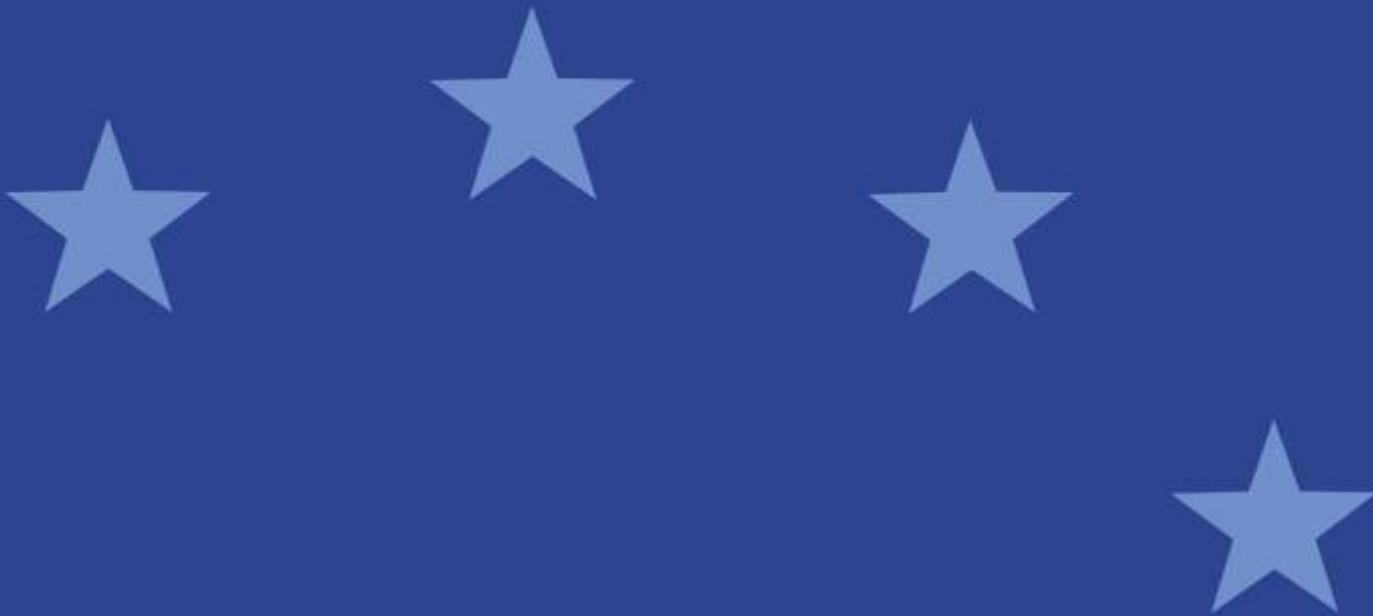




European Securities and  
Markets Authority

# Final Report

**Guidelines on non-significant benchmarks**



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## Executive Summary

### Reasons for publication

The Benchmarks Regulation (Regulation (EU) 2016/1011)<sup>1</sup> was published in the Official Journal of the European Union on the 29 June 2016 and entered into force the following day. It is fully applicable since 1 January 2018.

On 30 March 2017, ESMA submitted its draft regulatory and implementing technical standards to the European Commission. These regulatory and implementing technical standards were published in the Official Journal on 5 November 2018<sup>2</sup>.

These technical standards apply to critical and significant benchmarks.

For non-significant benchmarks, the Benchmarks Regulation states that ESMA may issue guidelines in relation to four areas of the Regulation.

On 29 September 2017, ESMA published a Consultation Paper<sup>3</sup> proposing draft guidelines on these four areas of the Regulation.

### Contents

This Final Report is organised in four chapters, each dedicated to one of the areas for which the Benchmarks Regulation suggests ESMA to develop guidelines for non-significant benchmarks, namely: (i) procedures, characteristics and positioning of oversight function, (ii) appropriateness and verifiability of input data, (iii) transparency of methodology, (iv) governance and control requirements for supervised contributors. Each chapter includes the relevant guidelines.

### Next Steps

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

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<sup>1</sup> The link to the Benchmarks Regulation published in the EU Official Journal:

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

<sup>2</sup> The link to the regulatory and implementing technical standards published in the Official Journal:

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

<sup>3</sup> ESMA Consultation Paper available here:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-105\\_consultation\\_paper\\_on\\_draft\\_guidelines\\_on\\_non-significant\\_benchmarks.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-105_consultation_paper_on_draft_guidelines_on_non-significant_benchmarks.pdf)

# 1. Guidelines on procedures and characteristics of the oversight function (Article 5 BMR)

## 1.1. Background

1. The BMR requires administrators of all benchmarks falling within the scope of Title II to establish a permanent and effective oversight function for all aspects of the provision of their benchmarks. The BMR sets out the minimum responsibilities and characteristics of the oversight function to ensure oversight of all aspects of the provision of the administrator's benchmarks.
2. ESMA developed draft regulatory technical standards (RTS) specifying the detailed procedures and characteristics of the oversight function, in particular its composition and its positioning within the organisation of the administrator, including a non-exhaustive list of governance arrangements. The ultimate aim of the draft RTS is to ensure the integrity of the oversight function and the absence of conflicts of interest; they do not apply to administrators of non-significant benchmarks. The proposed non-exhaustive list of governance arrangements included in the RTS leaves the administrators necessary and sufficient discretion to design their governance arrangements most appropriately.
3. ESMA published the draft regulatory technical standards under Article 5 BMR, on oversight function, on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 2<sup>4</sup>). These regulatory technical standards were published in the Official Journal on 5 November 2018<sup>5</sup>.
4. ESMA can issue guidelines addressed to administrators of non-significant benchmarks to further specify the elements referred to in Article 5(5) BMR. The text of the RTS as adopted by the Commission and published in the Official Journal represents therefore a starting point for the development of the guidelines, and its content is summarised in the next paragraphs.
5. In relation to the composition of the oversight function, ESMA believes that external stakeholders can provide valuable expertise to the oversight function. Its integrity and independence can be ensured by including independent members, but ESMA has decided not to make their membership in the oversight function mandatory for non-critical benchmarks. However, ESMA has left it with the administrators to decide on the composition of the oversight function most fit for the benchmarks they produce, as long as any conflict of interest of external members of the oversight function is adequately mitigated through the general procedures proposed in Article 3 of the RTS.

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<sup>4</sup> Final report on the draft technical standards under the Benchmarks Regulation:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-48\\_-\\_final\\_report\\_ts\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

<sup>5</sup> The link to the regulatory and implementing technical standards published in the Official Journal:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0001.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0001.01.ENG&toc=OJ:L:2018:274:TOC)

6. As far as the role of the staff of the administrator on the oversight function is concerned, the RTS allow their membership to the oversight function but without voting rights if they are directly involved in the provision of the respective benchmark. This will allow staff from the legal or compliance departments to sit on the oversight functions, and to do so in a voting capacity as the case may be.
7. For external members, including those that represent entities to which some aspects of the benchmark provision process have been outsourced, the RTS exclude these members from voting for decisions that would have a direct business impact on the organisation they represent. Observers to the oversight function may be permitted but this lies within the judgement of the administrator as long as the required procedures for their selection according to Article 3(1)(c) of the RTS apply.
8. The RTS allow the oversight function to be carried out by a natural person for non-critical benchmarks as long as that person is not directly involved in the provision of any relevant benchmark and has no potential conflict of interest arising from the level of the benchmark. ESMA has also included a provision to the draft RTS (Article 3(2)(b)) requiring an alternate appropriate body or natural person to ensure continuity of the oversight function when exercised by a single natural person.
9. As already mentioned, administrators are free in their decision to include external parties and observers, but ESMA has decided to specify in Article 3 of the RTS procedures of the oversight function that adequately address potential conflicts of interest. Members of the board or other decision making bodies of the administrator should not be allowed to be permanent members of the oversight function and should be allowed to be invited to attend meetings from time to time (in non-voting capacity) only.
10. In ESMA's view it is crucial that the oversight function can adequately oversee and address decisions of the management when they are related to the provision of the relevant benchmarks. The BMR also requires that the oversight function should be carried out by a separate committee (as the option of choice) or another governance arrangement that should be as appropriate (Article 5(4) BMR). ESMA is convinced that the positioning within the administrator's organisation and the attendance of meetings of the oversight function by representatives of the management where appropriate is sufficient to address the need for relevant input in the work of the oversight function.

*Proposal in the Consultation Paper*

11. The control of conflicts of interest and the safeguard of the public confidence in the integrity of a benchmark are the ultimate goals of the oversight function and, as such, they should be reflected in the content of the draft guidelines for administrators of non-significant benchmarks because they are relevant for all types of benchmarks.
12. According to Article 26(1) BMR administrators of non-significant benchmarks may choose not to apply Article 5(2), (3) and (4) BMR on "oversight function requirements". Article 5(1) BMR cannot be waived by administrators of non-significant benchmarks. Their

administrators will always have to establish and maintain a permanent and effective oversight function to ensure the oversight of all aspects of the provisions of their non-significant benchmarks.

