, please state which type of benchmark would be exempt / which elements of methodology would be exempt and why.

Q41: Do you agree that the publication requirements for the internal review of methodology apply regardless of benchmark type? If not, please state which information regarding the internal review could be differentiated and according to which characteristic of the benchmark or of its input data or of its methodology.

Q42: Do you agree that, in the requirements regarding the procedure for material change, the proportionality built into the Level 1 text covers all needs for proportional application?

6 Code of conduct (Article 9 BMR)

6.1 Mandate

Article 9

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

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

6.2 General remarks

138. The BMR requires administrators of benchmarks to produce a code of conduct to specify the responsibilities for contributors to each of their benchmarks, or families of benchmarks, with respect to input data, record keeping, suspicious input data reporting and conflict management requirements. The integrity and accuracy of benchmarks depends on the integrity and accuracy of the input data provided by contributors. It is essential that these obligations on contributors are clearly specified, can be relied on and are consistent with the benchmark administrator's methodology and controls of the input data received.

139. A code of conduct is only necessary where a benchmark is based on contributions from contributors, as defined in Article 3(1), (6) to (8) of the Regulation. Input data that is readily available to an administrator is not considered a contribution. Benchmarks based on regulated data will not be subject to Article 9 due to the exemption under Article 12a. According to Article 14a(1) administrators of commodity benchmarks, where the majority of contributors are non-supervised entities, will not be required to maintain a code of conduct for those benchmarks, as they are subject to Annex II only.

140. Subject to Article 14b, 14c and 14d, administrators of significant and non-significant benchmarks may waive the requirement to comply with Article 9(2), which lays out the specific elements to be included in a code of conduct. The mandate for Regulatory Technical Standards in Article 9 requires the further specification of the details of Art 9(2) only. Therefore, it could be expected that much of these standards will apply only to critical benchmarks. Other categories will be required to maintain a code of conduct for

each benchmark or family of benchmarks but are free to determine the details to be included.

141. Administrators are required to be continuously satisfied, and at least annually, that the contributors adhere with the code, under Article 9(1). For third country contributors, the administrator should do so to the extent possible (Recital 26). In case of indications of non-adherence of one or more contributors, the administrator should not use input data from those contributors, or should obtain representative publicly available data (Article 7(1)(c) BMR). In the case where an administrator produced “families of benchmarks” a single code can be published for all the benchmarks within each family.

142. Administrators are required to ensure that their code(s) complies with the content of the Regulation. Competent Authorities, in case they find elements of the code of conduct which do not comply with the requirements of the BMR, can require the administrator to make adjustments of the Code of Conduct for a benchmark.

143. Administrators of critical benchmarks and of significant and non-significant benchmarks – where the obligation has not been waived – will be required to include at least the following in their codes of conduct:

- description of the input data to be provided and the requirements for provision of input data in accordance with Articles 7 and 8;
- identification of contributors and submitters and authorisation submitters contributing on behalf of a contributor;
- policies to ensure contributors provide all relevant input data; and
- systems and controls that the contributor is required to establish.

144. The mandate under Article 9 requires ESMA to specify the terms of the code of conduct for different types of benchmarks and to take into account developments in benchmarks and financial markets. It is also necessary for ESMA to consider the different characteristics of benchmarks and contributors.

6.3 Code of conduct

145. When considered in the context of the different characteristics of benchmarks, the BMR makes reference to differences in input data and methodologies. In this respect it is certainly relevant to consider the different underlyings, for each of which not only the input data differs but a different methodology may be used.

146. Finally, when considered in the context of the different characteristics of contributors, the regulated nature of the contributors to a benchmark is also relevant to the terms of a code of conduct. Supervised entities contributing to a benchmark will be subject to the requirements of Article 11, in addition to the other EU laws applicable to them.

Contributors to benchmarks that are not EU supervised entities will be exempt from direct regulation but subject to the requirements established via the code of conduct.

147. There is a balance to be found between ensuring a sufficiently detailed code – as a useful guideline for contribution - and the risk of a benchmark becoming non-representative by introducing demanding requirements which may cause unsupervised contributors to cease voluntarily contributing to that benchmark.

148. In accordance with the Regulation, all administrators producing benchmarks based on contributions are expected to maintain a code and continuously assess contributors' adherence. Codes of conduct may be considered as guidelines from the administrators with regard to the contribution of input data by contributors. They should set out the administrator's expectation of contributors and are a set of recommended practices for contribution, in line with the benchmarks methodology – recognising that not all contributors will use the same contribution process.

149. Ultimately, having adequate system and controls is paramount to ensure that the data contributed are correct and reflective of the market the benchmark wants to represent. Recognising that benchmarks have different characteristics and that proportionality should apply, ESMA is of the opinion that a benchmark administrator could employ a standard code of conduct for all its benchmarks, which should be tailored based on the degree of use (critical, significant, non-significant) of a benchmark, on the underlyings and the different applicable methodology and on the supervised nature of the contributors.

Q43: Do you agree that a benchmark administrator could have a standard code for all types of benchmarks? If not, should there be separate codes depending on whether a benchmark is critical, significant or non-significant? Please take into account your answer to this question when responding to all subsequent questions.

Q44: Do you believe that an administrator should be mandated to tailor a code of conduct, depending on the market or economic reality it seeks to measure and/or the methodology applied for the determination of the benchmark? Please explain your answer using examples of different categories or sectors of benchmarks, where applicable.

150. The following sections detail requirements that apply only to administrators of critical benchmarks and those providing significant or non-significant benchmarks that have chosen not to waive the obligation under Article 9(2).

6.3.1 Description of input data and requirements for contribution²⁷

151. Paragraph 2(a) states that the code of conduct should include: “a clear description of the input data to be provided and the requirements necessary to ensure that the input data is provided in accordance with Articles 7 and 8”.

152. A code of conduct must clearly list the types of permissible input data to be provided including the hierarchy of the data sources, where appropriate, and the permitted use of discretion and of expert judgment. This should form part of a broader contribution process.

153. While the BMR generally states a preference for transaction data but then leaves flexibility to administrators to define the most appropriate data hierarchy for each benchmark provided (Article 7 BMR), it recommends that administrators of interest rate benchmarks follow the below hierarchy set out in Annex I, provided that the transactions in point (a) correspond with the input data requirements in the code of conduct.

154. Interest rate benchmarks – general priority of input data use:

(a) A contributor’s transactions in the underlying market the benchmarks seeks to measure or, if not sufficient, its transactions in related markets, such as:

- the unsecured inter-bank deposit market;
- other unsecured deposit markets, including certificates of deposit and commercial paper; and
- other markets such as overnight index swaps, repurchase agreements, foreign exchange forwards, interest rate futures and options.

(b) A contributor’s observations of third party transactions in the markets described in point a).

(c) Committed quotes.

(d) Indicative quotes or expert judgements.

155. In order to fulfil the requirements of Article 7, the code of conduct for all benchmarks subject to the requirements in Article 9(2) should include the following:

- The preferred type of input data to be submitted, and the circumstances in which different types of input data may be submitted and in what order;
- The permitted use of discretion and of expert judgment, along with the modalities according to which a contributor is required to qualify the type of input data

²⁷ This section should be read in conjunction with section 4.

contributed, to the benefit of the appropriateness check to be performed by an administrator;

- The framework for a contributor's contribution process, including procedures for adjustments to the input data and to address potential errors in contributions;
- The frequency for reviews of the contribution process;
- The criteria a contributor must fulfil in order to qualify for a panel, in order to ensure the representativeness of a benchmark, in line with the administrator's methodology and controls;
- Guidelines on the contributor's procedures for internal oversight and verification in the case that data is contributed from a front office function. Such guidelines should conform to what required under RTS [pursuant to Article 7 BMR].
- The procedures to ensure that any actual or suspected infringements of this Regulation are reported without undue delay to the administrator, which may then act in accordance with Article 8.

Q45: Do you agree with the above requirements for a contributor's contribution process? Is there anything else that should be included?

Q46: Do you agree that the details of the code of conduct to be specified by ESMA may still allow administrators to tailor the details of their codes of conduct with respect to the specific benchmarks provided?

6.3.2 Identification of contributors and submitters (including submitter authorisation)

156. Point (aa) of Article 9(2) requires the code of conduct to set out "who may contribute input data to the administrator and procedures to evaluate the identity of a contributor and any submitters and the authorisation of any submitters to contribute input data on behalf of a contributor."

157. In all cases, the administrator should expect that submitters as defined in Article 3(1)(9) of the Regulation should have the necessary skills, knowledge and experience for the duties assigned and should be subject to effective management and supervision. Such skills and experience at the contributor level are essential to ensure the integrity of contributions from contributors who are not subject to regulatory oversight.

158. Administrators should expect that these submitters would not be subject to undue influence or conflicts of interest and, where possible, their compensation and performance evaluation should not create conflicts of interest or otherwise impinge on the integrity of the benchmark process.

159. The administrator should set out the information required from the contributor to enable it to identify individual submitters and to approve their role as submitter. This could include the name, job description and relevant experience of the submitter.

160. The administrator is expected to have procedures to evaluate the identity of the submitters who will contribute to a benchmark on behalf of a contributor and ensure, to the fullest extent possible that they fulfil the administrator's expectations. Only when evaluation is complete would the administrator agree to the submitter's role in the benchmark contribution.

Q47: Do you agree that such information should be required from contributors under the code of conduct? Should any additional information be requested?

Q48: Are there ways in which contributors may manage possible conflicts of interest at the level of the submitters? Should those conflicts, where managed, be disclosed to the administrator?

Q49: Do you foresee any obstacles to the administrator's ability to evaluate the authorisation of any submitters to contribute input data on behalf of a contributor?

6.3.3 Policies to ensure contribution of all relevant input data

161. Paragraph 2(b) requires the code of conduct to set out "*policies to ensure contributors provide all relevant input data*". In order to fulfil this requirement, administrators should clearly set out what data they expect to be included in determining a benchmark contribution. Contributors should be required to maintain sufficient records of data sources used to complete a benchmark contribution and make them available to administrators, on request. The code of conduct may require that the contributor's contribution process provides clear rules according to which it may be allowed to disregard any available input data and procedures to explain the exclusion of such input data from each contribution, at the request of the administrator.

Q50: Do you agree that a contributor's contribution process should foresee clear rules for the exclusion of data sources? Should any other information be supplied to administrators to allow them to ensure contributors have provided all relevant input data?

6.3.4 Contributor systems and controls

162. Article 9 – para 2 (c) states that the code of conduct should include "*systems and controls that the contributor is required to establish*":

- (i) procedures for submitting input data, including requirements for the contributor to specify whether the input data is transaction data and whether the input data conforms with the administrator's requirements;

- (ii) policies on the use of discretion in providing input data;
 - (iii) any requirement for the validation of input data before it is provided to the administrator;
 - (iv) record keeping policies;
 - (v) suspicious input data reporting requirements; and
 - (vi) conflict management requirements.
163. Regarding the procedures for submitting input data (i)
- Administrators may require contributors to transfer data via a secure connection. Where this is not possible contributors should be expected to use other alternative means, as set out by the administrator. These could include email, phone or other ways under the condition that safe transmission of the data is warranted.
- When transaction data are not available, contributors may provide, together with the contributions, explanation on whether the provision of alternative input data is done in accordance with the administrator's methodology.
164. Regarding the policies on the use of discretion in providing input data (ii):
- Contributors should have in place policies and procedures designed to make sure that their contributions are reflective of the market the benchmarks want to represent. When the contributor has discretion in providing input data, for example discarding some data or choosing information among a series of possible alternatives, there should be some rules to provide consistency of its behaviour over the time. Where possible, this should be in accordance with the benchmark methodology. The code of conduct may require that the contributors' policies and procedures also envisage adequate record-keeping of any exercise of discretion by contributors, in order to allow the administrator to have access to the records, on request, and thus be able to verify the adherence to the methodology and the said consistency of behaviour.
165. Regarding the validation of input data (iii):
- Contributions should be checked for correctness. Validation could include, for example, a "four eye" process, senior manager signature, and automatic checks by the system or pre-set thresholds, that the administrator may impose – via the code of conduct - as a pre-requisite for acceptance of contributors.
166. Regarding record keeping policies (iv):
- Contributors should keep record of the contribution made to the administrators for a reasonable amount of time and in an easily accessible form. The minimum information should include the date, time, submitter name and the procedures

governing the contributions. Where possible additional information should be recorded, this could include information such as the inputs considered, the data discarded and any other exercise of discretion, any communication with the Administrator or other relevant evidence.

Administrators may also require records of expert judgement, in accordance with the methodology and the hierarchy of input data set out in the code of conduct.

167. Regarding suspicious input data reporting (v):

Administrators should require contributors to have an adequate system to monitor the inputs and contributions. This could include, for example, pre-contribution and/or post-contribution checks for suspicious transactions. When an alert is generated this should be reviewed by trained employees.

Contributors could also be required to have in place an effective and documented escalation process to report suspicious transactions to compliance or senior personnel who will then, where appropriate, contact the administrator.

168. Regarding conflict of interest management requirements (vi):

The code of conduct should set out the policies, procedures and controls a contributor could have in place that would allow the identification and management of conflicts of interest. This could include, but should not be limited to, conflicts of interest policy, conflicts of interest register, additional oversight, physical separation of employees, Chinese walls, and thorough remuneration policies for submitting staff. The code of conduct could set differentiated requirements, in this area, depending on the nature of the contributors and on the possible existence of conflicts of interest at the level of the submitters.

Q51: Do you think that the listed procedures for submitting input data are comprehensive? If not, what is missing?

Q52: Do you agree that rules are necessary to provide consistency of contributors' behaviour over the time? Should this be set out in the code of conduct or in the benchmark methodology, or both?

Q53: Should policies, in addition to those set out in the methodology, be in place at the level of the contributors, regarding the use of discretion in providing input data?

Q54: Do you agree with the list of checks for validation purposes? What other methods could be included?

Q55: Do you agree with the minimum information requirement for record keeping? If not would you propose additional/alternative information?

Q56: Do you support the recording of the use of expert judgement and of discretion? Should administrators require the same records for all types of benchmarks?

Q57: Do you agree that an administrator could require contributors to have in place a documented escalation process to report suspicious transactions?

Q58: Do you agree with the list of policies, procedures and controls that would allow the identification and management of conflicts of interest? Should other requirements be included?

Q59: Do you have any additional comments with regard to the contents of a code of conduct in accordance with Article 9(2)?

7 Governance and control requirements for supervised contributors (Article 11 BMR)

7.1 Mandate

Article 11

4. ESMA shall develop draft regulatory technical standards to specify further the requirements concerning systems and controls set out in paragraphs 1, 2 and, 2b for different types of benchmarks.

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

7.2 General remarks

169. Article 11(4) BMR requires ESMA to develop draft RTS to specify further the requirements concerning system and controls for supervised contributors set out in paragraphs 1, 2, 2b for different types of benchmarks.

170. The following section of the DP puts forward ESMA's views on the areas that should be covered by the draft technical standards that shall be developed pursuant to Article 11 BMR. The draft regulatory standards shall not extend to non-significant benchmarks, which may instead be covered by guidelines. The technical standards will therefore apply to supervised contributors when providing input data to significant and critical benchmarks only.

171. Having adequate systems and control in place is important to make sure that the contributions provided to the benchmark administrator are correct, reliable and reflective of the market which the benchmark wants to represent. Effective systems and controls at the contributors' level are also essential to ensure the integrity of the input and act as a layer of defence against misconducts.

172. The administrator of and the supervised contributors to a benchmark may be regulated by different National Competent Authorities. Therefore, it is important to have a consistent and level playing field in terms of requirements and expectations.

7.3 Proposals

173. According to Article 11(1) supervised contributors shall be subject to governance and control requirements that ensure that the provision of input data is not affected by any conflict of interest and that discretion, if any, is independently and honestly exercised in accordance with the code of conduct and regulations. Also, the governance and control requirements demand a control framework that ensures the integrity, accuracy and reliability of input data and that the input data is provided in accordance with the provisions of the BMR and the code of conduct.
174. The requirements of governance and control regarding the provision of input data (including the exercise of discretion) set out in Article 11(1)(a) are mirrored in Article 11(2)(c) and Article 11(2b) respectively. The governance and control requirements regarding a control framework for input data set out in Article 11(1)(b) are further reflected by the provisions of Article 11(2)(a), (b) and (c) which require effective systems and controls to ensure integrity and reliability of all contributions.
175. ESMA is mandated to specify further the requirements concerning systems and controls set out in paragraphs 1, 2 and 2b. ESMA realises that there is incoherent numbering of the BMR text and has interpreted the mandate as reflected here. Given the interrelation of the quoted paragraph, as explained above, ESMA proposes to draft RTS to further specify the requirements of Article 11(2) and Article 11(2b) as these themselves further specify Article 11(1).
176. All requirements for supervised contributors under Article 11, that ESMA is mandated to further specify, govern the provision of input data. ESMA's proposals in this section should therefore be read in conjunction with the section of this Discussion Paper that covers input data (Article 7) more generally.
177. Article 11(2) BMR requires supervised contributors to have effective systems and controls in place to ensure the integrity and reliability of all contributions of input data to the administrator. Regarding this, ESMA proposes the following general requirements for supervised contributors:
- Oversight: accountability of senior personnel, compliance function, internal audit.
 - Documented and effective process for contributing data including, where applicable, the use of expert judgement. The process should be reviewed periodically and should include an error management policy.
 - Submitters/alternates identification.
 - Conflict of interest management policy and conflict of interest register.
 - Monitoring and surveillance: appropriate systems should be in place to monitor the data used for the contributions. Such systems should provide for effective checks and

controls carried out by appropriately trained staff. The systems for monitoring potential errors or suspicious contributions should be capable of producing alerts in line with predefined parameters in order to allow for further analysis to be conducted. The whole process could require some level of automation.

- Whistleblowing policy, including appropriate safeguards for whistle-blowers.
- Robust rules and escalation procedures which require the submitters, or any other employee, to report any suspicious activity to their National Competent Authority.
- Record keeping which may include keeping record of contributions, any other relevant information used and the sensitivity analysis for a period of at least 5 years.
- External audit report covering benchmark contribution activity should be made available to the National Competent Authority on request, where available. Information regarding non-compliance to code of conduct should also be made available to the Benchmark Administrator, upon request.
- All documents and policies should be available on request to the Administrator.

Q60: Do you agree with the above list of requirements? Do you think that those requirements are appropriate for all benchmarks? If not what do you think should be the criteria we should use?

Q61: Do you agree that information regarding breaches to the BMR or to Code of Conduct should also be made available to the Benchmark Administrator?

Q62: Do you think that the external audit covering benchmark activities, where available, should also be made available, on request, to the Benchmark Administrator?

178. In addition to the above general criteria, Article 11(2)(a) to (c) contains a non-exhaustive ("including") concrete list of elements that the systems and controls in place should address. ESMA proposes to further specify these criteria as follows.

179. Contributions should be made by a designated submitter as defined in Article 3(9) BMR (or alternate) who has adequate experience to assess the underlying market/economic reality which the benchmark is meant to represent. Being able to assess a market does not necessarily mean to have performed a front office role.

180. The designated submitter should have received an adequate training on the firm's conflicts of interest policy and the code of conduct of the relevant benchmark in addition to the BMR and to Regulation (EU) No 596/2014 (as already required in L1). The submitter should also sign, at least annually, a compliance statement which confirms that he/she has understood all the applicable rules and policies.

181. Supervised contributors should, in addition or substitution for the organisational separation of employees, where appropriate, find adequate measures to minimize interaction of submitters with front desk employees as defined in Article 7(3a) BMR. Where the submitters are themselves front desk employees, the systems and controls should warrant that, at least, adequate internal oversight and verification procedures (as required by Article 7(3a)(b)) are in place. ESMA also believes that where input data contribution is organisationally linked to another (particularly front desk) activity, variable remuneration should not be based on the level of the contribution and, where appropriate, the cost coverage for benchmark submission should be separate and made transparent to the National Competent Authority on request.

Q63: Do you agree with the proposed criteria for the specific elements of systems and controls as listed in Article 11(2)(a) to (c)? If not, what should be alternative criteria to substantiate these elements?

Q64: Do you agree that the submitters should not be remunerated for the level of their contribution but could be remunerated for the quality of input and their ability to manage the conflicts of interest instead?

182. The submitter's superior should sign-off on the contribution process without undue delays. ESMA recognises that it may not always be effective or proportionate to have a sign-off of the contribution before the data is provided to the administrator. However, ESMA is of the opinion that the general requirement should be that the data is signed off before it is provided to the administrator and sign-off at a later stage should be admitted on condition (i) it occurs in exceptional circumstances to be clearly explained, (ii) the sign-off is fulfilled within a maximum admissible delay.

183. Where data contributions are made through an automated process an employee with an adequate level of seniority should be responsible for signing-off the contributions.

Q65: What would be a reasonable delay for signing-off on the contribution? What are the reasons that would justify a delay in the sign off?

Q66: Is the mentioned delay an element that may be established by the administrator in line with the applicable methodology and in consideration of the underlying, of the type of input data and of supervised contributors?

Q67: In case of a contribution made through an automated process what should be the adequate level of seniority for signing-off?

184. The mandate requires ESMA to develop draft RTS to further specify requirements for policies guiding any use of expert judgement or exercise of discretion as required by Article 11(2b). While transactions should be the preferred input to a contribution, ESMA recognises that there may be cases where transactions are not available or are not representative of the market. Where discretion or expert judgement are used, supervised

contributors should create or enhance existing policies that describe when and how they may apply discretion in their contributions.

185. When expert judgement is used, ESMA believes the following policies should be in place at the contributor's level:

- a) The process for applying expert judgement
- b) The framework for ensuring consistency and transparency of expert judgement
- c) Information that could be used to support the use of expert judgement
- d) Controls regarding the use of expert judgement
- e) Record keeping of all relevant information, which enable ex-post verification of the contribution based on expert judgement

Q68: Do you agree with the above policies? Are there any other policies that should be in place at contributor's level when expert judgement is used?

7.4 Different characteristics of benchmarks

186. Article 11(4) BMR requires ESMA to account for the different characteristics of benchmarks and supervised contributors, notably in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors.

187. The mandate requires ESMA also to calibrate the requirements for different types of benchmarks which are reflecting differences in input data. However, given the main feature to be taken into consideration, which is the reliance of input data on expert judgement, is already tackled, ESMA believes that no other differentiation need to be accounted for.

188. Secondly, attention should also be given to the nature of the activities carried out by the supervised contributors. Stricter rules should probably be imposed on those entities, within the list set under Article 3, point (14), of the BMR that may be authorised to deal in financial instruments. This includes either on own account or to execute client orders - on a professional basis (e.g. banks, investment firms). For all others, and to create further distinction, less strict rules could apply to those that may take a position on financial instruments as part of their core business (e.g. insurance, reinsurance, pension funds) and those for which this could only occur occasionally (e.g. market operators, central counterparties, trade repositories).

Q69: Do you agree with this approach? If so, what do you think are the main distinctions – amid the identified detailed measures that a supervised contributor will

be required to put in place - that it is possible to introduce to cater for the different types, characteristics of benchmarks and of supervised contributors?

Q70: Do you foresee additional costs to your business or, if you are not a supervised contributor, to the business of others resulting from the implementation of any of the listed requirements? Please describe the nature, and where possible provide estimates, of these costs.

8 Critical benchmarks (Article 13 BMR)

8.1 Extract from the Commission's request for advice

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes for assessing benchmarks under the thresholds in Article 13(1) and Article 14b(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international flora.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

8.2 Criteria and assessment to determine critical benchmarks

8.2.1 The quantitative threshold

189. Article 13 of the BMR, read in conjunction with the definition of “critical benchmark” in Article 3(21), identifies under which conditions a benchmark should be considered critical. The first condition is the following:

“the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for the determination of the performance of investment funds, having a total value of at least 500 billion euro on the basis of all the range of maturities or tenors of the benchmark, where applicable.”

190. This means that when a benchmark, other than regulated-data benchmarks (as stated in Article 3(21)), breaches the 500 billion euro threshold, it should be considered as a critical benchmark. In the context of the calculation vis-à-vis such threshold, ESMA was requested by the European Commission to deliver technical advice in order to specify how to assess:

- nominal amount of financial instruments other than derivatives,
- the notional amount of derivatives, and

- the net asset value of investment funds, also in case of the indirect reference to a benchmark within a combination of benchmarks.

8.2.2 Nominal amount of financial instruments other than derivatives

191. In order to specify how to assess the “notional amount of financial instruments other than derivatives”, the first step is to identify all the instruments that belong to this category.

192. Article 3(1)(13) of the BMR defines a financial instrument as any of the instruments listed in Section C of Annex I to Directive 2014/65/EU²⁸ (MiFID II) for which a request for admission to trading on a trading venue has been made or which are traded on a trading venue or on a systematic internaliser. The instruments listed under points (4) to (10) of Section C, as well as point (c) under the “transferable securities” definition (see Article 2(1)(29) of Regulation (EU) No 600/2014 (MiFIR)²⁹), are considered derivatives. The financial instruments that are not derivatives are therefore the following:

- Point (a) and (b) under the ‘transferable securities’ definition (Article 4(1)(44) of MiFID II):

193. shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

194. bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

- Money-market instruments (as defined in Article 4(1)(17) of MiFID II): instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;
- Units in collective investment undertakings; and
- Emission allowances, consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC³⁰ (Emissions Trading Scheme).

195. For the purpose of the calculation of the quantitative threshold, without considering derivatives (covered in the next section), ESMA believes that bonds, other forms of securitised debt and money-market instruments represent the largest categories of financial instruments referencing to a benchmark that could fall under the category of critical benchmarks. ESMA has estimated that the outstanding notional amount of bonds,

²⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=FR>

²⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0600&from=EN>

³⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0046:en:PDF>

other forms of securitised debt and money market instrument with a variable rate in Europe is approximately 5 trillion euro, as of November 2015³¹.

196. In this respect, it should be noted that the new MiFIR and MAR regimes introduce provisions regarding financial instruments “reference data”. In particular, with regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs or systematic internaliser (see Article 27 of MiFIR³²), trading venues / systematic internalisers³³ will have to provide competent authorities with identifying reference data that summarise the core characteristics of the financial instruments³⁴. Competent authorities will in turn provide these reference data to ESMA who will make it available on its website.

197. ESMA has developed regulatory technical standards specifying the details that trading venues will have to report to competent authorities (see RTS 23 under Article 27 of MiFIR³⁵, and RTS V under Article 5 of MAR³⁶). The “reference data” table to be used by the trading venues / systematic internalisers presents a section dedicated to “*bonds or other forms of securitised debt related fields*” that includes the field “*total issued nominal amount*”, for which the content to be reported is the “*total issued nominal amount in monetary value*”. ESMA is considering the use of this information within the reference data framework to assess the nominal amount of bonds, other forms of securitised debt and money-market instruments admitted to trading on a trading venue or on a systematic internaliser.

Q71: Could the approach proposed, i.e. the use of the field total issued nominal amount in the context of MiFIR / MAR reference data, be used for the assessment of the “nominal amount” under BMR Article 13(1)(i) for bonds, other forms of securitised debt and money-market instruments? If not, please suggest alternative approaches.

198. Concerning the category of shares in companies within the MiFID II transferable securities definition, ESMA believes that there are no cases in which “standard” shares reference to a benchmark. However, under point (a) of the transferable securities definition, there may be some particular types of equity-like instruments linked to benchmarks, such as Dutch “preferente aandelen” which can refer to a floating interest rate linked to a benchmark. According to ESMA internal estimates, the outstanding notional amount of equity-like instruments with a variable rate in Europe is approximately 300 billion euro, as of November 2015³⁷, representing just a fraction of the already

³¹ Source: Dealogic, ESMA.

³² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0600&from=EN>

³³ It should be noted that only MiFIR refers to “systematic internaliser”.

³⁴ It should be noted that after the entry into application of the BMR, the reference data to be notified to competent authorities by the market operators of regulated markets and investment firms and market operators operating an MTF or an OTF - with respect to financial instruments for which a request for admission to trading is made, which are admitted to trading, or which are traded for the first time on their trading venue - should encompass also the name of a referenced benchmark along with the name of the administrator that provides that benchmark, as per Article 40a of the BMR.

³⁵ ESMA/2015/1464 Regulatory technical and implementing standards – Annex I MiFID II / MiFIR

https://www.esma.europa.eu/system/files/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

³⁶ ESMA/2015/1455 Draft technical standards on the market abuse regulation:

https://www.esma.europa.eu/system/files/2015-esma-1455_-_final_report_mar_ts.pdf

³⁷ Source: Dealogic, ESMA.

mentioned 5 trillion euro of outstanding notional amount of bonds, other forms of securitised debt and money market instrument with a variable rate.

199. A separate category of financial instruments other than derivatives is emission allowances. Within the EU emissions trading system (EU ETS³⁸), an emission allowance give the holder the right to emit one tonne of carbon dioxide (CO2), or the equivalent amount of two other greenhouse gases. The EU ETS works on the 'cap and trade' principle. The overall volume of greenhouse gases that can be emitted each year by the entities covered by the system is subject to a cap set at EU level. Within this Europe-wide cap, companies receive or buy emission allowances which they can trade if they wish. Auctioning is the main method of allocating allowances. Considering the mechanics of the EU ETS, ESMA also tends to believe that emission allowances, in all cases, do not reference to benchmark that could fall under the category of critical benchmarks.

Q72: Are you aware of any:

- i) **shares in companies,**
- ii) **other securities equivalent to shares in companies, partnerships or other entities,**
- iii) **depositary receipts in respect of shares,**
- iv) **emission allowances**

for which a benchmark is used as a reference?

Q73: Do you have any suggestion for defining the assessment of the nominal amount of these financial instruments when they refer to a benchmark?

200. Finally, the list of financial instruments other than derivatives includes "units in collective investment undertakings". The empowerment under Article 13(3) point (1) requires ESMA to specify how to assess, besides the nominal amount of financial instruments other than derivatives, also the net asset value of investment funds, also in case of the indirect reference to a benchmark within a combination of benchmarks. Article 3(1) point (16) of the BMR states that "investment fund" means AIFs as defined in point (a) of paragraph 1 of Article 4 of Directive 2011/61/EU (AIFMD³⁹), or UCITS falling within the scope of Directive 2009/65/EU (UCITS Directive⁴⁰).