13. The draft guidelines addressed all the elements of Article 5(5) BMR, i.e. the composition of the oversight function, its characteristics and positioning within the organisational structure of the administrator, and include a non-exhaustive list of appropriate governance arrangements for the oversight function.
14. An administrator of non-significant benchmarks may choose not to apply some of these elements by virtue of Article 26(1) BMR. For this reason, ESMA included in the guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 5 BMR, then the corresponding part of the guidelines will not apply either.
15. In relation to the composition of the oversight function, the draft guidelines required administrators of non-significant benchmarks to select one or more members with the appropriate skills and expertise, i.e. the suitable knowledge of the underlying market or economic reality the benchmark seeks to measure. It is clear that the members of the oversight function must have a thorough understanding of the relevant benchmarks in all their aspects to be able to deliver the tasks the oversight function is supposed to cover.
16. Conflict of interest was another concept underpinning the draft guidelines on the composition of the oversight function, as it required the administrator to ensure that the number of members with conflicts of interest did not amount to, or exceed, a simple majority. Also, similarly to what was stated in the RTS, members of the board or other decision making bodies of the administrator should not be allowed to be permanent members of the oversight function and should be allowed to be invited to attend meetings from time to time, in non-voting capacity only.
17. The section of the draft guidelines dedicated to the characteristics and positioning of the oversight function had the same content of Article 2 of the corresponding RTS. This is because ESMA thought that its content was independent from the degree of use of the benchmarks and therefore should apply in the same manner to administrators of non-significant, significant and critical benchmarks. In particular, the principle that the oversight function should be separate from the management body and other governance functions of the benchmark administrator is valid also for administrators of non-significant benchmarks, as the oversight function should always be in a position to challenge the decision of the management body of the administrator.
18. In relation to the procedures to govern the oversight function for administrators of non-significant benchmarks, the draft guidelines proposed to include at least procedures on the selection and removal of the member(s) of the oversight function, as well as procedures related either to the conflict of interest, or to the core tasks of the oversight function. ESMA believed that all the proposed procedures included in the draft guidelines were essential

for a correct functioning of any oversight function, and therefore they should be required also in relation to administrators of non-significant benchmarks.

19. Finally, the draft guidelines proposed a non-exhaustive list of governance arrangements, including a number of possible arrangements for the oversight function. The proposed list was meant to include examples of governance arrangements, from the simplest, i.e. an oversight function composed only of a single natural person, to more structured ones, i.e. an oversight function consisting of multiple committees each of them responsible for either a single benchmark or a single task of the oversight function.

## 1.2. Feedback from stakeholders

20. Respondents generally supported ESMA's proposal for guidelines on the oversight function for non-significant benchmarks stressing that the proposals were not mandatory and administrators can decide on the composition of the oversight function most fit for their benchmarks.
21. Regarding the composition of the oversight function respondents argued that in relation to regulated-data benchmarks the reference in the Consultation Paper (CP) to "entities contributing net asset values of investment funds" could be misleading and suggested to delete it. Further, respondents supported the inclusion of external representatives but stressed that this should stay optional to avoid inclusion of conflicts of interest. The SMSG also supported this view and stressed that "*we would have had concerns about mandatory inclusion of representatives from other, competing trading venues on the oversight committee. For instance, parties could have gained access to price sensitive information (such as planned index changes) before other market participants*". In addition, some market participants highlighted the unnecessary burden on administrators of regulated-data benchmarks because they are already subject to a highly regulated framework.
22. One respondent mentioned that an oversight function composed of one single person may not be sufficient and at least three voting members was needed to guarantee an adequate level of challenge.
23. On the procedures governing the oversight function, some respondents argued that ESMA's proposal was not proportionate to small firms acting as non-significant benchmark administrators. While some respondents put forward the difficulty of implementation of the detailed procedures for evaluation criteria or election of potential members of the oversight function, others suggested to add additional criteria for the set-up of the oversight function that are important for a benchmark user to know. For instance, the criteria to select observers (Article 3.1.c of RTS), the criteria for choosing the person or committee responsible for overall direction and coordination and acting as the contact point for the management body (Article 3.1.e of RTS), the public disclosure of summary details of its members, along with any declaration of conflicts of interest (Article 3.1.f of RTS).

24. One respondent stressed that the proposal in the CP related to “its access to all documentation necessary to carry out its duties” was far reaching, disproportionate and can cause confidentiality and liability issues to contributors to those benchmarks.
25. In addition, one respondent suggested, for proportionality reasons, to only disclose material conflicts of interest before discussion of an agenda item during meetings of the oversight function.
26. Regarding the non-exhaustive list of governance arrangements, respondents questioned the requirements linked to the persons directly involved in the provision of the benchmark. First, one respondent questioned the term “directly involved in the provision” and suggested ESMA to include a clarification in Level 3 measures. Then, some respondents questioned the requirement that relates to the split between persons involved versus not directly involved in the provision of the benchmark, arguing that it can be inappropriate in terms of costs and organisation and that the design of the oversight function should be assessed on a case by case basis.
27. Some respondents opposed the proposal that members directly involved in the provision of the benchmark should be non-voting members arguing that they have the competence for non-significant benchmarks. These benchmarks are highly complex and need a high level of expertise. These respondents added that this proposal did not take into account the variety of firms offering non-significant benchmarks for example in some firms all staff would be considered directly involved in the provision of the benchmark and that this regulatory framework could result in an entity hiring new employees to vote at the oversight committee. Also, it is challenging to find people outside the organisation with sufficient knowledge.
28. Further, another respondent highlighted that the positions of staff members not directly involved in the provision of the benchmark should be assessed carefully to ensure that they can always be in a position to challenge the decision of the management body and they have sufficient expertise and skills to carry out their duties.

### **1.3. Content of the guidelines**

29. ESMA has upheld the general structure as proposed in the CP, the guidelines contain different sections on the composition of the oversight function, on its positioning and on procedures that should govern the oversight function, as well as a non-exhaustive list of governance arrangements. ESMA has updated the guidelines according to the changes made to the RTS as adopted by the European Commission and published in the Official Journal. For instance, the guidelines include now a first section related to its scope of application as requested also by market participants.
30. Regarding the composition of the oversight function, ESMA has simplified the wording of the requirement related to administrators of regulated-data benchmarks that may include

in the oversight function representatives from the entities listed in the definition of a regulated-data benchmark of Article 3(1)(24) BMR.

31. In relation to the procedures governing the oversight function, ESMA has decided to include additional proportionality and not to require administrators to establish detailed procedures on the criteria to select members of the oversight function. The proposal needs to be balanced between the burden on administrators on one side and the transparency that a user of benchmarks needs in order to choose the benchmark best suited for his investments. Therefore, following the proposal of market participants ESMA has included in the procedures governing the oversight function the public disclosure of declaration of material conflicts of interest of members, as this is a useful information for benchmarks users. Also, the access to all documentation necessary has been redrafted as suggested by market participants and only the material conflicts of interest are now required to be disclosed.
32. Regarding the non-exhaustive list of governance arrangements, an additional proportionality compared to the RTS is introduced as the guidelines do not include a minimum number of staff members not directly involved in the provision of the benchmark. However, ESMA stresses that persons directly involved in the provision of the benchmarks may be included in the oversight function only in a non-voting capacity to ensure that the administrator does not hold undue influence over the decisions of the oversight function. ESMA also stresses that this non-exhaustive list of governance arrangements allows the administrator to choose from the different options the governance most fit for its organisation.

## **2. Guidelines on input data (Article 11 BMR)**

### **2.1. Background**

33. Article 11 BMR defines the requirements that an administrator of benchmarks must apply in respect of input data.
34. As any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark, the BMR favours the use of transaction-based input data that are less subject to discretion and therefore to manipulation. As a general rule, stated in Article 11 BMR, benchmark administrators should use transaction-based input data where possible, but other data can be used in those cases where the transaction data is insufficient or inappropriate to ensure the integrity and accuracy of the benchmark.
35. Article 11 also imposes requirements on the verifiability of input data, on the controls to be established by an administrator in order to validate input data, and additional requirements applying only when input data are received from contributors, e.g. the evaluation of input data.