201. ESMA believes that the category of units in collective investment undertakings is fully included in the definition of investment fund in Article 3(1) point (16) of the BMR. The presence of units in collective investment undertakings within the set of financial instruments other than derivatives and, at the same time, the reference to net asset value

³⁸ More information are available in the European Commission website: http://ec.europa.eu/clima/policies/ets/index_en.htm

³⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>

⁴⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>

of investment funds under the empowerment in Article 13(3) point (1) could lead to a double counting of units in collective investment undertakings in the calculation of the quantitative threshold. For this reason, ESMA is proposing to consider the value of units in collective investment undertakings only under the assessment of net asset value of investment fund, without specifying how to assess the nominal amount of units in collective investment undertakings, so as to avoid double counting.

Q74: Do you agree with ESMA proposal in relation to the value of units in collective investment undertakings? If not, please explain why.

8.2.3 Notional amount of derivatives

202. In relation to derivatives, the BMR Article 13(3) point (1) makes reference to the “notional amount”, which is a concept common to other EU legislations, such as MiFIR and EMIR.

203. In particular, in the context of the reporting obligation under EMIR, the minimum details of the data to be reported to trade repositories (TRs) prescribed by Commission Delegated Regulation (EU) No 148/2013⁴¹ includes the item “notional amount”, described as «original value of the contract» (see Table 2, field 14).

204. ESMA has recently published a review of the EMIR TS on reporting obligation⁴² in which a new Article 3a in the regulatory technical standards defines the term notional amount as follows:

‘The notional amount of a derivative contract shall be:

- a. In the case of swaps, futures and forwards traded in monetary units, the reference amount from which contractual payments are determined in derivatives markets;
- b. In the case of options, the strike price;
- c. In the case of financial contracts for difference and derivative contracts relating to commodities designated in units such as barrels or tons, the resulting amount of the quantity at the relevant price set in the contract;
- d. In the case of derivative contracts where the notional is calculated using the price of the underlying asset and such price is only available at the time of settlement, the end of day price of the underlying asset at the date of conclusion of the contract;

⁴¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.052.01.0001.01.ENG

⁴²https://www.esma.europa.eu/system/files/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf

The initial report of a derivative contract whose notional amount varies over time shall specify the notional amount as applicable at the date of conclusion of the derivative contract.

205. The item “notional amount” has to be reported to Trade Repositories in accordance with table 2 “Common data”, field 14 “Notional”, contained in the Annex of the same reviewed technical standards. ESMA is considering the use of this item within the EMIR reporting obligation framework to specify how to assess the notional amount of derivatives for the calculation of the quantitative threshold.
206. It should be noted that under the EMIR regime currently applicable, if the underlying of the derivative is an index, this is indicated as part of the details to be reported to Trade Repositories; it is not possible however to identify to which index the derivative refers (see item 4, Table 2 of Commission Delegated Regulation (EU) No 148/2013⁴³). In other words, although this field is currently populated in case of a derivative which makes reference to a financial index, it does not currently provide for any qualitative information on the particular index referenced. More granular information is instead available in relation to the rate(s) to which interest rates derivatives refers (see section 2e of Table 2 of Commission Delegated Regulation (EU) No 148/2013). In this context, ESMA has recently published a review of the EMIR TS on reporting obligation⁴⁴, in which these items are further specified: where the underlying of a derivative is an index, according to the new standards, the ISIN of the index should be indicated if available, or otherwise the full name of the index, as assigned by the index provider (see item 8, Table 2 Common Data of the Annex); for interest rate derivatives, the floating rate related fields provide for a close list of names of floating rates to be used for the reporting, instead of free text, as the case in the previous version of the standards (see item 55, Table 2 of the Annex).

Q75: Do you agree with the approach of using the notional amount, as used and defined in the EMIR reporting regime, for the assessment of notional amount of derivatives under BMR Article 13(1)(i)? If not, please suggest alternative approaches.

8.2.4 Net asset value of investment funds

207. As already said, under Article 13(3) point (i) of the BMR, the Commission is empowered to adopt delegated acts in order to also “specify how [...] the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks” in order to be compared with the 500 billion euro thresholds for critical benchmarks. The relevant European sectoral legislation applicable to investment funds (i.e. Directive 2009/65/EC (UCITS Directive⁴⁵) and Directive

⁴³:http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.052.01.0001.01.ENG

⁴⁴ https://www.esma.europa.eu/system/files/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf

⁴⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>

2011/61/EU (AIFMD⁴⁶) does not provide for harmonised rules on the calculation of the net asset value of investment funds.

208. Although the AIFMD provides for a detailed set of rules aimed at a proper and independent valuation of the assets of alternative investment funds (AIF), article 19(2) of the AIFMD states that "*The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the AIF shall be laid down in the law of the country where the AIF is established and/or in the AIF rules or instruments of incorporation*". Similarly, Article of the UCITS Directive provides that the depositary of a UCITS fund shall "*ensure that the value of the units of the UCITS is calculated in accordance with the applicable national law and the fund rules or the instruments of incorporation*" (Article 22(3)(b) of the UCITS Directive).

209. However, both the AIFMD and UCITS Directives include rules relating to the disclosure of the net asset value of the funds to investors.

210. The AIFMD provides that managers of AIFs "shall also ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation" (Article 19(3) of the AIFMD). AIFMs are responsible for the publication of the net asset value (Article 19(10) of the AIFMD). The latest net asset value of the AIF has also to be made available to AIF investors before they invest in the AIF (Article 23(1)(m) of the AIFMD).

211. Managers of UCITS funds are obliged to publish annual and half-yearly reports for each UCITS they manage. According to Article 68(2) of the UCITS Directive, these reports shall be published within the following time limits, with effect from the end of the period to which they relate:

- a. four months in the case of the annual report; or
- b. two months in the case of the half-yearly report.

212. The annual and half-yearly reports of a UCITS shall include, *inter alia*, the net asset value per unit of the UCITS (Annex I, Schedule B of the UCITS Directive).

213. A possible first option to determine how the net asset value of funds should be assessed could be to take as a proxy the information to be disclosed to investors under the AIFMD and UCITS Directive, as described above. However, there may be mismatches in terms of availability of data under the UCITS Directive and the AIFMD⁴⁷. This is because – as mentioned above – the UCITS Directive requires UCITS to disclose

⁴⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>

⁴⁷ In this context, the AIFMD reporting system may also be of relevance as AIFs are deemed to report, *inter alia*, their net asset value with the frequency established under the AIFMD. However, the current AIFMD reporting system does not allow determining whether the reporting AIF uses any benchmark for the determination of its performance. Moreover, there are no databases for UCITS funds. The only information mandated by the current legislation is the one to be included in the UCITS yearly and half-yearly reports.

information on their net asset value at least at a certain frequency and a correspondent requirement does not apply to funds subject to the AIFMD. Therefore, an alternative second option could be that the net asset value of investment funds is assessed based on the latest available net asset value, wherever this information is published.

Q76: Which are your views on the two options proposed to assess the net asset value of investment funds? Should you have a preference for an alternative option, please provide details and explain the reasons for your preference.

8.2.5 Indirect reference to a benchmarks within a combination of benchmarks

214. The nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds need to be assessed for the purpose of determining whether a benchmark is critical and this has to be done also "*in case of the indirect reference to a benchmark within a combination of benchmarks*". Therefore, in case of a financial instrument, a derivative or an investment fund referencing to a composite benchmark, two different approaches may be considered. Firstly, only the portion of the nominal amount of the financial instrument / notional amount of the derivative/ net asset value of the investment fund which refers to the single benchmark (within a combination of benchmarks) the criticality of which is being assessed could be taken into account. Secondly, whenever a financial instrument, a derivatives or an investment fund makes reference to a benchmark (within a combination of benchmarks), the "full" nominal amount / notional amount / net asset value could be seen as relevant for the purpose of the assessment whether the relevant benchmark is critical or not.

Q77: Which are your views on the two approaches proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of an investment fund referencing a benchmark within a combination of benchmarks? Please provide details and explain the reasons for your preference. Do you think there are other possible approaches? If yes, please explain.

8.2.6 Significant and adverse impact of benchmarks

215. According to Article 13(1) of the Benchmark Regulation, the Commission shall adopt implementing acts to establish and review at least every two years a list of benchmarks provided by administrators located in the Union which are critical benchmarks, in accordance with the definition laid down in Article 3(21), provided that one of the conditions (a) to (c) of Article 13(1) is fulfilled.

216. ESMA was requested by the Commission to provide technical advice on how the criteria specified in Article 13(1)(c)(iii) of the Benchmark Regulation should be applied, taking into consideration any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on the elements listed in

subparagraph iii. ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

217. In order for a benchmark to be included in the list of critical benchmarks pursuant to Article 13(c)(iii) of the Benchmark Regulation, all the criteria mentioned under (iii) should be fulfilled. Therefore, for this paragraph to apply, a benchmark will have to be used as a reference for financial instruments and contracts having a total value between EUR 400 billion and EUR 500 billion. In addition, the benchmark should have no or very few appropriate market-led substitutes. Finally, ceasing to provide such a benchmark should have a significant and adverse impact in one or more Member State on:

- i. Markets integrity; or
- ii. Financial stability; or
- iii. Consumers; or
- iv. The real economy; or
- v. The financing of households and corporations.

218. It should be noted that in relation to the procedure of recognition of a benchmark as being critical in a single Member State by the competent authority of that Member State in accordance with Article 13(1)(b), Article 13(2b) of BMR already includes some indication of what should be taken into account by that competent authority in its assessment. These are:

219. the value of financial instruments and financial contracts that reference the benchmark within the Member State and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State;

220. the value of financial instruments and financial contracts that reference the benchmark within the Member State and its relevance in terms of the gross national product of the Member State.

221. ESMA believes that also the Commission should take into consideration these two values when establishing the list of critical benchmarks in accordance with Article 13(1), and that the technical advice for Article 13(1)(c)(iii), should be developed with a consistent approach with this one, already embedded in L1.

222. Indeed ESMA's technical advice with respect to Article 13(1)(c)(iii) should propose figures to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on the 5 areas mentioned above, for which ESMA is proposing a "relative impact approach". For example, with respect to the real economy a certain percentage point decrease of GDP could be qualified as having significant impact. With respect to consumers a similar approach could be taken by looking at the percentage of consumer loans that would be affected if a benchmark is discontinued or is

no longer considered reliable. However, consideration should be given to the availability of data to calculate the relative impact.

223. ESMA prefers to propose a “relative impact approach” rather than absolute figures. The significant impact in absolute figures, for example on GDP, could differ to a great extent from one Member State to another, while a “relative impact approach” is more flexible and it adapts to the different circumstances of the Member States.

224. Examples of criteria under the “relative impact approach” that could be used to assess the potential impact of the discontinuity or unreliability of a benchmark are provided below.

I. Markets integrity:

- the value of financial instruments and financial contracts that reference the benchmark within one or more Member States and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State(s) considered (*this would be a value similar to the one included in Article 13(2b) but taking into consideration also more Member States at the same time*);
- the value of financial instruments that reference the benchmark and are traded (or for which a request for admission to trading has been made) on a trading venue within one or more Member States and its relevance in terms of the total value of financial instruments traded (or for which a request for admission to trading has been made) on a trading venue in the Member State(s) considered;

II. Financial stability:

- the value of financial instruments and financial contracts that reference the benchmark within one or more Member States and its relevance in terms of
 - i. the total assets of the financial sector⁴⁸ in the Member State(s) considered;
 - ii. the total assets of the banking sector in the Member State(s) considered;

III. Consumers:

- the value of financial contracts referencing the benchmark that are credit agreements for consumers⁴⁹ within one or more Member States and its

⁴⁸ The European Central Bank’s monthly “Report on Financial Structures” may provide helpful figures in this respect: <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf>

relevance in terms of the total value of credit agreements for consumers outstanding in the Member State(s) considered;

IV. The real economy:

- the value of financial instruments and financial contracts that reference the benchmark within one or more Member States and its relevance in terms of the gross national product of the Member State(s) considered (*this would be a value similar to the one included in Article 13(2b) but taking into consideration also more Member States at the same time*);

V. The financing of households and corporations:

- the value of financial contracts referencing the benchmark that are loans to households or non-financial corporates within one or more Member States and its relevance in terms of the total value of loans to households or non-financial corporates⁵⁰ in the Member State(s) considered.

Q78: Do you agree with the ‘relative impact’ approach, i.e. define one or more value and “ratios” for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

Q79: What kind of other objective grounds could be used to assess the potential impact of the discontinuity or unreliability of the benchmark besides the ones mentioned above (e.g. GDP, consumer credit agreement etc.)?

⁴⁹ The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers) was adopted on 23 April 2008 and defines what credit agreements for consumers are and their EU legal framework.

⁵⁰ ECB maintains updated statistics on outstanding loans to households and non-financial corporations in its Statistical Data Warehouse : <https://sdw.ecb.europa.eu/home.do>

9 Significant benchmarks (Article 14c BMR)

9.1 Mandate

Article 14c

2. The national competent authority may decide that the administrator of the significant benchmark shall nevertheless apply one or more of the requirements of Articles 5(2), 5(3c)(c)(d)(e), 7(3a)(b) and 9(2) if it considers that it would be appropriate taking into account the nature or the impact of the benchmarks or the size of the administrator. In its assessment, the national competent authority shall, based on the information provided by the administrator, take into account the following criteria:
- a. the vulnerability of the benchmark to manipulation;
 - b. the nature of the input data;
 - c. the level of conflicts of interest;
 - d. the degree of discretion of the administrator;
 - e. the impact of the benchmark on markets;
 - f. the nature, scale and complexity of the provision of the benchmark;
 - g. the importance of the benchmark to financial stability;
 - h. the value of financial instruments and financial contracts that reference the benchmark;
 - i. the administrator's size, organisational form and/or structure.

8. ESMA shall develop draft regulatory technical standards to further specify the criteria referred to in paragraph 2.

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

9.2 Criteria of the assessment by National Competent Authorities

225. The BMR introduces the concept of significant benchmarks, i.e. non-critical benchmarks that are either used as a reference for financial instruments, financial contracts or for the determination of the performance of investment funds with a total average value of at least 50 billion euro over a period of 6 months or, among other things, that have no or very few market-led substitutes and the cessation of which would have significant adverse impacts.

226. For significant benchmarks, the administrator may decide not to apply single provisions, directly mentioned in the BMR, for operational separation, additional conflict of interest avoidance, accountability and minimum requirements for a contributor code of conduct if it considers that their application would be disproportionate. If he decides to do so, the administrator has to immediately notify the national competent authority and provide all necessary information (see Article 14c (1a)). The NCA may decide that one or more of the mentioned requirements shall, contrary to the administrator's statement, apply if deemed appropriate (see Article 14c (2)). When assessing the appropriateness, the BMR sets out nine criteria to be taken into account, and ESMA is asked to draft RTS to further specify these, in detail:

(a) vulnerability of the benchmark to manipulation

227. Where a benchmark is not based on transaction data and contributors are not supervised entities the vulnerability of the benchmark to manipulation is likely to be high in lack of additional measures of transparency, oversight and/or verifiability outside of the administrator's sphere. Therefore, exemptions from the requirements regarding the minimum contents of the contributor code of conduct should only be granted if the administrator can demonstrate that they do not adversely affect the benchmarks resistance to manipulation.

228. If the administrator of the benchmark is not dedicated to providing benchmarks alone, ESMA believes that the potential risk of collaborative manipulation by different functions within an administrator is particularly high and, hence, that the requirement for operational separation of the benchmark administration from the remaining business should generally be applied unless the administrator can demonstrate that there is no potential for a conflict of interest, particularly that the administrator does not have a financial interest in any instruments or contracts referencing the administrator's benchmark.

229. A clear indication for vulnerability of a benchmark will be if there are proven cases of manipulation of the same benchmark or any benchmark with a similar methodology. The NCA in its assessment whether to require the administrator to apply additional provisions should take past cases into account as lessons learned. Where there are no past cases of manipulation of the administrator's or a similar benchmark, the non-application of provisions should not be objected to where they would not perpetuate or strengthen an existing vulnerability of a benchmark that is founded in its methodology or the market it is intended to measure.

(b) nature of the input data

230. In its decision to approve of the non-application of one or more requirements mentioned in Article 14c (1), the NCA may not accept any exemptions for interest rate benchmarks, as the proportionality regime of Article 14b, 14c and 14d does not apply.

231. For regulated data by contrast, the NCA does not have any discretion to object to the administrator's decision not to apply the provisions on front office contribution (Article 7 (3a)) and contributor code of conduct (Article 9) as these do not apply for regulated data benchmarks in any case. The same holds for record keeping requirements where regulated data is sourced as defined in Article 3 (1)(20a). For the remaining provisions, ESMA thinks that administrators of regulated data benchmarks may decide not to separate the benchmark provision operationally and not to apply additional prohibitions and measures to employees and service personnel (as set forth in Article 5) if their conduct can be shown not to materially affect the benchmark calculation and they are prohibited to intentionally engage in conflicting activities by other measures, e.g. their employment contract or national labour law.

232. Where input data is transaction data and the administrator is itself engaged in the market the benchmark is intended to represent, ESMA is of the opinion that a higher risk for conflicts of interest exists in general which can support a decision by the NCA for the administrator to apply the provisions of Article 5 (3c) (c),(d),(e).

(c) level of conflicts of interest

233. The potential for a conflict of interest may be particularly high when the benchmark is based on transactions and the administrator itself participates in the market the benchmark is designed to represent. The NCA should therefore generally be allowed to require the administrator to apply the provisions of Article 5.

234. When determining the conflict of interest in cases where the administrator provides benchmarks that are based on contributions, the decision to grant exemptions from the minimum elements for a contributor code (Article 9) should take into account the administrator's potential or actual involvement with contributors and the code of conduct should warrant that any involvement is transparent and governed by adequate control mechanisms.

(d) degree of discretion of the administrator

235. Where the benchmark methodology grants the administrator discretion in calculating the benchmark, any exemption of the provision quoted in Article 14c para 1 may in ESMA's view not serve to or allow for a reduction of transparency of the process or accountability of the administrator and all persons involved in the benchmark provision. If the benchmark is based on transaction data, the degree of discretion of the administrator will in most cases be lower than in cases where benchmarks are based on quotas. In these cases, however, the accuracy of the underlying data is paramount and the NCA can have stronger arguments to ask for the provisions on internal oversight and verification procedures by the contributor (Article 7 (3a) (b)) to be applied by the administrator to strengthen data reliability.

(e) impact of the benchmark on markets

236. The definition of a significant benchmark in Article 14b already takes into account the impact the benchmark has on the market by referring to a quantitative threshold and qualitative criteria. Where a benchmark is significant for quantitative reasons, in its decision whether or not to require the administrator to apply the provisions quoted in Article 14c the NCA may take into account if the total average value of the instruments, contracts and funds referencing the benchmark is on the lower end or rather close to the threshold for critical benchmarks (500 bn euros, Article 13 (1) (i)).

237. Equally, the NCA may assess the benchmark's market impact by further analysing the administrator's assessment – if any – of and reasons for the impact a cessation of the benchmark would have on markets integrity and financial stability according to Article 14b (1)(b).

238. The closer the benchmark is to being non-significant, the lower its impact on markets will generally be. Conversely, a proximity to being a critical benchmark will indicate a higher impact and will in general support a decision of the NCA to require the administrator to apply one or more criteria quoted in Article 14c (1) it has announced it would not.

(f) nature, scale and complexity of the provision of the benchmark

239. In ESMA's view, this criterion aims at the process of providing the benchmark rather than the benchmark itself, which should be covered by the remaining criteria.

240. In this respect, the nature of the provision could extend to the process of collecting input data and the NCA in its decision to require the administrator to apply certain provisions may take this difference into account. Where the benchmark is based on contributions, again, the NCA can have strong arguments when it asks the administrator to apply Article 9 (2). Likewise, where transaction data is contributed, there is a strong general case for the internal oversight and verification procedures in the contributor code of conduct as set forth in Article 7 (3a) (b) to apply.

241. The scale of benchmark provision by contrast is likely to reflect the size of the benchmark administration also in relation to the administrator's remaining business, if any. The scale could therefore affect the NCA's decision in respect to all provisions quoted in Article 14c (1), and should be carefully evaluated in conjunction with other criteria.

242. When considering the complexity of the benchmark provision, an NCA would have to look at the process the administrator will have to apply according to the methodology. ESMA suggests that, particularly, aspects like the complexity of the calculation method itself, the level of discretion the administrator has (in conjunction with criterion (d)), the amount of data to be processed and/or the number of contributors and the variety of data sources should be taken into account.

(g) importance of the benchmark to financial stability

243. The BMR already requires the European Commission, and NCAs respectively, to assess the importance of a benchmark for markets integrity, financial stability, consumers, the real economy, the financing of households and corporations when determining the criticality of a benchmark in Article 13.

244. According to Article 13 (2b)(i) the NCA should take into account the value of financial instruments and financial contracts that reference the benchmark within the Member State and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State. While this is, in ESMA's view, a criterion that will reflect the benchmark's importance for market integrity, a similar relation can be helpful for the NCA when assessing the importance of a benchmark for financial stability alone as required in Article 14c (2)(g). Instead of relating the total value of referencing financial instruments and financial contracts to the overall outstanding sum of these, the NCA may take as a reference the total assets of the financial sector and/or of the banking sector in its Member State⁵¹.

(h) value of financial instruments and financial contracts that reference the benchmark

245. This criterion is in ESMA's view closely linked to the criterion (e) above (impact of the benchmark on markets) and should be assessed similarly, i.e. where a significant benchmark is – quantitatively – close to surpassing the threshold of 500bn euros (Article 13 (1)(i)) the provisions named in Article 14c should generally apply and exemptions would need to be supported by clear evidence by the administrator that in exceptional cases the non-application of single provisions may nonetheless not harm the benchmark's integrity and may not adversely affect the markets. Benchmarks, by contrast, that are close to being non-significant may generally be more open to exemptions.

(i) administrator's size, organisational form and/or structure

246. ESMA believes that the criterion of the administrator's size, organisational form and/or structure should be viewed together with other criteria, i.e. it should be the benchmark's methodology, complexity, size and importance that dictate what measures of transparency, systems and controls and conflict avoidance (in particular operational separation) should apply, and the administrator's organisational form and/or structure should be appropriate to accommodate these.

247. Where an administrator is not a dedicated benchmark administrator, its benchmark operation should generally be separated from e.g. trading activity or client business. In most cases it will be the size and complexity of the benchmark rather than that of the administrator that may justify exemptions, i.e. if a smaller benchmark with little relevance for the markets and little proneness to manipulation is provided by a large institution, an operational separation and verification procedures for front office submissions (Article 5

⁵¹ The European Central Bank's monthly "Report on Financial Structures" may provide helpful figures in this respect: <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf>

(2), Article 7 (3a)(b)) may be more likely to be dispensable than if an important benchmark is provided by a smaller administrator with little personnel and a simple organisational structure.

Q80: Do you agree with ESMA's approach to further define the above criteria? Particularly, do you think that ESMA should develop more concrete guidance for the possible rejection of the NCA under Article 14c para 2? Do you believe that NCAs should take into consideration additional elements in their assessment?

10 Compliance Statement for Significant and Non-significant Benchmarks (Article 14c and 14d BMR)

10.1 Mandate

Article 14c

6. Where the administrator of significant benchmarks does not comply with one or more of the requirements laid down in Articles 5(2), 5(3c)(c)(d)(e), 7(3a)(b) and 9(2) it shall publish and maintain a compliance statement that shall clearly state why it is appropriate for that administrator not to comply with those provisions.

7. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 6.

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by [12 months after entry into force].

Article 14d

2. Where the administrator does not apply one or more of the requirements laid down in paragraph 1, it shall publish and maintain a statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions. The administrator shall provide the statement to its competent authority.

3. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 2.

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by [12 months after entry into force].

10.2 Compliance statement: significant benchmarks

248. As explained in the previous section, administrators of significant benchmarks may decide not to apply a number of provisions, listed in Article 14c(1), subject to the assessment of the relevant competent authority. Where the administrator does not comply with one or more of the provisions listed in Article 14c(1), it has to publish and maintain a compliance statement explaining why it is appropriate for that administrator not to comply with those provisions.

249. In this context, ESMA is empowered to develop implementing technical standards to develop a template for such compliance statement.

250. The template should ensure that the statement is clear and unambiguous, and at the same time the explanation of the non-application of the provisions should be as detailed and comprehensive as possible. ESMA believes that a statement should refer to a single benchmark/family of benchmarks, and therefore if an administrators decide not to apply those provisions to, e.g., three different benchmarks (not belonging to the same family as defined under Article 3(1)(2a) of the BMR), it should publish three separate statements.

251. For sake of clarity, the compliance statement should also indicate where the “benchmark statement”, that administrators have to publish in accordance with Article 15 (see next section), has been published.

252. For these reasons, ESMA is proposing that the template is composed by the following fields:

- identity of the administrator: as it appears in the “Register of administrators and benchmarks” published by ESMA according to Article 25a;
- relevant National Competent Authority: i.e. the NCA who has authorised the administrator pursuant to Article 23;
- name of the benchmark: as it appears in the “Register of administrators and benchmarks” published by ESMA according to Article 25a;
- declaration that the benchmark is a significant benchmark;
- reference to benchmark statement: indication to where the benchmark statement (required by Article 15) is publicly available;
- identification of the first provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the first provision identified in the previous field;
- identification of the second provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the second provision identified in the previous field;
- identification of the “N” provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the “N” provision identified in the previous field.

253. The fields on the identification of the provision and the related detailed explanation should be repeated for each single provision that the administrator is not applying, so as to ensure the maximum clarity.

10.3 Statement: non-significant benchmarks

254. In relation to non-significant benchmarks, the BMR has a similar approach towards possible exemption. According to Article 14d of the BMR, when a benchmark is not classified as critical or significant benchmark, its administrator may decide not to apply a number of requirements indicated under the L1 and related to: governance and conflict of interest (Article 5), oversight function (Article 5a), control framework (Article 5b), accountability framework (Article 5c), input data (Article 7), transparency of methodology (Article 7b), reporting of infringement (Article 8), code of conduct (Article 9), governance and control requirements for supervised contributors (Article 11).

255. If an administrator decides not to apply any of the provisions listed in Article 14d(1), it will have to publish and maintain a statement explaining why it is appropriate not to comply with the specific provisions.

256. The main difference with the process for significant benchmarks is that in the case of non-significant benchmarks:

- there is no assessment by the competent authority on the appropriateness of the exemptions elected by the administrator (see Article 14c for significant benchmarks);
- the compliance statement should also be provided to the relevant competent authority;
- the competent authority may require additional information as well as changes to ensure compliance with the BMR (see Article 14d(4));
- the competent authority can also require an administrator to appoint an independent external auditor to review and report on the accuracy of the administrator's compliance statement and to provide this report to the competent authority (see Article 14d(5));

257. In this context, ESMA is empowered to develop implementing technical standards to develop a template for such compliance statement, in the same way in which it is empowered to develop a template for the compliance statement of significant benchmarks.

258. The template should ensure that the statement is clear and unambiguous, and at the same time the explanation of the non-application of the provisions should be as detailed and comprehensive as possible. ESMA believes that a statement should refer to a single benchmark/family of benchmarks, and therefore if an administrators decide not to apply those provisions to, e.g., three different benchmarks (not belonging to the same family as defined under Article 3(1)(2a) of the BMR), it should publish three separate statements.

259. For these reasons, ESMA is proposing the same template that for significant benchmarks, composed by the following fields:

- identity of the administrator: as it appears in the “Register of administrators and benchmarks” published by ESMA according to Article 25a;
- relevant National Competent Authority: i.e. the NCA who has authorised the administrator pursuant to Article 23;
- name of the benchmark: as it appears in the “Register of administrators and benchmarks” published by ESMA according to Article 25a;
- declaration that the benchmark is a non-significant benchmark;
- reference to benchmark statement: indication to where the benchmark statement (required by Article 15) is publicly available.
- Identification of the first provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the first provision identified in the previous field;
- identification of the second provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the second provision identified in the previous field;
- identification of the “N” provision which the administrator does not apply to the benchmark: number of the Article of the BMR and full text of the provision;
- detailed explanation of the reason(s) why the administrator is not applying the “N” provision identified in the previous field.

260. The proposed template is the same as the one for significant benchmarks, and therefore the fields on the identification of the provision and the related detailed explanation should be repeated for each single provision that the administrator is not applying.

Q81: Do you think that the fields identified for the template are sufficient for the competent authority and the stakeholders to form an opinion on the representativeness, reliability and integrity of a benchmark, notwithstanding the non-application of some material requirements? Could you suggest additional fields?

11 Benchmark Statement (Article 15 BMR)

11.1 Mandate

Article 15

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

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by [12 months after entry into force].

11.2 General remarks

261. Article 15 of the Benchmark Regulation requires administrators to publish a benchmark statement. Article 15(1) states general requirements regarding transparency, appropriateness and user caution. The minimum contents for all benchmark statements are specified in Article 15(2) with reference to the methodology and the process to determine the benchmark, in particular the input data.

262. ESMA suggests further specifications for the general requirements (I), including a minimum timeframe for publication of the benchmark statement and updates, and the minimum contents (II). Beyond these, ESMA suggests specific requirements for different types of benchmarks (III), taking into account the principle of proportionality.

11.3 Requirements for all benchmarks

11.3.1 General requirements

263. According to Article 15(1)(a), a benchmark statement must clearly and unambiguously define the market or economic reality measured by the benchmark and the circumstances in which such measurement may become unreliable.

264. While within the universe of benchmarks a wide variety of markets are and may be covered, ESMA believes that the benchmark statement should be easily accessible and should inform the public in a concise and comprehensible manner at least about the following aspects:

- Type of market: a general description of the measured market and its geographical boundaries (e.g. one or several member states), including its forming part of a specific sector under the Regulation (interest rates, commodities) and whether it is regulated or not.

- Market access and market participants: information on the actual or potential participants of the market (e.g. investment firms or retail investors) and whether there are barriers to access it (e.g. regulatory, geographical, economic).
- Size of the market: an estimate of the volume of transactions in the relevant market over the period measured by the benchmark, reflecting where applicable periods preceding the publication of the benchmark statement.