36. The BMR requires ESMA to provide draft RTS to specify further how the administrator must ensure that the input data used to determine the benchmark is appropriate and verifiable. ESMA is also mandated to specify further the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where the input data is contributed from a front office function. The front office function is defined in Article 11(3) as “ [...] any department, division, group, or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities [...]”.
37. The draft RTS should apply to critical benchmarks and they should apply to significant benchmarks unless their administrator decides not to apply Article 11(3) BMR, as provided for by Article 25(1) BMR. In addition, the RTS do not apply to administrators of non-significant benchmarks and of commodity benchmarks subject to Annex II instead of Title II of BMR. Also, Article 17(1) BMR exempts regulated-data benchmarks from Article 11(3) BMR .
38. ESMA published the draft regulatory technical standards under Article 11 on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 3<sup>6</sup>). These regulatory technical standards were published in the Official Journal on 5 November 2018<sup>7</sup>.
39. ESMA can issue guidelines addressed to administrators of non-significant benchmarks to further specify the elements under Article 11(1)(a) and (b), as well as the ones under Article 11(3)(b). ESMA has addressed these elements in the draft RTS, which apply only to administrators of significant and of critical benchmarks. The text of the RTS as adopted by the Commission and published in the Official Journal represents the starting point for the development of the guidelines.
40. The RTS are composed of two Articles, the first covering Article 11(1)(a) and (b) and the second one dealing with input data from front office functions (Article 11(3)(b)).
41. The aim of Article 2 of the RTS is to allow administrators to have the necessary information to ensure the appropriateness and verifiability of the input data used to determine the benchmark. To assess the appropriateness, administrators need to take into consideration the characteristics of the underlying market or economic reality as well as the applicable methodology. To ensure that input data is appropriate and verifiable, input data should be monitored on a regular basis, reflecting the vulnerability of its specific type. Indeed, regulated data, as defined in Article 3(1)(24) BMR, are less vulnerable to manipulation because of their nature and of existing Regulations applicable to them, thus can be subject to less extensive checks by an administrator.

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<sup>6</sup> Final report on the draft technical standards under the Benchmarks Regulation:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-48\\_-\\_final\\_report\\_ts\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

<sup>7</sup> The link to the regulatory and implementing technical standards published in the Official Journal:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0006.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0006.01.ENG&toc=OJ:L:2018:274:TOC)

42. Article 2 contains a number of checks that administrators have to perform on a regular basis and, for critical benchmarks and in relation to a subset of checks only, prior to any publication of the benchmark.
43. Article 3 is dedicated to the internal oversight and verification procedures that an administrator should ensure are in place at the level of the contributor, where the input data is contributed from a front office function. Contributions from a front office function present a particular risk as a result of an inherent conflict of interest between the commercial role of the front office and its role in contributing to a benchmark.
44. The internal oversight and verification procedures proposed in Article 3 of the RTS are structured along three different level of control functions. The internal oversight procedure consists of the internal rules of the contributors defining the respective roles of the three levels of control functions, as well as the means of cooperation and flow of information between them.
45. The first level of control function is responsible for the checking of input data prior to contribution in accordance with any requirement for the validation of input data defined in the code of conduct. At this level of control, the contributor should also check, inter alia, that the submitter is authorised to contribute input data on behalf of the contributor.
46. The second level of control function is about the review of input data after contribution, as well as the maintenance of a whistle-blowing procedure and of procedures for the internal reporting of any attempted or actual manipulation of input data and any failure to comply with the contributor's benchmark-related policies. Additionally, the second level of control function is responsible for the establishment and maintenance of a conflicts of interest policy.
47. Finally, a third level of control function that is independent from the first two levels of control is responsible for performing checks, on a regular basis on the controls exercised by the first two levels of control.

#### *Proposal in the Consultation Paper*

48. The quality of input data is one of the most prominent issues dealt with in the BMR. The reliability of benchmarks depends on the input data used to determine them: without proper rules governing the contribution of input data and the conflicts of interest inherent to this process, the vulnerability of benchmarks is set to increase.
49. Input data must be governed by specific rules, regardless of whether the benchmarks based on such input data are critical, significant or non-significant benchmarks. Even for the less used benchmarks, i.e. non-significant benchmarks, the quality of input data cannot be underestimated. Following the application of the new EU legal framework for benchmarks, administrators of all types of benchmarks must have in place robust procedures for the control of input data.

50. At the same time, administrators of non-significant benchmarks are subject to a less detailed regime under the BMR, and therefore the aim of the guidelines is to strike the right balance between the need for robust input data and the aim of minimising the administrative burden for administrators of non-significant benchmarks.
51. In this context, it should be noted that Article 26 BMR on non-significant benchmarks states that administrators of non-significant benchmarks may choose not to apply Article 11(1)(b) BMR on the verifiability of input data, and Article 11(3) BMR on the additional checks the administrator should impose on contributions from front office functions. For this reason, ESMA included in the draft guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 11 BMR, then the corresponding part of the guidelines will not apply either.
52. In relation to Article 11(1)(a) and (b) BMR, regarding the ability of the administrator to ensure that the input data is appropriate, ESMA proposed a number of checks that administrators of non-significant benchmarks should perform.
53. The administrator has to be satisfied that the submitter has been authorised to contribute input data on behalf of the contributor in accordance with the applicable code of conduct. In relation to all types of input data, including regulated input data (i.e. input data contributed entirely and directly from one of the sources listed in Article 3(1)(24) BMR), the administrator of non-significant benchmarks should check that all characteristics of the input data are fully in line with the methodology.
54. ESMA considered that the form of the input data to be provided to the administrator and the required level of reliability of the source of input data were elements, already included in the RTS on input data, that would also be included by the administrator in the applicable code of conduct. For this reason, these two elements were not considered as core parts of the verifiability requirements of the input data for administrators of non-significant benchmarks, and ESMA proposed not to include them in the guidelines.
55. In relation to Article 11(3)(b) BMR on the internal oversight and verification procedures that an administrator should impose on its contributors, where the input data is contributed from a front office function, ESMA proposed a structure of controls that is similar to the one included in the RTS for critical and significant benchmarks, but materially simplified.
56. Contributors contributing to non-significant benchmarks via front office functions should establish an internal oversight procedure structured along three levels of controls and detail the means of cooperation and flow of information between them together with the communication to the administrator of information requested by the administrator relating to the contributor's internal oversight and verification procedures.
57. A first level of control function should be responsible for: the review of input data prior to contribution to check its integrity and accuracy; effective checking of input data prior to contribution; checking that the submitter is authorised to contribute input data on behalf of the contributor; the restriction of contributed input data to persons involved in the

contribution process, except where access is justified under the rules and procedures of the contributor.

58. ESMA considered that the requirements applicable for significant benchmarks should also be applicable for non-significant benchmarks, as the first level of control is of paramount importance to identify as soon as possible any error or misconduct.
59. A second level of control should have three main objectives: the review of input data after contribution, the maintenance of a whistle-blowing procedure, and the establishment of a conflicts of interest policy. ESMA considered that the requirements included in the RTS in relation to the internal reporting for any operational problems and the physical presence of a staff member from the second level of control function should not apply to the contribution to non-significant benchmarks, and therefore this was not included in the guidelines.
60. In relation to conflicts of interest, ESMA considered that this procedure should only cover the material conflicts of interest for non-significant benchmarks and should include: the identification and disclosure to the administrator of actual or potential material conflicts of interest in relation to the contributor's front office staff who are involved in the contribution process, as well as the separation of the remuneration of a submitter from the benchmark related determinations that might give rise to a conflict of interest linked to the contribution to the benchmark.
61. Administrators of non-significant benchmarks should also establish a third level of control function responsible for evaluating the performance of the first and the second level of control.

## **2.2. Feedback from stakeholders**

62. Respondents generally supported ESMA's proposal for guidelines on non-significant benchmarks, stressing that no compromise should be made on the data quality and that the BMR already includes the right level of proportionality in Article 24 in relation to the verifiability of input data (Article 11(1)).
63. Regarding the first section of the guidelines on ensuring appropriate and verifiable input data, one respondent agreed with the exclusion of the requirement on the contribution of input data in the right format (included in the RTS) but stressed the importance of the format to avoid operational errors or delays in the benchmark publication. This respondent also addressed the exclusion of the reliable source of input data stressing that this exclusion is justified when reliable relates to the frequency of dissemination of data and not to the quality of the data that administrators of non-significant benchmarks should ensure.
64. In relation to the requirement for regulated-data benchmarks, some respondents argued that further clarification was needed regarding regulated-data benchmarks and that trading venues should not be considered contributors as defined in Article 3(1)(8) BMR. The MSG also supported this view. Further, these respondents highlighted that benchmark administrators often obtain data from trading venues via market data providers that do not

alter the raw data. Such practice should fall within the scope of a regulated-data benchmark.

65. Some respondents argued that the requirements in the section of the guidelines on “Ensuring appropriate and verifiable input data” were not applicable to all benchmarks, e.g., transaction data can be obtained from a variety of sources and it should not be necessary to designate an individual source, also the items listed in relation to the input data that meets the requirements of the methodology are not applicable to all benchmarks.
66. Regarding the second section of the guidelines on the internal oversight and verification procedures of a contributor, the majority of the respondents agreed with ESMA’s proposal to have three level of controls function at the level of the contributor for front office contributions to ensure data quality. Some respondents asked to clarify the responsibilities between administrators and contributors, i.e. the administrator should not have an investigation role but obtain sufficient assurance from contributors.
67. Some respondents questioned the proportionality included in ESMA’s proposal. For instance, one respondent mentioned that the second level of control function requirements seemed more onerous than those for significant benchmarks.
68. Another respondent mentioned that in the procedures governing the conflicts of interest the word “potential” is missing in “the actual or material conflict”.
69. One respondent suggested to perform the surveillance of the communications between front office staff directly involved in contributions and other internal functions or external bodies only when concerns or issues arise and not on an on going basis.
70. Some respondents reiterated their call for ESMA to clarify the definition of input data. ESMA acknowledges this request and may publish some clarification through another Level 3 tool.