265. ESMA acknowledges that the conditions for a reliable measurement of the underlying market or economic reality may not be established in absolute terms but are dependent on the benchmark's methodology defined by the administrator and made transparent to users. Taking this into account, ESMA suggests to consider the following aspects when defining the circumstances in which a measurement may become unreliable:

- Size and number of participants: a minimum size (e.g. volume of transactions reflecting the benchmark methodology) and where applicable a minimum number of participants below which the market would lack sufficient information to determine the benchmark according to the methodology.
- Liquidity: a general environment that allows executing a transaction of a reasonable size in a timely manner, if this is a requirement under the relevant methodology.

Q82: Do you agree with the suggested minimum aspects for defining the market or economic reality measured by the benchmark?

Q83: Do you think the circumstances under which a benchmark determination may become unreliable can be sufficiently described by the suggested aspects?

266. Article 15(1)(c) requires that the benchmark statement clearly and unambiguously identifies elements of the benchmark that may be subject to discretion, the circumstances under which such discretion may be exercised and by whom. Furthermore, the benchmark statement should include a reference to a procedure for evaluation of such discretion. ESMA suggests that the benchmark statement should at least contain information on:

- Applicability: whether or not discretion is generally allowed according to the benchmark methodology. Where it is allowed, the benchmark statement should include a reference to the particular element of the benchmark determination that is or may be subject to discretion and who may exercise it.
- Necessary discretion: a description of aspects of the benchmark methodology that indispensably require the exercise of discretion, if any.
- Evaluation: where the methodology allows for discretion, the benchmark statement should include a clear reference to the person or body that

evaluates any exercise of discretion and its role in the benchmark determination process, if any.

Q84: Do you agree with the minimum information on the exercise of discretion to be included in the benchmark statement?

11.3.2 Minimum Content

267. Article 15(2), (a) to (g) already define minimum contents that apply for all benchmark statements no matter the type of benchmark or sector and further specify these in terms of definitions, determination procedures and their limitations, situations of stress or insufficient or unreliable transaction data as well as rules and procedures regarding discretion and dealing with errors. ESMA believes that the description of minimum contents in Art. 15 para. 2 is sufficiently precise and that further requirements would have to differ according to the individual benchmarks properties and methodologies.

Q85: Are there any further precise minimum contents for a benchmark statement that should apply to each benchmark beyond those stated in Art. 15(2) points (a) to (g) BMR?

11.4 Specific requirements for different types of benchmarks

268. Beyond the requirements and minimum contents that apply to each benchmark, ESMA considers it appropriate to establish additional criteria for the specific types of benchmarks as defined by the Regulation, i.e. interest rate benchmarks, commodity benchmarks, regulated-data benchmarks. The empowerment in Article 15(3) asks ESMA to take into account the principle of proportionality, and therefore ESMA proposes specific requirements for the following category of benchmarks: critical benchmarks, significant benchmarks and non-significant benchmarks.

11.4.1 Interest rate benchmarks

269. According to Article 3(1) point (19) 'interest rate benchmark' means a benchmark where the underlying asset for the purposes of Article 3(1) point (1) (c) is the rate at which banks may lend to, or borrow from other banks or agents, other than banks, in the money market. The Regulation applies special requirements to interest rate benchmarks in Annex I (e.g. addressing the hierarchy and transparency of input data; the establishment and tasks of the oversight function; Code of Conduct; audit requirements; additional requirements for contributors to interest rate benchmarks). ESMA therefore suggests for the benchmark statement of interest rate benchmarks to contain a concise and clear description how these additional requirements have been implemented by the Administrator. Where appropriate, the description might make reference to other sources of information, in particular when provided by the Administrator (e.g. on its homepage), where more detailed information concerning the aspects covered may be easily obtained. However, in the interest of transparency, an excessive use of cross-references should

not impede the possibility to get a concise and clear overview as regards the benchmark at stake by means of the benchmark statement.

Q86: Do you agree that a concise description of the additional requirements including references, if any, would be sufficient for the information purposes of the benchmark statement for interest rate benchmarks?

11.4.2 Commodity benchmarks

270. ESMA proposes that, further to the general requirements, the statement to be published for each commodity benchmark should clearly describe the criteria that define the physical commodity that is subject of a particular benchmark calculation methodology.

271. In addition, according to Article 14a, the special requirements laid down in Annex II should apply to the provision of and contribution to commodity benchmarks, unless the benchmark is a regulated-data benchmark or is based on submissions by contributors which are in majority supervised entities. Annex II stipulates for example special provisions as regards the methodology, respective publication requirements and for the quality and integrity of the benchmark calculations. ESMA suggests that when the special requirements of Annex II apply, the benchmark statement should briefly describe their applicability and implementation by the administrator. In this context, the benchmark statement should in particular inform about the concise explanation that has to be published with each benchmark calculation according to Annex II, para. 6, in order to inform the public about the key elements of each particular benchmark determination. The benchmark statement should also indicate the source where these explanations may be found. Furthermore, the benchmark statement should also outline the professional profiles of the contributors to the benchmark and explain why the same is predominantly based on submissions by such non-supervised entities.

Q87: Do you agree that the statement for commodity benchmarks should be delimited as described? Otherwise, what other information would be essential in your opinion?

11.4.3 Regulated-data benchmarks

272. According to Article 12a, benchmarks that are determined by a formula applied to data that is entirely sourced from trading venues, approved publication arrangements or reporting mechanisms, qualified exchanges or auction platforms, or to net asset values of UCITS are privileged in so far as a reduced number of obligations under the Regulation applies. Taking the principle of proportionality into account, ESMA considers it therefore inappropriate to establish further material requirements with regard to the benchmark statement for such regulated-data benchmarks that go beyond what is required in general (see sections: "general requirements" and "minimum content"). However, ESMA is of the opinion that benchmark statements for regulated-data benchmarks should contain:

- Qualification as a regulated-data benchmark: a clear indication that the benchmark is a regulated-data benchmark as defined by the Regulation, what kind of data is used to determine it and who regulates this data.

273. Where appropriate in the interest of a concise regulated-data benchmark statement, the same might be limited to mentioning the relevant source documents, when and where these have been disclosed to the public and how they may be directly and easily accessed by the public. ESMA supposes that these conditions should regularly be fulfilled in case of regulated-data benchmarks.

Q88: Do you agree with ESMA's approach not to include further material requirements for the content of benchmark statements regarding regulated-data benchmarks?

11.5 Proportionality

11.5.1 Critical Benchmarks

274. The Regulation applies high standards to critical benchmarks (e.g. mandatory contribution, enhanced oversight). ESMA therefore considers it crucial for the addressee of the benchmark statement to know if and why a particular benchmark is considered critical as defined by Article 3(1) point (21). On the one hand, it may be important for the benchmark user to know why this benchmark is classified by critical. On the other hand, benchmark users may profit from the additional supervisory regime that applies to the benchmark at hand that should generally increase its trustworthiness. ESMA therefore suggests for critical benchmarks to require that the benchmark statement includes:

- Qualification as a critical benchmark: the fact that a determination of the benchmark as critical has been made according to Article 13 of the Regulation and a summary of the underlying reasons, unless their publication would have an adverse impact on the benchmark administrator or the functioning of the benchmark.
- Information about the degree of utilisation of the benchmark in general and also with regard to different Member States as well as about the nature of its contributors and their location. Information, to the extent available, about the most relevant types of financial instruments, financial contracts and investment funds that reference the critical benchmark and the total reference value for this benchmark.
- Enhanced regime: an indication that increased oversight mechanisms according to the Regulation are in force for this benchmark and which.

Q89: Do you agree with the suggested additional content required for statements regarding critical benchmarks? If not, please precise why and indicate what alternative

or additional information you consider appropriate in case a benchmark qualifies as critical.

11.5.2 Significant benchmarks

275. Significant benchmarks as defined under Article 14b(1)(a) or (b) are, as a general rule, subject to all the requirements stipulated under Title II of the BMR. As Article 14b(1) stipulates two alternative definitions for the qualification as a significant benchmark, ESMA suggests that the benchmark statement for a significant benchmark should, with reference to Article 14b(1)(a) and/or (b), explain why the benchmark qualifies as a significant benchmark.

276. According to Article 14c(1), the administrator of a significant benchmark may decide not to apply certain requirements under Title II where it considers that the application of one or more of these requirements would be disproportionate taking into account the nature or impact of the benchmarks or the size of the administrator. In this case, the administrator must notify its national competent authority according to Article 14c para. 1a and publish a compliance statement as described under Article 14c para. 6 giving the reasons for the non-compliance with certain requirements under Title II (see previous section: "compliance statement").

277. For the purposes of the benchmark statement under Article 15, ESMA suggests that, the statement should indicate that the benchmark is significant. In cases where the administrator decides not to apply some of the provisions listed in Article 14c(1), three possible levels of details could be considered:

- Option 1: the benchmark statement should indicate that the administrator has lawfully decided not to apply some provisions of the Regulation, and it should also indicate where the compliance statement is publicly available.
- Option 2: the benchmark statement should include all the information under option one and it should also include the list of provisions not complied with by the administrator.
- Option 3: the benchmark statement should include all the information under option two and it should also include a summary of the explanations for the decision of not compliance, contained in the compliance statement.

Q90: Do you agree with the suggested additional requirements for significant benchmarks? Which of the three options proposed you prefer, and why?

11.5.3 Non-significant benchmarks

278. According to Article 14d(1), a benchmark that does neither fulfill the conditions of Article 13 nor of Art. 14b is a non-significant benchmark. Consequently, the administrator of such a benchmark may opt not to apply certain requirements under Title II listed under

Article 14d para. 1. Where the administrator decides not to apply one or more of these requirements, it shall publish and maintain a statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions (see previous section “compliance statement”).

279. As regards the benchmark statement for a non-significant benchmark, the same should identify the benchmark as being non-significant. In cases where the administrator decides not to apply some of the provisions listed in Article 14d(1), three possible levels of details could be considered (same approach as for significant benchmarks):

- Option 1: the benchmark statement should indicate that the administrator has lawfully decided not to apply some provisions of the Regulation, and it should also indicate where the compliance statement is publicly available.
- Option 2: the benchmark statement should include all the information under option one and it should also include the list of provisions not complied with by the administrator.
- Option 3: the benchmark statement should include all the information under option two and it should also include a summary of the explanations for the decision of not compliance, contained in the compliance statement.

Q91: Do you agree with the suggested additional requirements for non-significant benchmarks? If not, please explain why and indicate what alternative or additional information you consider appropriate in case a benchmark is non-significant.

Q92: Are there any further contents for a benchmark statement that should apply to the various classes of benchmarks identified in this chapter?

12 Authorisation and registration of an administrator (Article 23 BMR)

12.1 Mandate

Article 23

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

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by [12 months after entry into force].

12.2 General remarks

280. Article 23 BMR provides for the authorisation of a natural or legal person located in the EU that intends to act as an administrator by the relevant competent authority. In cases where that person is already a supervised entity, the article further provides for that entity to be registered by the relevant competent authority, but only where the legal framework applicable to the entity does not prevent it from acting as an administrator and only where it does not intend to act as administrator to critical benchmarks as defined by the BMR. Similarly, a person intending to act as an administrator only of non-significant benchmarks is subject to registration.

281. Recital 35 BMR provides the context for the provisions on authorisation and registration of the provider of a benchmark and highlights their overarching objectives. Indeed it is clear that although a distinction is made between authorisation and registration, it does not have an impact on the supervision to be carried out by the relevant competent authorities on the authorised/registered administrators.

282. Article 23 BMR stipulates that “the applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation.”

283. ESMA has to develop RTS to specify the information to be provided by the applicants for authorisation and the applicants for registration.

284. ESMA’s mandate to specify the information to be provided in the application offers the opportunity to ensure that the requirements are appropriate for the diversity of profiles and types of providers of benchmarks. In addition to the distinction between an application for authorisation and an application for registration, the mandate specifies that

ESMA should take into account the principle of proportionality, if the administrator only provides non-significant benchmarks, as well as the underlying costs to the applicants and competent authorities.

285. In considering how to fulfil its mandate, ESMA has taken into consideration the authorisation / registration requirements found in other EU financial market sector legislation such as in MiFID and in the CRA texts.

12.3 Authorisation

286. Following reflection on their pertinence to the scope of the BMR, ESMA is of the view that the information should cover the following areas:

- a) information of a general nature;
- b) financial information;
- c) organisational structure and corporate governance;
- d) conflicts of interest;
- e) internal control structure, oversight and accountability framework;
- f) description of benchmarks provided;
- g) input data and methodologies;
- h) requirements for specific situations.

287. Regarding point a) information of a general nature, ESMA considers appropriate to require information such as name and address.

288. In the case of legal persons, this would also include the legal name and structure, registered office and, where applicable, information on domestic branches and offices, and corporate documents. Information on the ownership structure and the shareholders would also be required.

289. ESMA is of the view that the applicant should provide information on its operations including both regulated and unregulated activities (including ancillary services), in the form of a programme of operations. The programme should include information on the geographical distribution of the activities to be carried out in the European Economic Area.

290. Regarding point b) financial information, ESMA believes that this should include information on capital and financial resources including private resources and any plans on accessing financial markets, whether the capital or debt markets. Financial statements also form part of this section, including forecast information. For supervised entities,

information regarding its own funds and the capital requirements the applicant is subject to should be provided as well.

291. In the case of newly established entities, the information available may be limited to how capital and other financing will be raised, in which case evidence of these plans should be provided. To this respect a business plan established on the three first accounting years may be provided.

Q93: Do you agree with the approach outlined above regarding information of a general nature and financial information? Do you see any particular cases, such as certain types of providers, for which these requirements need to be adapted?

292. Point c), organisational structure and corporate governance, is expected to cover important information pertaining to the members of the management body and persons effectively directing the business. It will be important for the applicant to provide all the information necessary to assess the suitability of these persons, including a detailed CV and documentation attesting to their reputation and experience. A description of the resources (human, technical and legal) allocated to the different activities of the applicant should also be provided.

293. Regarding point d), conflicts of interest, ESMA believes that particular importance should be attached to this topic. Applicants should provide information regarding:

- (i) the manner in which conflicts of interest that may arise will be identified;
- (ii) the manner in which they will be managed and recorded;
- (iii) how the remuneration policy of the administrator will be structured so as to ensure that it does not give rise to conflicts of interest or impact the calculation or the marketing of the benchmarks to be administered.

294. In the area of controls, under point e), (internal control structure, oversight and accountability framework) ESMA believes that information on the internal control system should include:

- a description of information processing systems used for the monitoring of the activities of the firm, such as back-up systems and contingency plans;
- the names and CVs of the persons involved in the control processes of the firm;
- a description of the compliance function including measures to ensure on going compliance with the requirements of the BMR;
- a description of the risk management system;
- the record management procedures, including record-keeping and record retention;

- a description of measures to verify the contributors' compliance with the code of conduct.

295. With regards to oversight and accountability, under the same point e), Article 5a(1) BMR requires administrators to "establish and maintain a permanent and effective oversight function"; while article 5c(1) BMR requires them to have an "accountability framework". In this context, ESMA believes that the information to be provided should include descriptions of the oversight function and accountability framework with a sufficient level of detail so as to allow the competent authority to evaluate their pertinence and robustness. The name and CV of the persons in charge of the oversight function should be provided so that the NCA can assess their suitability for the task.

Q94: Do you agree with ESMA's approach to the above points? Do you believe that any specific cases exist, related either to the type of provider or the type of conflict of interest, that require specific information to be provided in addition to what initially identified by ESMA?

296. As per point f) description of benchmarks provided, the application would have to clearly state whether the applicant believes the benchmarks it intends to provide are critical, significant or non-significant. In addition to the general information to be provided on the underlying market or economic reality that the benchmarks measure, it is essential that the applicant provides the data to evaluate the amount of financial instruments and contracts referencing each such benchmark, so as to corroborate the categorisation of such benchmarks and be sure of the applicable regime. ESMA notes that such a request appears to be in line with the text of the BMR in which it is required that administrators inform NCAs whenever the reference values of their benchmarks cross the lower threshold for significant benchmarks (Article 14b(4) BMR and Article 14d BMR).

297. If the applicant provides non-significant benchmarks, the compliance statement mentioned in Article 14d (2) should be provided to the NCA. If the applicant provides significant benchmarks, the application should indicate which requirements the applicant intends not to apply and explain why it considers that the application of one or more of these requirements would be disproportionate, taking into account the nature or impact of the benchmarks or the size of the provider.

298. Under point f), the application should also clearly state to which type the benchmark belongs: regulated-data benchmarks, interest-rate benchmarks or commodity benchmarks. ESMA's preliminary view is that there is no need to require specific additional information regarding the first category, as the key elements discussed under the other points should be sufficient to identify a benchmark that is compiled from regulated input data (see in particular point g) below). Instead, specific information should be provided for interest-rate benchmarks, allowing the NCA to assess whether the more stringent requirements set out in Annex I of BMR covering the contribution process for such benchmarks are fulfilled.

299. For commodity benchmarks, it is important that the applicant provides the information necessary for assessing the applicable regime. In fact, as set out in Article 14a BMR, in case (i) the commodity benchmark is compiled from regulated data, or (ii) the majority of contributors to it are supervised entities, or (iii) the benchmark is critical and the underlying is a precious metal, the general requirements established in Title II of BMR will be applicable. Otherwise, the requirements set out in Annex II of BMR will be applicable. It is ESMA's view that such information is pivotal in the application for an authorisation by a provider of commodity benchmarks. In addition, as the requirements of Annex II differ in part from those of Title II BMR, the information that the applicant will have to provide for commodity benchmarks, also under other points, will have to be adjusted to satisfy the NCA that the applicant has in place all the procedures, policies and controls to ensure the accuracy and integrity of its indices.

300. Regarding point g), input data and methodology, Article 7 BMR sets out the requirements for input data to be used to determine a benchmark. On input data, ESMA is therefore of the view that the information to be provided in the application should include an explanation of how the administrator will be satisfied that there is sufficient input data to represent accurately and reliably the economic reality that the benchmark is intended to measure.

301. Regarding methodology, the BMR sets out requirement for the methodology in Article 7a BMR and provides for publication of a benchmark statement in Article 15. ESMA believes, therefore, that the information to be provided should include a copy of the methodology and of the draft benchmark statement, where available for each benchmark or family of benchmarks.

302. In addition, Article 7b BMR sets out requirements regarding the publication of key elements of the methodology. The information to be provided in the application should therefore also include the list of the key elements of a benchmark's methodology the applicant intends to publish and the media that will be used for publication.

Q95: Do you agree with the proposals outlined for the above points? Do you see any areas requiring particular attention or adaptation?

303. Regarding the special situations mentioned under point h), this area could include various types of information. For example, in the case where activities are outsourced to third parties, the applicant should provide all relevant general information that allows the identification of such third party, including relevant contracts (e.g. service-level agreements) which demonstrate compliance with Article 6 BMR.

Q96: Can you suggest other specific situations for which it is important to identify the information elements to be provided in the authorisation application?

304. In the requirements of the RTS, ESMA will take into consideration that content of the application, in particular in relation to points a), b), c), d) and e) above, would need to be adapted in case the applicant is a natural person and not a legal person.

12.4 Registration

305. As explained in the introduction, the process of registration is foreseen only for persons that are supervised entities (as defined in Article 3(1)(14) of the BMR) and for administrators of non-significant benchmarks. Supervised entities have to meet two conditions in order to be able to register:

- the legal framework applicable to the entity does not prevent it from acting as an administrator; and
- it does not intend to act as administrator to critical benchmarks.

306. It should also be noticed that both Article 23 and Recital 35 specify that, compared to registration, "*authorisation requires a more extensive assessment of the administrator's application*". Providers of non-significant benchmarks are eligible for registration, in line with the fact that they are generally subject to a less detailed regime because of the nature of the benchmarks they administer (see Recital 31d). Supervised entities are eligible for registration in consideration of the fact these entities are already known to their relevant competent authorities and subject to ongoing supervision.

307. In light of this background, ESMA's preliminary view would be for the registration process to be similar to the authorisation regime but proportionally adapted to the mentioned two cases in which the registration is allowed. Considering the areas of information identified for authorisation, ESMA is analysing the possibility of excluding some of them from the registration information requirements. Potential preliminary candidates could be (b) financial information, and/or (h) requirements for specific situations. At the same time, it would also be possible to reduce the volume/granularity of information requested by the areas of information that will be retained for the registration process, making the application process of registration significantly different from the one of authorisation.

308. In the specific case of an application for registration by a supervised entity, the contents of the application for registration might be scaled down in consideration of the fact that some of the information elements to be provided are already in the availability of the relevant competent authority. Therefore the contents of the application may focus on the benchmarks that the applicant provides/intends to provide and on those organisational, governance and control requirements that are typical of the activity of provision of benchmarks.

Q97: Do you agree with the proposed approach towards registration? How should the information requirements for registration deviate from the requirements for authorisation?

Q98: Do you believe there are any specific types of supervised entities which would require special treatment within the registration regime? If yes, which ones and why?

13 Recognition and endorsement of third country administrators and benchmarks (Article 21a and 21b BMR)

13.1 Mandate and extract from the Commission's request for advice

Article 21a(9)

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

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after entry into force].

(Extract from the Commission's request for advice)

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

13.2 General remarks

309. The BMR foresees three parallel regimes relating to the use by supervised entities in the Union of benchmarks provided by an administrator located in a third country. These regimes may be summarised as follows.

13.2.1 Equivalence (Article 20 of the BMR)

310. Benchmarks provided by an administrator in a third country may be used by supervised entities in the Union provided that, *inter alia*, (1) the Commission has adopted

an equivalence decision and (2) ESMA has established cooperation arrangements with the authorities in the third country (Article 20(1)(a) and (e) of the BMR)⁵².

311. The Commission may alternatively adopt an equivalence decision when binding requirements in a third country with respect to specific administrators or specific benchmarks or families of benchmarks are equivalent to the requirements resulting from the BMR, and such specific administrators or specific benchmarks or families of benchmarks are subject to effective supervision and enforcement on an on-going basis in that third country (Article 20(2a) of the BMR).
312. Recital 34 of the BMR explains that the equivalence decision is needed in order to ensure investor protection in the EU. However, in order to avoid the adverse impacts of a possible abrupt cessation of the use in the EU of benchmarks provided from a third country, the BMR also provides for two other mechanisms (recognition and endorsement) under which third country benchmarks can be used by supervised entities located in the Union.
313. According to Article 20(3), ESMA is requested to establish cooperation arrangements with the competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent, and under Article 20(4) it is empowered to develop draft regulatory technical standards to determine the minimum content of such cooperation arrangements. ESMA is not consulting the public in relation to these standards because the public is not impacted by them. This approach is consistent with the ones used by ESMA in the past when developing level 2 measures of other Regulations.

13.2.2 Recognition (Article 21a of the BMR)

314. Until such time as an equivalence decision is adopted, third country benchmarks may be used in the European Union provided that the administrator acquires prior recognition.
315. The recognition will be granted at national level by the competent authority of the Member State of reference, determined in accordance with the rules set out under Article 21a(4) of the BMR.
316. In order to obtain the recognition, an administrator has to ensure compliance with some of the material requirements of the BMR (Article 21a(2) of the BMR). It also has to establish a legal representative in the EU (Article 21a(3) of the BMR): either a natural person domiciled in the EU or a legal person with its registered office in the EU. The legal representative acts on behalf of such administrator vis-à-vis the authorities and any other person in the EU with regard to the administrator's obligations under the BMR and is accountable to the competent authority of the Member State of reference.

⁵² See Article 20 of the BMR for the full list of requirements on equivalence.

317. The establishment of cooperation arrangements between the competent authority of the Member State of reference and the competent authority in the jurisdiction where the third country benchmark administrator is established is one of the prerequisites for the recognition (Article 21a(5)(i) of the BMR).

318. Recital 34b explains that the competent authority of the Member State of reference should be able to grant recognition to administrators on the basis of them applying the IOSCO Principles. To do so, the competent authority should assess the administrator's application of the IOSCO Principles and determine whether such application is equivalent, for this administrator, to compliance with the various requirements established in the BMR, taking into account the specificities of the regime of recognition as compared to the equivalence regime.

13.2.3 Endorsement (Article 21b of the BMR)

319. An administrator located in the Union and authorised or registered in accordance with Article 23 or any other supervised entity located in the Union with a clear and well defined role within the control or accountability framework of the third country administrator which allows such person to effectively monitor the provision of the benchmark, may apply to its competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, provided that, inter alia, the provision of the benchmark or family of benchmarks fulfils requirements, on a mandatory or on a voluntary basis, which are at least as stringent as the requirements set out in the BMR (Article 21b(1) of the BMR)⁵³.

320. In case of endorsement, an administrator or another supervised entity that has endorsed a benchmark or family of benchmarks remains fully responsible for such a benchmark or family of benchmarks and the compliance with the obligations resulting from the BMR (Article 21b(5) and Recital 34c of the BMR).

13.2.4 ESMA role

321. The BMR foresees a number of tasks for ESMA in the context of the third country regime. After an equivalence decision by the Commission, ESMA will have to establish cooperation arrangements with the competent authority of the third country whose legal framework and supervisory practices have been recognised as equivalent. In case of recognition, if a competent authority considers that the third country administrator may be exempted from some requirements, ESMA will have to advise the competent authority about the application of the exemption to that third country administrator. Finally, The BMR Article 39b requires ESMA to review every two years each recognition granted and endorsement authorised by competent authorities and to issue an opinion assessing the continued compatibility of the recognitions/endorsements with all the applicable requirements under the BMR. The ultimate goal of this review is to build a common

⁵³ See Article 21b of the BMR for the full list of requirements on endorsement.

European supervisory culture by ensuring consistent approaches among competent authorities.

13.3 Recognition of an administrator located in a third country (Article 21a BMR)

322. Article 21a of the BMR sets out the recognition process that administrators located in a third country have to follow in order to obtain recognition in the Union.

323. The empowerment for ESMA to develop RTS in Article 21a(9) relates to two topics:

- 1) the form and content of the application for the recognition of the third country administrator required in Article 21a(5);
- 2) the presentation of the information required in Article 21a(6).

13.3.1 Form and content of the application required in Article 21a(5)

324. Based on the provisions of article 21a(5) of the BMR, these seem to be the essential elements of the application for the recognition of a third country administrator:

- (i) all information necessary to assess that the administrator has established, at the time of recognition, all the necessary arrangements to meet the relevant requirements for the recognition referred to under 21a(2);
- (ii) the list of its actual or prospective benchmarks which may be used in the Union; and
- (iii) the competent authority responsible for the supervision of the administrator in the third country.

325. ESMA considers that the RTS under Article 21a of the BMR should elaborate on the above elements to be included in the application. In particular, they should provide further details on which information under item (i) should be included in the application form.

326. In relation to item (i), it should be noted that Article 23(3) on Authorisation and registration of an administrator uses a very similar wording, stating that "*The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation*". ESMA therefore believes that item (i) should be, to the extent possible, aligned with the information to be provided in the application for authorisation, taking into account the specificities of the recognition process. In developing the relevant RTS, ESMA will consider other similar provisions existing under the European legislation.

Q99: Do you have any suggestions on which information should be included in the application for the recognition of a third country administrator?

13.3.2. The presentation of the information required in Article 21a(6)

327. Article 21a(6) allows the competent authority of the Member State of reference to consider that the administrator located in a third country may be exempted from compliance with the requirements not applicable to the provision of (i) significant benchmarks, (ii) non-significant benchmarks, (iii) regulated-data benchmarks or (iv) commodity benchmarks that are not based on submissions by contributors which are in majority supervised entities (as provided for in Articles 12a, 14a(1), 14c and 14d respectively). If this is the case, the competent authority should notify ESMA with an assessment supporting the exemption and based on the information provided by the administrator in the application for the recognition. Once ESMA has received the assessment, it will have one month to produce an advice to the competent authority about the application of the exemption from those specific requirements. The same Article 21a(6) states that ESMA's advice should address whether the conditions for such exemption appear to be fulfilled based on the information provided by the administrator in the application for recognition.
328. In this context, ESMA is required to specify in the technical standards how the information related to the possible exemption in Article 21a(6) should be included in the original application for recognition of the third country administrator. The administrator should specify to which type (regulated-data or commodity) or category (significant, non-significant) of benchmarks the relevant benchmark belongs and provide evidence of the categorisation thereof.
329. ESMA believes that the third country administrator should include in the application the list of provisions for which it believes it should be exempted together with an explanation, as granular as possible, stating the reasons why it should be eligible for the specific exemptions. In the case of commodity benchmarks, the administrator should provide evidence about the applicable regime (either the Title II or Annex II of the BMR, or the corresponding sets of IOSCO principles). In relation to the exemptions for the provisions not applicable to significant and non-significant benchmarks, Articles 14c and 14d require administrators of significant and non-significant benchmarks to publish a compliance statement regarding their non-compliance with the relevant provisions, and ESMA is empowered to develop implementing technical standards specifying regarding the compliance statement. ESMA is considering that the presentation of the information required under Article 21a(6) should be, to the extent possible, aligned with the compliance statement for significant and non-significant benchmarks. In particular, in his application the administrator should specify to which requirements the exemption should extend and give a detailed explanation for each of the desired exemptions.

Q100: Do you agree with the general approach proposed by ESMA for the presentation of the information required in Article 21a(6) of the BMR?

13.4 Endorsement by an administrator located in the Union of benchmarks provided in a third country (Article 21b(8) BMR)

330. One of the conditions for an authorised or registered administrator located in the Union to apply to its competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, is that "*there is an objective reason to provide the benchmark or family of benchmarks in a third country and endorse them for their use in the Union*" (Article art. 21b(1)(c) of the BMR).

331. The Commission is empowered to adopt delegated acts to determine the conditions on which the competent authorities may assess whether there is such objective reason and out of the exemplary list of elements to be taken into account contained in Article 21b(8), the Commission requested ESMA to elaborate on issues such as:

- (i) the need for geographical proximity of the benchmark provision to the underlying market or economic reality the benchmarks seeks to measure, and to its contributors,
- (ii) the availability of input data (e.g. due to different time zones), and
- (iii) specific skills necessary for the provision of the benchmark in question.

Q101: For each of the three above mentioned elements, please provide your views on what should be the measures to determine the conditions whether there is an 'objective reason' for the endorsement of a third country benchmark.

Q102: Do you consider that there are any other elements that could be taken into consideration to substantiate the 'objective reason' for the provision and endorsement for use in the Union of a third country benchmark or family of benchmarks?

14 Transitional provisions (Article 39 BMR)

14.1 Extract from the Commission's request for advice

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

14.2 General remarks

332. Article 39(1) BMR provides for a 24 month period after the date of application of the Regulation for existing benchmark providers to apply for authorisation or registration under Article 23.