### **2.3. Content of the guidelines**

71. ESMA has upheld the general structure as proposed in the CP, the guidelines contain two sections on ensuring appropriate and verifiable input data and on the internal oversight and verification procedures of a contributor to a non-significant benchmarks. ESMA has updated the guidelines according to the changes made to the RTS as adopted by the European Commission and published in the Official Journal. For instance, the guidelines include now a first section related to its scope of application as requested also by market participants.
72. Regarding the section on ensuring appropriate and verifiable input data, ESMA acknowledges the issue raised by market participants regarding the use of “contributed” in the definition of regulated-data benchmarks and in particular that trading venues are not contributing data in the meaning of “contribution of input data” as defined in Article 3(1)(8) BMR. However, ESMA cannot address this issue in the Level 1 text via these guidelines

or via any other Level 3 tool. ESMA has also decided to include additional proportionality and has deleted the requirement on regulated-data benchmarks as in general the methodology specifies the sources of the input data and the other controls performed are sufficient to ensure appropriate and verifiable input data in the case of non-significant benchmarks.

73. ESMA acknowledges also the view expressed by market participant that the requirements in the guidelines are not applicable to all benchmarks. ESMA would like to point out that it has included “where applicable” at the beginning of the section in order to specify that the requirements depend on the type of benchmarks. For instance, the requirements of the methodology depend on each benchmark and the methodology used to determine that benchmark. ESMA has therefore simplified this requirement to only refer to input data that meets the requirements of the methodology of the benchmark.
74. As far as the section on the internal oversight and verification procedures of a contributor to a non-significant benchmarks is concerned, ESMA has upheld the three levels of control function as proposed in the CP as respondents supported this structure. Further, ESMA would like to point out that compared to the RTS on input data applicable to critical and significant benchmarks, ESMA has not included some of the requirements in the second level of control, e.g. the establishment and maintenance of internal reporting procedures for reporting any operational problems in the contribution process, or the presence of a staff member from the second level of control in the office area of the front office function. Also only three requirements related to the conflict of interest policy are included in the guidelines while the RTS mentions seven requirements and the conflict of interest policy refers now to the actual or potential material conflicts of interest as requested by market participants.
75. ESMA has decided to further enhance the proportionality in this section of the guidelines. In the first level of control function, ESMA has included a general wording related to the checking of input data prior to the contribution.
76. In the second level of control function, the independent review of the input data has been deleted. Indeed, ESMA believes that the other controls performed by the second level of control function and the review of input data by the first level of control function are sufficient to ensure that the data is accurate in the case of non-significant benchmarks. Further, the surveillance of the communications of front office staff is no longer to be carried out on an on-going basis but at a point in time when the controls performed give rise to concerns.
77. Further, for consistency reasons, ESMA has included that the conflict of interest policy should relate to the actual or potential material conflicts of interest.

### 3. Guidelines on transparency of methodology (Article 13 BMR)

#### 3.1. Background

78. The accuracy and reliability of a benchmark in representing the economic reality it is intended to measure depends on its methodology. It is therefore necessary that all administrators adopt a methodology that is appropriate to ensure the reliability and accuracy of the benchmark and that is transparent to increase the administrator's accountability.
79. Article 13 BMR focuses on the transparency of the methodology and requires administrators to publish or make available a number of information, including: the key elements of the methodology used, details of the internal review and the approval of a given methodology, and the procedures for consulting on any proposed material change in the methodology.
80. Once the methodology is established and internally approved by the benchmark's administrator, it may be subject to changes, in order to ensure the continued accuracy and reliability of the benchmark. According to Article 13(1)(b) BMR, the definition of the frequency of the review of the methodology lies with the administrator.
81. Any changes to the methodology have an impact on users and stakeholders of the benchmark. It is therefore necessary for the administrator to follow procedures that ESMA is required to further specify when changing the methodology of the benchmark. In particular, when the changes are deemed material, a consultation is needed in order to allow users and stakeholders to take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes.
82. In the RTS under Article 13(3) BMR, ESMA further specified the key elements of the methodology to be disclosed in order for users to understand how the benchmark is provided and to assess the appropriateness of the benchmark to their intended use, the details of the internal review and approval of a given methodology and the procedures for consulting on any proposed material change in the administrator's methodology. ESMA published the draft regulatory technical standards under Article 13 BMR on the 30 March 2017, together with the other draft standards (see Final Report on draft standards ESMA70-145-48, chapter 4<sup>8</sup>). These regulatory technical standards were published in the Official Journal on 5 November 2018<sup>9</sup>.

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<sup>8</sup> Final report on the draft technical standards under the Benchmarks Regulation:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-48\\_-\\_final\\_report\\_ts\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

<sup>9</sup> The link to the regulatory and implementing technical standards published in the Official Journal:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0021.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0021.01.ENG&toc=OJ:L:2018:274:TOC)

83. The RTS do not cover or apply to administrators of non-significant benchmarks (and they also do not apply to administrators of commodity benchmarks subject to Annex II instead of Title II of BMR). However, ESMA can issue guidelines addressed to administrators of non-significant benchmarks to further specify the elements included in Article 13(1) and (2) BMR. The text of the RTS as adopted by the Commission and published in the Official Journal represents the starting point for the development of the guidelines.
84. The RTS are composed of three main Articles that, respectively, further specify Article 13(1)(a), (b), and (c) BMR.
85. Article 2 details the key elements of the methodology to be published or made available by the administrator. In this context, it should be considered that the BMR states in Recital 27 that the transparency of the methodology should not be meant as the publication of the formula applied for the determination of a benchmark, but rather the disclosure of the elements sufficient to allow stakeholders to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use.
86. ESMA therefore considered that the publication of the formula used should not be included in the list of the key elements. Instead, Article 2 of the RTS includes a list of elements that should provide users and potential users with all the information they need to understand how a benchmark is determined, what it measures and therefore to understand the appropriateness of the benchmark for their purposes and any limitations or risks of the methodology. Also, ESMA believes that uniform disclosure of the key elements of the methodology across the EU will allow users and potential users to easily compare the methodologies of different benchmarks and choose appropriately according to their intended use.
87. The elements listed in Article 2 of the RTS relate to the input data used to determine the benchmark, the use of expert judgement, the panel of contributors, changes to the methodology and limitations of the methodology.
88. Article 3 of the RTS relates to the elements of the internal review and approval of the methodology to be published or made available by the administrator, and requires administrators to disclose their policies and procedures regarding the internal review and the approval of the same, including the specific events that may trigger an internal review and the bodies or functions within the administrator's organisational structure that are involved in reviewing and approving the methodology.
89. According to Article 3, for critical benchmarks, administrators should also disclose the roles performed by any persons involved in reviewing and approving the methodology, as well as a description of the procedure for the nomination and removal of the persons involved in reviewing and approving the methodology.
90. Finally, Article 4 is about the information on a proposed material change to an administrator's methodology that an administrator should publish or made available. It is important that users or potential users of benchmarks understand how an administrator will

consult on a proposed material change to a benchmark, and therefore ESMA believes that the administrator should disclose in advance certain information on how it will conduct the consultation, and on the rationale for a proposed material changes including how it will assess the impact of a proposed change.

91. In specific circumstances, such as in case of sudden market events, ESMA appreciates that the administrator might conduct a consultation within a shorter time frame than the standard period otherwise set out.

*Proposal in the Consultation Paper*

92. The general principles of transparency of the methodology of the benchmark, ensuring the reliability and accuracy of the same, apply to all benchmarks and it is therefore independent from the degree of use of the benchmarks, i.e. independent from whether the benchmarks are critical, significant or non-significant. Also, the need to provide users or potential users with elements sufficient to allow them to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use is a general principle independent from the degree of use of a benchmark.

93. At the same time, administrators of non-significant benchmarks are subject to a less detailed regime under the BMR, and therefore the aim of the guidelines was to strike the right balance between the general principles of transparency of methodology and providing users and potential users with the appropriate information. ESMA aimed at minimising the administrative burden for administrators of non-significant benchmarks.

94. In relation to the key elements of the methodology to be published or made available by an administrator of non-significant benchmarks, ESMA proposed that the general information regarding benchmarks, i.e. the definition and description of the benchmark and of the market or economic reality it is intended to measure and the unit of measurement of the benchmark (e.g. the currency or other metric) should be published or made available where applicable to the benchmark.

95. Further, the information regarding the input data should be published also for non-significant benchmarks since it gives users information about the reliability of the benchmark and also it allows them to understand the relevance and appropriateness of a non-significant benchmark vis-a-vis their needs. The following elements should be covered when applicable to the benchmark: types of input data used and the priority given to each type, any minimum requirements for the quantity of input data and minimum standards for the quality of input data, as well as a description of the constituent elements of a benchmark and the criteria used for their selection and for assigning weights to them (if any).

96. The key elements of the methodology should also always cover the use of expert judgement and in particular rules identifying how and when discretion may be exercised in the determination of the non-significant benchmark, as this information would allow users and potential users to assess the reliability and accuracy of the benchmark.

97. Another element to be published or made available was whether the benchmark takes into account any reinvestment of dividends and coupons paid by its constituent elements. The reinvestment of dividends and coupons is the key characteristic for a benchmark being a total return index or a price index. This is essential for the value of the index and for the value of financial instruments referring to it, so there should be no differentiation among significant and non-significant benchmarks.
98. The composition of panel contributors and the limitations of the methodology and indications of the applicable methodology in exceptional circumstances should also be included in the public document on the methodology.
99. As specified in Article 13(1)(a) BMR, the key elements of the methodology could, when applicable, be provided by the administrator for each family of benchmarks or for each single benchmark.
100. In relation to details of the internal review and the approval of a given methodology, as well as the frequency of such review, ESMA proposed that administrators of non-significant benchmarks should publish or make available a description of the relevant policies and procedures and a description of any specific event that may give rise to an internal review of the methodology.
101. Finally, in relation to Article 13(1)(c) BMR, ESMA proposed in the guidelines that an administrator of non-significant benchmarks should publish or make available the key elements of the methodology that will in its view be impacted by a proposed material change. ESMA considered that together with the other requirements already provided for in Article 13(1)(c) and Article 13(2) BMR, users will have sufficient information regarding non-significant benchmarks. On the other hand, the burden on the administrators of such benchmarks would be minimised.

## **3.2. Feedback from stakeholders**

102. The majority of the respondents generally supported ESMA's proposal on the transparency of the methodology. One respondent highlighted that too much transparency could result in benchmarks being manipulated as all components needed for their creation would be published.
103. On the key elements of the methodology, two respondents suggested to include additional requirements of Article 2 of the RTS, e.g. on the criteria for the selection of the sources of data and the frequent changes to the methodology as these gather important information for users and are not burdensome for administrators.
104. Regarding the key elements of the methodology, one respondent suggested to extend the key element on the potential limitations of the methodology to cover procedures when there are no or insufficient transactions. Further on this point two respondents mentioned that liquidity should be assessed in a proportionate manner taking into consideration the specificities of the relevant market. For instance, emerging markets liquidity can be rather

volatile but should not impact the provision of indices. This is particularly important for non-significant benchmarks.

105. Some respondents argued that the requirements in this section of the CP were not applicable to all benchmarks, e.g., it is not always possible or appropriate to publish the unit of measure of the benchmark or the types of input data used or the minimum requirements for the quantity and quality of input data.
106. On the internal review and approval of the methodology, two respondents did not agree with the publication of detailed information related to internal procedures but supported the publication of a summary.
107. To the question on whether the proposal of the CP to include a requirement for publishing or making available to the public a description of specific events that may give rise to an internal review, the majority of the respondents did not support the proposal stressing that non significant benchmarks are generally tailor made and thus the specific events could be upon the client request.
108. On the last section of the guidelines regarding the information to be published on a proposed material change to the methodology, one respondent suggested to reinforce this section by including an advance notice sufficient to allow users to consider a change of benchmark, an explanation and a rationale for the change, an exact description of changes and an assessment of expected impact on users.

### **3.3. Content of the guidelines**

109. ESMA has upheld the general structure as proposed in the CP, the guidelines contain three sections on the key elements of the methodology, the elements of the internal review of the methodology and the information on a proposed material change to an administrator's methodology. ESMA has updated the guidelines according to the changes made to the RTS as adopted by the European Commission and published in the Official Journal.
110. As far as the key elements of the methodology are concerned, ESMA has kept the elements included in the CP. Regarding the key element on the limitations of the methodology and the applicable methodology in exceptional circumstances the guidelines already include "where transaction data sources may be insufficient" as proposed by market participants. Further, compared to the RTS as published in the official journal, an additional proportionality has been introduced for administrators of non-significant benchmarks that only need to indicate the applicable methodology in exceptional circumstances without mentioning its details as for the two other categories of benchmarks.
111. ESMA agrees with the view expressed by market participant that the requirements in the guidelines are not applicable to all benchmarks. ESMA would like to point out that it has included "where applicable" at the beginning of the first section in order to specify that the requirements depend on the type of benchmarks. For instance, the currency or the unit

of measurement of the benchmark may not be applicable to some benchmarks. The same holds for the priority given to each type of input data.

112. Compared to the CP and as suggested by some market participants, ESMA has introduced in this final report an additional element that is useful for the users to know for non-significant benchmarks that may change periodically their methodology. In this case, the public document should include the criteria that determines when such a change is necessary.
113. In relation to the elements of the internal review of the methodology to be published, following the feedback received from market participants, ESMA has decided to enhance the proportionality for administrators of non-significant benchmarks that will no longer need to include in this public document a description of the specific events that may give rise to an internal review. Indeed, as mentioned by the respondents to the CP, non-significant benchmarks are generally tailor made. This section of the guidelines is therefore materially less burdensome and includes only a description of the policies and procedures relating to the internal review or approval of the methodology and not the details of these policies and procedures.
114. The last section of the guidelines specifies the information to be disclosed on a proposed material change to an administrator's methodology. ESMA highlights that the proposal made by a market participant on an advance notice sufficient to allow users to consider a change of benchmark, an explanation and a rationale for the change, an exact description of the change are already included in Article 13(1) and (2) BMR. Further, in accordance with Article 26(1) BMR administrators of non-significant benchmarks may opt out of Article 13(2) and therefore the related requirements on the material changes of the methodology.

## **4. Guidelines on governance and control requirements for supervised contributors (Article 16 BMR)**

### **4.1. Background**

115. Article 16 BMR is dedicated to specific obligations that supervised contributors have to comply with when contributing input data to benchmark administrators.
116. Article 16(5) BMR requires ESMA to develop draft RTS to specify further the requirements concerning systems and control for supervised contributors set out in paragraphs 1, 2 and 3 of the same Article. ESMA published the draft regulatory technical standards under Article 16 on the 30 March 2017, together with the other draft standards

(see Final Report on draft standards ESMA70-145-48, chapter 6<sup>10</sup>). These regulatory technical standards were published in the Official Journal on 5 November 2018<sup>11</sup>.

117. The RTS on the governance and control requirements for supervised contributors do not apply to supervised contributors of non-significant benchmarks. Furthermore, paragraph 5 of Annex 1 BMR states that the RTS do not cover interest rate benchmarks: instead, paragraphs 6 to 12 of Annex I contain rules specifically for contributors to interest rate benchmarks.
118. It should be noted that Article 26 BMR on non-significant benchmarks states that administrators of non-significant benchmarks may choose not to apply Article 16(2) and (3) BMR. For this reason, ESMA included in the draft guidelines some specification explaining that if an administrator has chosen not to apply a specific paragraph of Article 16 BMR, then the corresponding part of the guidelines will not apply either.
119. Article 16(6) BMR states that ESMA may issue guidelines addressed to supervised contributors to non-significant benchmarks to specify the elements referred to in Article 16(5) BMR. The later requires ESMA to develop draft RTS specifying further the requirements set out in paragraphs (1) to (3).
120. Because the guidelines will have to specify how the elements further specified in the draft RTS would apply to supervised contributors to non-significant benchmarks, as outlined in the CP, the starting point of the guidelines is the content of the RTS as adopted by the Commission and published in the Official Journal.
121. Article 2 of the RTS on “Control framework” specifies Article 16(1)(b) BMR and contains provisions requiring periodic review of the process for contributing input data, effective oversight of the same, and policy on whistle-blowing, including appropriate safeguards for whistle-blowers.
122. Article 3 on “Controls on submitters”, specifying Article 16(2)(a) BMR, details the minimum elements to be included in the systems and control of a supervised contributor in relation to the process of submitting input data.
123. Article 4 of the RTS is about the training for submitters (specifying Article 16(2)(b) BMR), and requires adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality and adequate knowledge of all the elements of the applicable code of conduct. For critical benchmarks the knowledge of submitters should periodically, and at least annually, be re-assessed.

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<sup>10</sup> Final report on the draft technical standards under the Benchmarks Regulation:

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-48\\_-\\_final\\_report\\_ts\\_bmr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf)

<sup>11</sup> The link to the regulatory and implementing technical standards published in the Official Journal:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.274.01.0016.01.ENG&toc=OJ:L:2018:274:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.274.01.0016.01.ENG&toc=OJ:L:2018:274:TOC)

124. Article 5 is about conflicts of interest and includes in particular requirements on the remuneration of submitters. Article 6 is about the records to be kept by the supervised contributors regarding the submission process.
125. Finally, Article 7 on expert judgement, requires supervised contributors to establish a framework to ensure a consistent approach among submitters in relation to the use of expert judgement, the identification of the information that can be used to its support and procedures for the systematic review of any use of expert judgement.

*Proposal in the Consultation Paper*

126. In relation to the general control framework that supervised contributors should have in place, ESMA had a preliminary view that similar requirements should apply to supervised contributors of significant and non-significant benchmarks alike. This is because the conformity of the input data to the BMR and the code of conduct, and their accuracy, are qualities that are independent from the degree of use of the benchmarks, and they should always be met by contributors to all benchmarks.
127. Supervised contributors to non-significant benchmarks should therefore establish effective oversight of the process for contributing input data and a policy on whistle-blowing because this is considered an effective tool to prevent and detect potential misconduct. If compared with the requirements included in Article 2 of the RTS, the control framework envisaged for supervised contributors' contributions to non-significant benchmarks was less demanding as ESMA proposed not to include the obligation to periodically review the process for contributing data.
128. In relation to the controls that a supervised contributor should establish over its submitters when contributing to non-significant benchmarks (Article 16(2)(a) BMR), ESMA requested the establishment of a process through which "official" submitters are designated within the contributor. ESMA believed that, as part of the controls on submitters, a supervised contributor to non-significant benchmarks should also establish procedures and systems for monitoring the data used for the contributions, in order to create an extra-layer of checks potentially capable of producing alerts in relation to unusual values of the data used for the determination of the input data.
129. ESMA thought that there was no need to specify in these guidelines a process for sign-off of a contribution by a natural person senior to the submitter. If a sign-off is requested by the the applicable code of conduct under Article 15 BMR, the supervised contributor will nevertheless have to comply with the code and therefore establish a process for sign-off. Under this approach, it would be therefore up to the code of conduct, defined by the administrator of the non-significant benchmark, to decide whether a sign-off process is needed or not.
130. Regarding training for submitters and contrary to the approach favoured in the RTS, ESMA believed that the obligation already included in the text of the BMR, covering at least

the BMR and Regulation (EU) No 596/2014 (Market Abuse Regulation), was sufficient for the supervised contributors to non-significant benchmarks.

131. The management of conflicts of interest is one of the main focuses of the BMR and also in this context it is one of the main areas that the guidelines should cover. Under the guidelines, and compared to the RTS only material conflicts of interest should be included in a register. Also, where appropriate, the measures for the management of conflicts of interests should include physical separation of submitters from other employees of the contributor. In order to decide whether the physical separation is needed, the supervised contributors should take into account different elements and in particular, the nature, scale and complexity of the supervised contributor's activities.
132. One of the dimensions in which conflicts of interest often materialise is the remuneration of the persons involved in the submission of input data. The guidelines therefore proposed that the measures for the management of conflict of interest also include remuneration policies in relation to submitters.
133. The records to be kept by supervised contributors are essential to demonstrate compliance with the applicable rules. In the guidelines, ESMA proposed an approach similar to the one proposed for significant benchmarks in the RTS. Supervised contributors to non-significant benchmarks would be required to keep records not only for all the contributions made, but also the names of the acting submitters.
134. Finally, the proper management of expert judgement is key to the reliability of all benchmarks, and therefore also for non-significant benchmarks. ESMA thus proposed to include in the guidelines that the policies of the use of expert judgement should include a framework for ensuring consistency between different submitters, and consistency over time, as well as procedures for the systematic review of any use of expert judgement or the exercise of discretion.

## **4.2. Feedback from stakeholders**

135. Respondents generally supported ESMA's proposal for guidelines on the governance and control requirements for supervised contributors. In particular, market participants supported the deletion of the sign off process for non-significant benchmarks as the supervised contributors will need to comply with the code of conduct.
136. To the question regarding the inclusion of an obligation to physically separate submitters, the MSG supported the proposal to establish where appropriate this physical separation stressing that "*a balanced approach should be undertaken when making these decisions to avoid instating cumbersome and costly processes where this is not appropriate and proportionate*". However, all respondents to the CP did not support ESMA's proposal, some respondents argued that this requirement would not be suitable for small firms. They stressed that the controls included in the guidelines should be sufficient and this requirement should be left for the supervised contributor's judgement.

137. In relation to the section on policies on expert judgement, one respondent highlighted that the procedures for the review of the use of expert judgement were more prescriptive than the RTS applicable to significant and critical benchmarks.

### **4.3. Content of the guidelines**

138. The general approach included in the final guidelines on governance and control requirement remains the same as proposed in the CP. Only some small amendments have been introduced following the comments made by market participants as described in the previous section “Feedback from stakeholders”.

139. ESMA has updated the guidelines according to the changes made to the RTS as adopted by the European Commission and published in the Official Journal. For instance, the guidelines include now a first section related to its scope of application as requested also by market participants.

140. The main outcome of the consultation relates to the section of the guidelines on the management of conflicts of interest of supervised contributors to non-significant benchmarks. Some market participants did not support the physical separation of submitters from other employees of the contributor as a requirement for non-significant benchmarks. Some respondents argued that this requirement would not be suitable for small firms. Further, they stressed that the controls included in the guidelines should be sufficient and this requirement should be left for the judgement of the supervised contributor. While ESMA acknowledges the feedback received, ESMA would like to point out that this requirement would only be applicable when, inter alia, the nature, scale and complexity of the supervised contributor’s activities allows it. Further, this requirement is applicable to supervised contributors to non-significant benchmarks and not to administrators of non-significant benchmarks. Indeed, administrators of non-significant benchmarks could generally be small firms but supervised contributors to those benchmarks are not expected to always be small firms. Therefore, ESMA has upheld this requirement as it already embeds proportionality regarding the nature, scale and complexity of the supervised contributor’s activity.

141. ESMA agrees with the request of some market participants to remove the last part of the requirement on the review procedures as it was seen as additional requirements to the RTS applicable to critical and significant benchmarks.

## 5. Annexes

### 5.1. Annex I - Cost-benefit analysis

#### Guidelines on procedures and characteristics of the oversight function

<p><i>Benefits</i></p>	<p>The main benefit of the guidelines is to further specify key aspects of the oversight function, such as its positioning in the administrator's organization and its composition. To this end the guidelines expand the general procedures, including characteristics of the oversight function, so as to provide administrators of non-significant benchmarks with a practical indication on how to implement Article 5 BMR in their organisations.</p> <p>For this reason, administrators of non-significant benchmarks would be the ones who will benefit the most from the guidelines. Also investors and consumers would indirectly benefit from the guidelines, because the guidelines focus on the avoidance of potential conflicts of interest. This should allow non-significant benchmarks provided under the control of an appropriate oversight function that is established in compliance with the guidelines to be more robust against potential conflict of interest, i.e. the integrity of the benchmark should be enhanced.</p> <p>The guidelines have the advantage to further define the content of Article 5 BMR while, at the same time, leaving administrators of non-significant benchmarks with a well-balanced level of flexibility so as to adapt the oversight function to their specific needs and to adjust it on the basis of their size and the nature of the non-significant benchmarks they provide.</p> <p>Although the list of governance arrangements is non-exhaustive, it should represent a very useful tool for administrators of non-significant benchmarks in order to define the structure of the oversight function appropriate to their non-significant benchmarks. The elements included in the list represent different organisational solutions to which most of the administrators of non-significant benchmarks should be able to relate their own specific situation. In particular, the list defines a spectrum of possible structures of oversight functions that reaches from a basic form, in which the oversight function is composed by a single natural person, to a structured form where a function is composed of multiple committees performing a subset of the oversight tasks.</p>

	<p>Thereby administrators of non-significant benchmarks should be able to gain direct benefit from the implementation of this section of the guidelines. Without the non-exhaustive list of appropriate governance requirements there was a risk that administrators of non-significant benchmarks apply Article 5 BMR in significantly diverging ways.</p> <p>Investors and consumers should also benefit from the guidelines, because the guidelines allow administrators of non-significant benchmarks to establish an appropriate oversight function which will enhance the integrity of the benchmarks and will therefore directly benefit the ultimate users. In this context, the possibility of having independent members, external stakeholders, and also observers in the oversight function should improve even further the effectiveness of the oversight function and the quality of its decisions.</p>
<p><i>Costs</i></p>	<p>Potential additional costs will be borne by administrators of non-significant benchmarks only.</p> <p>Depending on the structure of the oversight function chosen by the administrator of non-significant benchmarks, cost will vary. An independent oversight committee or an oversight function consisting of multiple committees possibly represent the costliest form of oversight function, as opposed to the oversight function composed by a single natural person. The guidelines allow administrators of non-significant benchmarks to embed the oversight function within their organisation rather than to create an external committee: this flexibility should substantially minimise costs for administrators of non-significant benchmarks.</p> <p>Specific costs for administrators of non-significant benchmarks could arise from section 3 of the guidelines that sets out “procedures governing the oversight function”. The section specifies Article 5(2) BMR, that requires administrators to develop and maintain robust procedures regarding their oversight function. It is worth mentioning that Article 26 BMR allows administrators of non-significant benchmarks not to apply this article and therefore the corresponding section of the guidelines. In case the administrator is nevertheless to apply this section 3 of the guidelines then the elements relating to disclosure and the ones requiring the administrator to create new policies could incur costs at the administrator level as they may have to adopt existing structures to the new requirements, although these would likely be one-off costs.</p> <p>Another source of ongoing cost, mostly in staff time, could be the requirement to record decisions.</p>

	Potentially, there can be some minor detrimental effects on benchmarks users as administrators would likely pass on costs to the users through increased license fees.
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### Guidelines on input data

Benefits	<p>The proposed approach for ensuring appropriateness and verifiability of input data as well as ensuring the internal oversight and verification procedures within a contributor would promote a common and consistent control framework across different administrators of non-significant benchmarks to the main benefit of users.</p> <p>The different checks to be conducted on input data aim at strengthening the reliability of the non-significant benchmark through ensuring the integrity and accuracy of the input data and reducing the opportunity of its manipulation.</p> <p>Further, the internal oversight and verification procedures where input data are contributed from a front office function would allow to mitigate the specific risk of conflicts of interest that arises in this particular case, and to reduce the opportunity to manipulate data by implementing a robust internal oversight at the contributor level.</p>
Costs	<p>Potential costs arising from these guidelines will be borne by administrators of non-significant benchmarks and contributors to non-significant benchmarks.</p> <p>The incremental costs stemming from the proposed approach in relation to input data are not expected to be significant. Indeed, the guidelines specify further the requirements already included in the Benchmarks Regulation regarding the appropriateness and verifiability of input data and the internal oversight and verification procedures of contributors.</p> <p>Moreover, the guidelines have been designed in a way to minimise the burden on administrators of non-significant benchmarks, in accordance with the principle of proportionality which is a general requirement under the Benchmarks Regulation. Where possible, the requirements in these guidelines have been reduced or simplified, if compared to the requirements included in the corresponding draft RTS, applicable to administrators of significant and critical benchmarks.</p>

	<p>Further, it is worth mentioning that according to Article 25 BMR, administrators of non-significant may choose not to apply Article 11(1)(b) and Article 11(2) and therefore the corresponding sections of the guidelines will not be applicable to those administrators. In the case where the administrator is nevertheless to apply these sections of the guidelines, ESMA has enhanced proportionality compared to the Consultation Paper in relation to the second level of control function requirements.</p>
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### Guidelines on transparency of methodology

<p><i>Benefits</i></p>	<p>The proposed minimum list of key elements to be disclosed by administrators of non-significant benchmarks would promote common and consistent transparency principles across different administrators of such benchmarks, to the principal benefit of users and potential users. This could turn out to prove beneficial also for administrators, as it has the potential to create a fairer competitive environment.</p> <p>The key elements of the methodology would be available to all markets participants who would have access to the minimum list of information required regarding non-significant benchmarks and thus have a better view on the possibilities of investments available in the market.</p> <p>Through the publication of any policies and procedures relating to the internal review or approval of the methodology, administrators of non-significant benchmarks would provide market participants with additional information on the mechanisms ruling the governance of the methodology.</p>
<p><i>Costs</i></p>	<p>Potential costs arising from these guidelines will be borne by administrators of non-significant benchmarks.</p> <p>The incremental costs stemming from the proposed transparency of the methodology are not expected to be significant. Indeed, the guidelines specify further the requirements already included in the BMR regarding the publication of the key elements of the methodology, the internal review of the methodology and the specific procedure for any material change to the methodology.</p> <p>Moreover, most of the already established index providers are already familiar with providing transparency of the methodology applied.</p> <p>Additionally, the guidelines have been designed in a way to minimise the administrative burden on administrators of non-significant benchmarks, in</p>

	<p>accordance with the principle of proportionality which is a general requirement under the BMR. Only the necessary information to be disclosed has been included in these guidelines, which are less burdensome if compared with the related RTS for administrators of significant and critical benchmarks.</p>
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### Guidelines on governance and control requirements for supervised contributors

<i>Benefits</i>	<p>There will be benefits from the further specification of the requirements on supervised contributors included in Article 16 BMR both for supervised contributors to non-significant benchmarks, and for the administrators of non-significant benchmarks to which supervised contributors provide input data.</p> <p>The main benefit of the further level of specification of the requirements will be to ensure consistent application of the requirements throughout the Union. Without such further clarification, each supervised contributor to non-significant benchmarks would have to make its own judgement of the way in which it should comply with the high level requirements in the Benchmarks Regulation.</p> <p>Different interpretation of the requirements by different supervised contributors within a Member State would mean that each national competent authority would have to establish for itself criteria for judging compliance of contributors it supervises with the requirements. Even if each national competent authority established consistent application, a benchmark administrator could find that its contributors in different Member States were applying different standards.</p> <p>The further specification provided by the guidelines is even more relevant taking into account the likely high number of benchmarks that will be classified as non-significant.</p>
<i>Costs</i>	<p>The incremental costs of these guidelines for supervised contributors are minimal for two main reasons.</p> <p>First, the guidelines just specify the elements already included in Article 16 BMR, and therefore the main source of costs is the text of the BMR. In other</p>

words, the further specification of the obligations for supervised contributors included in the guidelines does not imply incremental costs compared to the mere application of L1.

Second, supervised contributors already have established systems and controls in relation to contribution of input data, and therefore the additional costs should be limited and focused on the adjustment of the already existing systems to the requirements of the guidelines.

Further, according to Article 25 BMR, administrators of non-significant may choose not to apply Article 16(2) and (3) and therefore the corresponding sections of the guidelines will not be applicable to those administrators. In the case where the administrator is nevertheless to apply these sections of the guidelines, they include a reduced number of requirements, if compared to the corresponding draft RTS for supervised contributors to significant and critical benchmarks. The impact of these guidelines from a cost perspective is therefore considered to be minimal.

## 5.2. Annex II – Opinion of the Securities and Markets Stakeholder Group

As provided by Article 16(2) of the ESMA Regulation, ESMA also sought the advice of the Securities and Markets Stakeholder Group's (SMSG).

### ADVICE TO ESMA

#### Response to ESMA's Consultation Paper on draft guidelines on non-significant benchmarks

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##### I. Executive summary

*We welcome the proposed guidelines with the aim to ensure common, uniform and consistent application, in relation of non-significant benchmarks, of the oversight function requirements, the input data provision, the transparency of the methodology provision and the governance and control requirements for supervised contributors.*

*However, given that the BMR definition of benchmarks is very broad and that accordingly non-significant benchmarks can cover a very wide range of indices a proportional approach is important. While the draft Guidelines on non-significant benchmarks helpfully clarify that some sections are elective (in keeping with Level 1), other sections cannot be waived and here the requirements are very close to those of significant benchmarks. This lack of proportionality for benchmarks with a narrow or low volume usage could act as a barrier to entry for providers of non-significant benchmarks that could limit competition and customer choice..*

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##### II. Background

###### 1. The role of the SMSG

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

###### 2. Purpose of this Advice

The SMSG wishes to use the opportunity of the publication of ESMA's Consultation Paper on Draft Guidelines on non-significant benchmarks.

The SMSG considers that indices are fundamental as they may underpin an investment strategy, serve as underlyings or even reflect the state of an economy. Therefore, indices should be underpinned by universally agreed principles of good governance, sound methodology and transparency, in order to provide investors with the adequate level of protection and to limit risks of conflicts of interests and manipulation.

The Benchmark Regulation (BMR) will introduce important rules and requirements and following its implementation, correct supervision and enforcement will be essential in order to avoid future cases of benchmark manipulation. Rules alone will not prevent abuses, but supervision and enforcement will be key to strengthen consumer protection.

Following the serious cases of manipulation of critical benchmarks such as LIBOR and EURIBOR, BMR aims to prevent future manipulation from occurring by strengthening governance structure and controls to ensure the accuracy, robustness and integrity of financial benchmarks.

### **III. Summary of ESMA SMSG Views on ESMA Draft Guidelines on Non-Significant Benchmarks Under the Benchmarks Regulation**

#### **1. Oversight function**

1. The SMSG considers that there is merit to the content of the oversight function to take the form of a separate committee within the organisational structure of the administrator.
2. For regulated data benchmarks, we support the option to include external representatives as members of the oversight function. We support this being optional and not mandatory, as inclusion of external representatives could introduce conflicts of interest to benchmark administration. In particular, we would have had concerns about mandatory inclusion of representatives from other, competing trading venues on the oversight committee. For instance, parties could have gained access to price sensitive information (such as planned index changes) before other market participants. The BMR Level 1 text does not require external parties to be included in the oversight and therefore requiring this in Level 3 would have been against the Level 1 text.

#### **2. Input Data**

3. In terms of the scope of input data the SMSG considers that further clarification is necessary to determine that regulated data will be considered regulated data and that trading venues should not be considered contributors.
4. Benchmarks based on regulated data are subject to a proportionate framework that acknowledges that the input data is transaction based, already subject to stringent regulatory requirements and that these benchmarks are therefore less prone to manipulation. Today, benchmark administrators often obtain data from trading venues via market data providers that provide the technical link between the venue and administrator without making any alterations to the raw and unprocessed data. Such practices should be deemed to fall within the scope of a regulated data benchmark, specifically meeting the requirement for the data to be taken 'entirely and directly from the trading venue' so long as the data is provided in a raw and unprocessed state.
5. A regulated data benchmark is based on (post-trade) transparent transaction data published by trading venues and made available to the public. Therefore, regulated data can be considered to be 'readily available'. Using regulated data as input data for a benchmark can, for that reason, not be considered as data that is being contributed as defined in Article 3(1)(8). Trading venues whose data is being used for purposes of a benchmark cannot be considered a (supervised) contributor for that purpose.

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

6. The SMSG supports the guidelines as developed by ESMA and deems that these correspond to current market practices. The SMSG supports the ESMA proposal to promote clarity regarding the composition and ensuring that the methodology is traceable and verifiable.
7. However, the SMSG also wished to underline the need to strike the right balance between transparency and the protection of intellectual property rights and that the transparency requirements should be calibrated to a level that is suitable and proportionate for non-significant benchmarks.

### **4. Governance and control requirements**

8. The SMSG welcomes the ESMA draft guidelines regarding governance and control requirements for supervised contributors to non-significant benchmarks.
9. In principle, the SMSG supports the proposal to establish, where appropriate, a physical separation of submitters from other employees of the supervised contributors.
10. However, a balanced approach should be undertaken when making these decisions to avoid instating cumbersome and costly processes where this is not appropriate and proportionate.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 8 November 2017

Rüdiger Veil  
Chair  
Securities and Markets Stakeholder Group

## 5.3. Annex III – Guidelines

### I. Scope

#### Who?

1. These guidelines apply to competent authorities designated under Article 40 of the Benchmarks Regulation, administrators as defined in Article 3(1)(6) of the Benchmarks Regulation and to supervised contributors as defined in Article 3(1)(10) of the Benchmarks Regulation.

#### What?

2. These guidelines apply in relation to the provision of non-significant benchmarks and the contribution to non-significant benchmarks (Article 5, Article 11, Article 13, Article 16 of BMR).

#### When?

3. These guidelines apply from two months after the date of publication of the guidelines on ESMA's website in all EU official languages.

### II. Legislative references, abbreviations and definitions

#### Legislative references

<i>BMR</i>	REGULATION (EU) 2016/1011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.
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#### Abbreviations

<i>NSBs</i>	Non-significant benchmarks
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#### Definitions

4. Unless otherwise specified, terms used in the Benchmarks Regulation have the same meaning in these guidelines. In addition, the following definitions apply:

<i>Competent authority</i>	An authority designated under Article 40 of the Benchmarks Regulation
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### III. Purpose

5. The purpose of these guidelines is to ensure common, uniform and consistent application, for NSBs, of the oversight function requirements in Article 5 of BMR, of the input data provision in Article 11 of BMR, of the transparency of the methodology provision in Article 13 of BMR and of the governance and control requirements for supervised contributors provision in Article 16 of BMR.

## **IV. Compliance and reporting obligations**

### **Status of the guidelines**

6. This document contains guidelines issued under Article 16 of the ESMA Regulation<sup>12</sup>. In accordance with Article 16(3) of the ESMA Regulation competent authorities and financial market participants must make every effort to comply with these guidelines.
7. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

### **Reporting requirements**

8. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply or (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.
9. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website. Once completed, the notification form shall be sent to ESMA using the following email address: [bmr@esma.europa.eu](mailto:bmr@esma.europa.eu).
10. Administrators of NSBs and supervised contributors to NSBs are not required to report whether they comply with these guidelines.

## **V. Guidelines on non-significant benchmarks**

### **V.I. Guidelines on procedures and characteristics of the oversight function (Article 5 BMR)**

#### *Scope*

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<sup>12</sup> ESMA Regulation published in the EU Official Journal:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1095&from=FR>

11. Notwithstanding the requirement of Article 26(4) of BMR, paragraphs 20 and 21 are not applicable to administrators of NSBs who chose not to apply Article 5(2) of BMR.

#### *Composition of the oversight function*

12. The oversight function should be composed of one or more members who together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities the oversight function is required to fulfil. Members of the oversight function should have appropriate knowledge of the underlying market or economic reality that the benchmark seeks to measure.
13. Administrators of regulated-data benchmarks should consider including, as members of the oversight function, representatives from the entities listed in the definition of a regulated-data benchmark of Article 3(1)(24) of BMR.
14. Where a benchmark is based on contributions and representatives of its contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator should ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority. Before the appointment of members, administrators should also identify and take into account the conflicts arising from relationships between potential members and other external stakeholders, in particular resulting from a potential interest in the level of the relevant benchmarks.
15. Persons directly involved in the provision of the benchmark that may be members of the oversight function, should have no voting rights. Representatives of the management body should not be members or observers but may be invited to attend meetings by the oversight function in a non-voting capacity.
16. Members of the oversight function should not include persons who have been subject to sanctions of administrative or criminal nature relating to financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.

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

17. The oversight function should constitute a part of the organisational structure of the administrator, or of the parent company of the group to which it belongs, but be separate from the management body and other governance functions of the benchmark administrator.
18. The oversight function should assess and, where appropriate challenge, the decisions of the management body of the administrator with regards to the fulfilment of the requirements of BMR. Without prejudice to Article 5(3)(i) of BMR, the oversight function should address all recommendations on benchmark oversight to the management body.
19. Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations or decisions of the oversight function, it should record this fact clearly in the minutes of its next meeting, or in its record of decisions.

*Procedures governing the oversight function*

20. An oversight function of an administrator of NSBs should have procedures at least relating to the following areas:

- a) the criteria to select its members;
- b) the election, nomination or removal and replacement of its members;
- c) the suspension of voting rights of external members for decisions that would have a direct business impact on the organisations they represent;
- d) requiring members to disclose material conflict of interest before discussion of an agenda item during meetings of the oversight function;
- e) the exclusion of members from specific discussions in respect of which they have a conflict of interest;
- f) its access to the documentation necessary to carry out its duties;
- g) measures to be taken in respect of breaches of the code of conduct;
- h) the notification to the competent authority of any suspected market abuse by contributors or the administrator;
- i) the prevention of improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function;
- j) the public disclosure of the declaration of material conflicts of interest of members.

21. Where the oversight function is carried out by a natural person points (c) and (e) of the previous paragraph do not apply, and the administrator should appoint an alternate appropriate body or natural person to ensure that duties of the oversight function can be consistently carried out in case of the absence of the person responsible for the oversight function.

*Non-exhaustive list of governance arrangements of the oversight function*

22. The structure and composition of the oversight function should be determined, where appropriate, in accordance with one or more of the following non-exhaustive list:

- a) Unless the complexity or vulnerability of the NSBs indicate otherwise, one or more natural persons who are staff members of the administrator or any other natural persons whose services are placed at the administrator's disposal or under the control of the administrator, who are not directly involved in the provision of any relevant benchmark and are free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;

- b) An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors to the benchmarks and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
- c) Where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function, an oversight committee that includes members of staff representing parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities or, where such appropriate staff members are not available, independent members.
- d) An oversight function consisting of multiple committees, each responsible for:
  - the oversight of a NSB, type of NSBs or family of NSBs, or
  - a subset of the oversight responsibilities and tasks,

provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.

## **V.II. Guidelines on input data (Article 11 BMR)**

### *Scope*

- 23. Notwithstanding the requirement of Article 26(4) of BMR, points a. and b. of paragraph 25 are not applicable to administrators of NSBs who chose not to apply Article 11(1)(b) of BMR.
- 24. Notwithstanding the requirement of Article 26(4) of BMR, paragraph 26 is not applicable to administrators of NSBs which are regulated data benchmarks and administrators of NSBs who chose not to apply Article 11(3) of BMR.

### *Ensuring appropriate and verifiable input data*

- 25. For the purpose of Article 11(3)(a) and (b) of BMR, the administrator of a NSB should ensure that it has available to it all information necessary to enable it to check the following matters in relation to any input data that it uses for the benchmark, where applicable:
  - a) whether the submitter is authorised to contribute the input data on behalf of the contributor in accordance with any requirement for authorisation under Article 15(2)(b) of BMR;

- b) whether the input data is provided by the contributor, or selected from a source specified by the administrator, within a time-period prescribed by the administrator;
- c) whether the input data meets the requirements set out in the methodology of the benchmark.

*Internal oversight and verification procedures of a contributor to a NSBs*

26. The internal oversight and verification procedures of a contributor that the administrator of a NSB should ensure are in place in compliance with Article 11(3)(b) of BMR should include at least the following:

- a) procedures governing:
  - i. communication of