333. During this period no obligations under the Regulation should apply to existing benchmark providers. If interpreted literally, Article 39(1) does not prohibit during this period the use of existing benchmarks produced by such providers.

334. Article 39(3) applies where an existing benchmark does not meet the requirements of the Regulation, in which case the use of such benchmark shall be permitted by the competent authority of the benchmark administrator if ceasing or changing that benchmark to conform with the requirements of the Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any existing financial contract or financial instrument which references that benchmark. It shall be noted that in accordance with Article 39(3) no financial instruments or financial contracts shall start to reference such an existing benchmark after the entry into application of the Regulation.

335. In this context, ESMA believes that there are two possible relevant scenarios:

- 1) The benchmark provider has not applied for authorisation or registration within 24 month.

After the expiration of the 24 month period, the benchmark provider who has not applied for the authorisation/registration is considered as non-compliant. Consequently all its benchmarks are automatically considered as non-compliant with the Regulation and their further use should only be permitted by the relevant competent authority in case the requirements set out under Article 39(3) are met.

2) The benchmark provider applied for authorisation or registration within 24 month period and the authorisation/registration is refused.

336. Once the application has been submitted by the benchmark provider, the 24 month period provided for under Article 39(1) stops running. In this case, pursuant to Article 39(2) the financial benchmarks produced by the benchmark provider may be used by supervised entities unless and until such authorisation or registration is finally refused. In case the assessment of the NCA leads to a refusal, it has been officially recognised that the benchmark provider is not in compliance with the Regulation, therefore Article 39(3) applies.

14.3 Barriers to change or cease a benchmark

337. In order to apply the grandfather clause stipulated under Article 39(3) BMR, ceasing or changing a benchmark to conform to the Regulation must result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark.

338. ESMA is of the view that this situation could occur if an adjustment of a specific benchmark to conform to the Regulation would result in significantly different values for that benchmark, and if these values would result in significant changes to interest rates, prices or other variables used to determine the amount payable under a financial contract or financial instrument which references that benchmark.

339. Moreover, ESMA believes that the situation could also occur if a financial contract or financial instrument did not include an option to substitute the referenced benchmark with another benchmark, and the referenced benchmark was to be ceased in accordance with the Regulation.

340. Finally, with the entry into application of the Regulation and in particular the obligation to use only benchmarks provided by authorised/registered administrators, a situation may arise which may be seen as a change of law in the relevant financial contracts or financial instruments and could result in the frustration of the respective terms.

Q103: Do you agree that in the situations identified above by ESMA the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references a benchmark? If not, please explain the reasons why.

Q104: Which other circumstances could cause the consequences mentioned in Article 39(3) in case existing benchmarks are due to be adapted to the Regulation or to be ceased?

14.4 Proposals

341. Replacing a non-compliant benchmark by a benchmark compliant with the Regulation will obviously have an impact on a multitude of financial instruments in the meaning of Article 3(1)(13) and financial contracts in the meaning of Article 3(1)(15) referencing the non-compliant benchmark and may result, depending on the contractual arrangements set out in the terms and conditions of such financial instruments or financial contracts, in a frustration of the terms of the instrument or the contract and may in turn trigger the need to redeem the invested amounts.
342. On the other hand, it may be the case that the terms and conditions of financial instruments or financial contracts provide for fall back provisions, foreseeing the possibility to switch to an alternative benchmark as a substitute instead of the further use of a non-compliant benchmark⁵⁴.
343. The delegated acts to be adopted by the Commission should elaborate on the possible criteria that a Competent Authority should consider before permitting the further use of a non-compliant benchmark in financial contracts and/or financial instruments already referencing such benchmark.
344. The reference to a “force majeure event” is one of the possible reasons justifying the permission of the continued use of a non-compliant benchmark. Mindful of the need to define the concept of “force majeure event” in the technical advice to the EU Commission, in order to provide certainty and consistency in the application of Article 39(3) throughout the Union, ESMA took into consideration a number of elements to inform its views on this issue. ESMA considered the legal analysis of, *inter alia*, legal issues linked to a transition to IBORs+ in the Final Report of the Market Participants Group on Reforming Interest Rate Benchmarks of March 2014: in particular, the EUR Currency Report (pages 339 and ff. of the document) include some useful elements from a European perspective on ‘force majeure’ and ‘contract frustration’. Moreover, ESMA took into account how force majeure is considered for the purpose of the ISDA Master Agreement.
345. Finally, ESMA also looked at the technical advice, which was provided in December 2014 in the context of the MiFIDII/MiFIR, and that elaborates on specifying the derivative contracts referred to in Section C.6 of Annex I of Directive 2014/65/UE and, in particular, which are the circumstances that would prevent physical delivery where the condition “must be physically settled” applies. In such a context, ESMA has clarified that “*Force majeure should be understood as an event or a set of circumstances which are outside the control of the parties to the contract, which the parties to the contract could not have reasonably foreseen or avoided and which prevent one or both parties to the contract from fulfilling their contractual obligations. Force majeure characteristically*

⁵⁴ While mentioned fall back provisions are only possible at current, after entry into application of the BMR specific written plans by supervised entities – whether or not in the form of contractual clauses – should be set to address the consequences of a benchmark change or cessation (see Article 17(2)).

provides for a temporary suspension of contractual obligations while the force majeure event or set of circumstances is in place rather than an outright termination of the contract and for the contract to be set aside when the fulfilment of the contractual obligations becomes impossible.”

346. Based on the above, ESMA proposes the following definition of ‘force majeure’ for the purpose of Article 39(6) of the BMR:

“Force Majeure event” means an extraordinary, unforeseeable, external set of circumstances beyond the control of the contracting parties of a financial contract or a financial instrument, that has not been considered by such parties at the time the contract was concluded and that cannot be prevented even through the use of utmost due diligence and technical and financial reasonable means which makes it impossible for either party to perform its obligations under the financial contract or the financial instrument despite all reasonable efforts to the contrary”.

Q105: Do you agree with the proposed definition of “force majeure event”? If not, please explain the reasons and propose an alternative.

347. Moreover, ESMA considers that the existence of only few financial contracts or financial instruments with a low residual value may not lead a Competent Authority to permit the continued use of a non-compliant benchmark in existing financial instruments or financial contracts. Such an approach – which seems to be in line with the initial proposition of the European Commission⁵⁵ - would suggest identifying conditions (i.e. limits/thresholds) to provide guidance for a Competent Authority to make a decision.

348. ESMA’s initial opinion is that in order to ensure a smooth transition the competent authority should allow the continued use of a non-compliant benchmark within a timeframe which can be either fixed in time or based on a quantitative criteria determining a threshold until the benchmark shall be retained:

- Time limit until the non-compliant benchmark may be used:

ESMA considers that it might be suitable to fix a time limit which could depend on the time to maturity of the majority of financial contracts/ financial instruments that reference the non-compliant benchmark and which should be adequately defined by the competent authority on a case-by-case basis.

An advantage of this solution is that it reflects adequately the need to maintain a non-compliant benchmark in connection with the outstanding “portfolio” of financial

⁵⁵ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on indices used as benchmarks in financial instruments and financial contracts COM(2013)0641, in which Article 39(4) says: "*The use of a benchmark shall be permitted by the relevant competent authority of the Member State where the administrator is located until such time as the benchmark references financial instruments and financial contracts worth no more than 5% by value of the financial instruments and financial contracts that referenced this benchmark at the time of entry into force of this Regulation. No financial instruments or financial contracts shall reference such an existing benchmark after the entry into application of this Regulation.*"

products referencing to such benchmark. In addition, it might be reasonably assumed that the majority of the financial products referencing a benchmark will have a clear defined maturity date (such as e.g. bonds, most derivative products or loans), whereas only very few of the financial products referencing a benchmark may present a maturity which is perpetual.

- Quantitative limit above which the non-compliant benchmark may be used:

Alternatively to the abovementioned time limit ESMA also considers that a quantitative criterion with regards to the retention of a non-compliant benchmark might address the needs of the market participants.

Due to the fact that Article 39(3) prohibits that new financial instruments/financial contracts start referencing an existing non-compliant benchmark after the entry into application of the Regulation and the consequent continuous decrease of the total value of financial contracts/financial instruments referencing that benchmark, the resulting situation could be one in which it is no longer reasonable to further allow the use of a non-compliant benchmark.

The main advantage of this proportional solution would be to avoid that a non-compliant benchmark for which the reference value diminished significantly over time, and has become of minor importance, continue being referenced in financial contracts/financial instruments over a long timeframe.

349. In order to allow the competent authority of the Member State where the administrator is located to assess whether a non-compliant benchmark should be retained and until which time/ threshold, the competent authority might take into consideration (i) the specific financial contracts and financial instruments that reference the benchmark and whose terms would be breached due to a ceasing or changing of the benchmark (for example the maturity term of such instruments/contracts), as well as (ii) the volumes of such instruments.

350. In order for the competent authority to perform the assessment under Article 39(3) applying the conditions described above, in a first instance the non-compliant benchmarks need to be identified. This is relevant also in view of granting legal certainty to the supervised entities in the Union, which will be compelled, after entry into application of the BMR, to use only benchmarks that are provided by authorised/registered/recognised administrators or that are endorsed, and thus are provided in compliance with the BMR.

351. As explained at the beginning of the Chapter, Article 39(3) is triggered upon two possible scenarios:

1. The benchmark provider has not applied for authorisation or registration within 24 month:

352. In this case the administrator did not apply for authorisation/ registration within 24 month period of Article 39(1). As, in the context of transitional provisions, the Regulation is aimed at 3 addressees, namely the benchmark administrators, the users of a benchmark and the national competent authorities where the benchmark administrator is located, it appears that it is in the responsibility of all related parties to contribute the required information according to their abilities.

353. In a first step it needs to be ensured that at the end of the 24 month period, the competent authority is aware of national benchmarks that are not compliant because their providers did not apply for authorization/registration in accordance with the BMR.

354. Whilst the competent authority will be aware of national benchmarks which are easily identifiable - for example as used in a large number of financial instruments traded or admitted to trading on the trading venues located in its jurisdiction, it should be noted that the competent authority is rarely able to be aware of all benchmarks being used in its respective country.

355. Therefore ESMA recognises the benchmark providers as well as the users which are supervised entities located in the Member State of the Competent Authority as main responsible to provide such information and consequently:

- The national benchmark providers might be required to declare to their competent authority the benchmarks of which they are aware are being used in financial contracts/financial instruments.
- The supervised entities that use benchmarks in the meaning of the BMR might be required to transmit such information to the competent authority of the administrator.

2. The authorisation or registration of the benchmark provider is refused:

356. In this scenario Article 39(3) is triggered upon the refusal of the benchmark provider's authorisation/registration by the competent authority. In such case, the competent authority should already have useful information the benchmark provider should have provided in the context of the authorisation/registration process (provided that the authorization/registration was not refused due to insufficient information).

357. However, it is worth mentioning that the information received in the process of authorisation/registration pursuant to Article 23 is not sufficient to allow the national authority to assess whether the cessation or the changing of the benchmark to conform with the requirements of the Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark. In particular the benchmark administrator will not be able to provide information which is available only to the users of the benchmark, i.e. knowledge about whether or not a contract might be breached or if it provides for fall back provisions.

14.4.1 Information required for the assessment of the competent authority

358. Following the identification of a non-compliant benchmark the competent authority has to assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contracts or financial instruments which reference such benchmark and the contracts cannot be healed (i.e. the terms and conditions do not foresee contingency clauses/fall back provisions and the cessation of the existing benchmark would lead to a breach of the financial contracts or financial instruments which would implicate the early redemption of the financial instruments/contracts).

359. Where a benchmark is identified as non-compliant, according to the mentioned conditions (i.e. non application within 24 months or refusal of authorisation / registration), the use of such benchmark should be permitted until such time as the competent authority is in a position to perform an informed assessment. It is ESMA's understanding that the transitional provisions, in particular Article 39(3) should avoid any unduly discontinuation with regards to the use of the benchmark. To this end, a transitory period might be foreseen to enable stakeholders to proof that the cessation or the changing of an existing benchmark to conform with the requirements of the BMR could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contracts or financial instruments which reference a benchmark and the contracts cannot be healed.

360. The benchmark provider might be required to provide all information at its disposal to permit the competent authority to perform its appraisal. ESMA believes however that the administrator may not dispose of all necessary information as the information needs to be extracted from the terms and conditions of the financial instruments and financial contracts referencing the non-compliant benchmark.

361. Any benchmark user being affected by the BMR in the sense of Article 39(3) (i.e. the terms of its financial contracts/financial instruments referencing a non-compliant benchmark would be breached in case a benchmark is ceased or changed to conform with the requirements of the BMR) should provide the competent authority with evidence that its contracts/instruments are at risk to be breached. This should be done by sending for example "standard contracts" used in its financial instruments and financial contracts which indicate the type of link of the product to the benchmark and prove the lack of "fall back provisions".

362. Benchmark providers (to the extent they dispose of such information) and benchmark users should provide information regarding the outstanding volume of the financial contracts and/or financial instruments referencing a non-compliant benchmark in order to enable the competent authority to assess the importance of such benchmark in terms of the impact that its discontinuation/change may determine.

363. In this context it seems to be favorable that the different users that are supervised entities liaise directly with the competent authority of the administrator instead of contacting their own national competent authorities.

Q106: Are the two envisaged options (with respect to the term until which a non-compliant benchmark may be used) adequate: i.e. either (i) fix a time limit until when a non-compliant benchmark may be used or (ii) fix a minimum threshold which will trigger the prohibition to further use a non-compliant benchmark in existing financial instruments/financial contracts?

Q107: Which thresholds would be appropriate to foresee and how might a time limit be fixed? Please detail the reasons behind any suggestion.

Q108: Is the envisaged identification process of non-compliant benchmarks adequate? Do you have other suggestions?

Q109: Is the envisaged procedure enabling the competent authority to perform the assessment required by Article 39(3) correct in your view? Please advise what shall be considered in addition.

Q110: Which information it would be opportune to receive by benchmark providers on the one side and benchmark users that are supervised entities on the other side?

Q111: Do you agree that the different users of a benchmark that are supervised entities should liaise directly with the competent authority of the administrator and not with the respective competent authorities (if different)?

Q112: Would it be possible for relevant benchmark providers/users that are supervised entities to provide to the competent authority an estimate of the number and value of financial instruments/contracts referencing to a non-compliant benchmark being affected by the cessation/adaptation of such benchmark?

Q113: Would it be possible to evaluate how many out of these financial contracts or financial instruments are affected in a manner that the cessation/adaptation of the non-compliant benchmark would result in a force majeure event or frustration of contracts?

15 Annex I: Summary of questions

Q1: Do you agree that an index's characteristic of being "made available to the public" should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?

Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?

Q3: Do you agree with ESMA's proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator? Which other characteristics/activities would you regard as covered by Article 3(1) point 3(a)?

Q4: Do you agree with ESMA's proposal for a definition of issuance of a financial instrument? Are there additional aspects that this definition should cover?

Q5: Do you think that the business activities of market operators and CCPs in connection with possible creation of financial instruments for trading could fall under the specification of "issuance of a financial instrument which references an index or a combination of indices"? If not, which element of the "use of benchmark" definition could cover these business activities?

Q6: Do you agree with the proposed list of appropriate governance arrangements for the oversight function? Would you propose any additional structure or changes to the proposed structures?

Q7: Do you believe these proposals sufficiently address the needs of all types of benchmarks and administrators? If not, what characteristics do such benchmarks have that would need to be addressed in the proposals?

Q8: To the extent that you provide benchmarks, do you have in place a pre-existing committee, introduced through other EU legislation, or otherwise, which could satisfy the requirements of an oversight function under Article 5a? Please describe the structure of the committee and the reasons for establishing it.

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

Q10: If an administrator provides more than one critical benchmark, do you support the approach of one oversight function exercising oversight over all the critical

benchmarks? Do you think it is necessary for an oversight function to have sub-functions, to account for the different needs of different types of benchmarks?

Q11: Where an administrator provides critical benchmarks and significant or non-significant benchmarks, do you think it should establish different oversight functions depending on the nature, scale and complexity of the critical benchmarks versus the significant or non-significant benchmarks?

Q12: In which cases would you agree that contributors should be prevented from participating in oversight committees?

Q13: Do you foresee additional costs to your business or, if you are not an administrator, to the business of others resulting from the establishment of multiple oversight functions in connection with the different businesses performed and/or the different nature, scale and type of benchmarks provided? Please describe the nature, and where possible provide estimates, of these costs.

Q14: Do you agree that, in all cases, an oversight function should not be responsible for overseeing the business decisions of the management body?

Q15: Do you support the proposed positioning of the oversight function of an administrator? If not, please explain your reasons why this positioning may not be appropriate.

Q16: Do you have any additional comments with regard to the procedures for the oversight function as well as the composition and positioning of the oversight function within an administrator's organisation?

Q17: Do you agree with the proposed list of elements of procedures required for all oversight functions? Should different procedures be employed for different types of benchmarks?

Q18: Do you agree with the proposed treatment of conflicts of interest arising from the composition of an oversight function? Have you identified any additional conflicts which ESMA should consider in drafting the RTS?

Q19: Do you agree with the list of records to be kept by the administrator for input data verification? If not, please specify which information is superfluous / which additional information is needed and why.

Q20: Do you agree that, for the information to be transmitted to the administrator in view of ensuring the verifiability of input data, weekly transmission is sufficient? Would you instead consider it appropriate to leave the frequency of transmission to be defined by the administrator (i.e. in the code of conduct)?

Q21: Do you agree with the concept of appropriateness as elaborated in this section?

Q22: Do you see any other checks an administrator could use to verify the appropriateness of input data?

Q23: Would you consider it useful that the administrator maintains records of the analyses performed to evaluate the appropriateness of input data?

Q24: Do you see other possible measures to ensure verifiability of input data?

Q25: Do you agree with the identification of the concepts and underpinning activities of evaluation, validation and verifiability, as used in this section?

Q26: Do you agree that all staff involved in input data submission should undergo training, but that such training should be more elaborate / should be repeated more frequently where it concerns front office staff contributing to benchmarks?

Q27: Do you agree to the three lines of defence-principle as an ideal type of internal oversight architecture?

Q28: Do you identify other elements that could improve oversight at contributor level?

Q29: Do you agree with the list of elements contained in a conflict of interest policy? If not, please state which elements should be added / which elements you consider superfluous and why.

Q30: Do you agree that where expert judgement is relied on and/or discretion is used additional appropriate measures to ensure verifiability of input data should be imposed? If not, please specify examples and reasons why you disagree.

Q31: Do you agree to the list of criteria that can justify differentiation? If not, please specify why you disagree.

Q32: Do you agree to the list of elements that are amenable to proportional implementation? If not, please specify why you disagree.

Q33: Do you agree to the list of elements that are not amenable to proportional implementation? If not, please specify why you disagree.

Q34: Do you consider the proposed list of key elements sufficiently granular "*to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts*"?

Q35: Beyond the list of key elements, could you identify other elements of benchmark methodology that should be disclosed? If yes, please explain the reason why these elements should be disclosed.

Q36: Do you agree that the proposed key elements must be disclosed to the public (linked to Article 3, para 1, subpara 1, point (a))? If not, please specify why not.

Q37: Do you agree with ESMA's proposal about the information to be made public concerning the internal review of the methodology? Please suggest any other information you consider useful to disclose on the topic.

Q38: Do you agree with the above proposals to specify the information to be provided to benchmark users and, more in general, stakeholders regarding material changes in benchmark methodology?

Q39: Do you agree, in particular, on the opportunity that also the replies received in response to the consultation are made available to the public, where allowed by respondents?

Q40: Do you agree that the publication requirements for key elements of methodology apply regardless of benchmark type? If not, please state which type of benchmark would be exempt / which elements of methodology would be exempt and why.

Q41: Do you agree that the publication requirements for the internal review of methodology apply regardless of benchmark type? If not, please state which information regarding the internal review could be differentiated and according to which characteristic of the benchmark or of its input data or of its methodology.

Q42: Do you agree that, in the requirements regarding the procedure for material change, the proportionality built into the Level 1 text covers all needs for proportional application?

Q43: Do you agree that a benchmark administrator could have a standard code for all types of benchmarks? If not, should there be separate codes depending on whether a benchmark is critical, significant or non-significant? Please take into account your answer to this question when responding to all subsequent questions.

Q44: Do you believe that an administrator should be mandated to tailor a code of conduct, depending on the market or economic reality it seeks to measure and/or the methodology applied for the determination of the benchmark? Please explain your answer using examples of different categories or sectors of benchmarks, where applicable.

Q45: Do you agree with the above requirements for a contributor's contribution process? Is there anything else that should be included?

Q46: Do you agree that the details of the code of conduct to be specified by ESMA may still allow administrators to tailor the details of their codes of conduct with respect to the specific benchmarks provided?

Q47: Do you agree that such information should be required from contributors under the code of conduct? Should any additional information be requested?

Q48: Are there ways in which contributors may manage possible conflicts of interest at the level of the submitters? Should those conflicts, where managed, be disclosed to the administrator?

Q49: Do you foresee any obstacles to the administrator's ability to evaluate the authorisation of any submitters to contribute input data on behalf of a contributor?

Q50: Do you agree that a contributor's contribution process should foresee clear rules for the exclusion of data sources? Should any other information be supplied to administrators to allow them to ensure contributors have provided all relevant input data?

Q51: Do you think that the listed procedures for submitting input data are comprehensive? If not, what is missing?

Q52: Do you agree that rules are necessary to provide consistency of contributors' behaviour over the time? Should this be set out in the code of conduct or in the benchmark methodology, or both?

Q53: Should policies, in addition to those set out in the methodology, be in place at the level of the contributors, regarding the use of discretion in providing input data?

Q54: Do you agree with the list of checks for validation purposes? What other methods could be included?

Q55: Do you agree with the minimum information requirement for record keeping? If not would you propose additional/alternative information?

Q56: Do you support the recording of the use of expert judgement and of discretion? Should administrators require the same records for all types of benchmarks?

Q57: Do you agree that an administrator could require contributors to have in place a documented escalation process to report suspicious transactions?

Q58: Do you agree with the list of policies, procedures and controls that would allow the identification and management of conflicts of interest? Should other requirements be included?

Q59: Do you have any additional comments with regard to the contents of a code of conduct in accordance with Article 9(2)?

Q60: Do you agree with the above list of requirements? Do you think that those requirements are appropriate for all benchmarks? If not what do you think should be the criteria we should use?

Q61: Do you agree that information regarding breaches to the BMR or to Code of Conduct should also be made available to the Benchmark Administrator?

Q62: Do you think that the external audit covering benchmark activities, where available, should also be made available, on request, to the Benchmark Administrator?

Q63: Do you agree with the proposed criteria for the specific elements of systems and controls as listed in Article 11(2)(a) to (c)? If not, what should be alternative criteria to substantiate these elements?

Q64: Do you agree that the submitters should not be remunerated for the level of their contribution but could be remunerated for the quality of input and their ability to manage the conflicts of interest instead?

Q65: What would be a reasonable delay for signing-off on the contribution? What are the reasons that would justify a delay in the sign off?

Q66: Is the mentioned delay an element that may be established by the administrator in line with the applicable methodology and in consideration of the underlying, of the type of input data and of supervised contributors?

Q67: In case of a contribution made through an automated process what should be the adequate level of seniority for signing-off?

Q68: Do you agree with the above policies? Are there any other policies that should be in place at contributor's level when expert judgement is used?

Q69: Do you agree with this approach? If so, what do you think are the main distinctions – amid the identified detailed measures that a supervised contributor will be required to put in place - that it is possible to introduce to cater for the different types, characteristics of benchmarks and of supervised contributors?

Q70: Do you foresee additional costs to your business or, if you are not a supervised contributor, to the business of others resulting from the implementation of any of the listed requirements? Please describe the nature, and where possible provide estimates, of these costs.

Q71: Could the approach proposed, i.e. the use of the field total issued nominal amount in the context of MiFIR / MAR reference data, be used for the assessment of the “nominal amount” under BMR Article 13(1)(i) for bonds, other forms of securitised debt and money-market instruments? If not, please suggest alternative approaches

Q72: Are you aware of any:

- i) shares in companies,

- ii) other securities equivalent to shares in companies, partnerships or other entities,
- iii) depositary receipts in respect of shares,
- iv) emission allowances

for which a benchmark is used as a reference?

Q73: Do you have any suggestion for defining the assessment of the nominal amount of these financial instruments when they refer to a benchmark?

Q74: Do you agree with ESMA proposal in relation to the value of units in collective investment undertakings? If not, please explain why

Q75: Do you agree with the approach of using the notional amount, as used and defined in the EMIR reporting regime, for the assessment of notional amount of derivatives under BMR Article 13(1)(i)? If not, please suggest alternative approaches.

Q76: Which are your views on the two options proposed to assess the net asset value of investment funds? Should you have a preference for an alternative option, please provide details and explain the reasons for your preference.

Q77: Which are your views on the two approaches proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of an investment fund referencing a benchmark within a combination of benchmarks? Please provide details and explain the reasons for your preference. Do you think there are other possible approaches? If yes, please explain.

Q78: Do you agree with the ‘relative impact’ approach, i.e. define one or more value and “ratios” for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

Q79: What kind of other objective grounds could be used to assess the potential impact of the discontinuity or unreliability of the benchmark besides the ones mentioned above (e.g. GDP, consumer credit agreement etc.)?

Q80: Do you agree with ESMA’s approach to further define the above criteria? Particularly, do you think that ESMA should develop more concrete guidance for the possible rejection of the NCA under Article 14c para 2? Do you believe that NCAs should take into consideration additional elements in their assessment?

Q81: Do you think that the fields identified for the template are sufficient for the competent authority and the stakeholders to form an opinion on the

representativeness, reliability and integrity of a benchmark, notwithstanding the non-application of some material requirements? Could you suggest additional fields?

Q82: Do you agree with the suggested minimum aspects for defining the market or economic reality measured by the benchmark?

Q83: Do you think the circumstances under which a benchmark determination may become unreliable can be sufficiently described by the suggested aspects?

Q84: Do you agree with the minimum information on the exercise of discretion to be included in the benchmark statement?

Q85: Are there any further precise minimum contents for a benchmark statement that should apply to each benchmark beyond those stated in Art. 15(2) points (a) to (g) BMR?

Q86: Do you agree that a concise description of the additional requirements including references, if any, would be sufficient for the information purposes of the benchmark statement for interest rate benchmarks?

Q87: Do you agree that the statement for commodity benchmarks should be delimited as described? Otherwise, what other information would be essential in your opinion?

Q88: Do you agree with ESMA's approach not to include further material requirements for the content of benchmark statements regarding regulated-data benchmarks?

Q89: Do you agree with the suggested additional content required for statements regarding critical benchmarks? If not, please precise why and indicate what alternative or additional information you consider appropriate in case a benchmark qualifies as critical.

Q90: Do you agree with the suggested additional requirements for significant benchmarks? Which of the three options proposed you prefer, and why?

Q91: Do you agree with the suggested additional requirements for non-significant benchmarks? If not, please explain why and indicate what alternative or additional information you consider appropriate in case a benchmark is non-significant.

Q92: Are there any further contents for a benchmark statement that should apply to the various classes of benchmarks identified in this chapter?

Q93: Do you agree with the approach outlined above regarding information of a general nature and financial information? Do you see any particular cases, such as certain types of providers, for which these requirements need to be adapted?

Q94: Do you agree with ESMA's approach to the above points? Do you believe that any specific cases exist, related either to the type of provider or the type of conflict of

interest, that require specific information to be provided in addition to what initially identified by ESMA?

Q95: Do you agree with the proposals outlined for the above points? Do you see any areas requiring particular attention or adaptation?

Q96: Can you suggest other specific situations for which it is important to identify the information elements to be provided in the authorisation application?

Q97: Do you agree with the proposed approach towards registration? How should the information requirements for registration deviate from the requirements for authorisation?

Q98: Do you believe there are any specific types of supervised entities which would require special treatment within the registration regime? If yes, which ones and why?

Q99: Do you have any suggestions on which information should be included in the application for the recognition of a third country administrator?

Q100: Do you agree with the general approach proposed by ESMA for the presentation of the information required in Article 21a(6) of the BMR?

Q101: For each of the three above mentioned elements, please provide your views on what should be the measures to determine the conditions whether there is an 'objective reason' for the endorsement of a third country benchmark.

Q102: Do you consider that there are any other elements that could be taken into consideration to substantiate the 'objective reason' for the provision and endorsement for use in the Union of a third country benchmark or family of benchmarks?

Q103: Do you agree that in the situations identified above by ESMA the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references a benchmark? If not, please explain the reasons why.

Q104: Which other circumstances could cause the consequences mentioned in Article 39(3) in case existing benchmarks are due to be adapted to the Regulation or to be ceased?

Q105: Do you agree with the proposed definition of "force majeure event"? If not, please explain the reasons and propose an alternative.

Q106: Are the two envisaged options (with respect to the term until which a non-compliant benchmark may be used) adequate: i.e. either (i) fix a time limit until when a non-compliant benchmark may be used or (ii) fix a minimum threshold which will

trigger the prohibition to further use a non-compliant benchmark in existing financial instruments/financial contracts?

Q107: Which thresholds would be appropriate to foresee and how might a time limit be fixed? Please detail the reasons behind any suggestion.

Q108: Is the envisaged identification process of non-compliant benchmarks adequate? Do you have other suggestions?

Q109: Is the envisaged procedure enabling the competent authority to perform the assessment required by Article 39(3) correct in your view? Please advise what shall be considered in addition.

Q110: Which information it would be opportune to receive by benchmark providers on the one side and benchmark users that are supervised entities on the other side?

Q111: Do you agree that the different users of a benchmark that are supervised entities should liaise directly with the competent authority of the administrator and not with the respective competent authorities (if different)?

Q112: Would it be possible for relevant benchmark providers/users that are supervised entities to provide to the competent authority an estimate of the number and value of financial instruments/contracts referencing to a non-compliant benchmark being affected by the cessation/adaptation of such benchmark?

Q113: Would it be possible to evaluate how many out of these financial contracts or financial instruments are affected in a manner that the cessation/adaptation of the non-compliant benchmark would result in a force majeure event or frustration of contracts?



16 Annex II: Commission's mandate to provide technical advice

Link to the text of the mandate to provide technical advice:

http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf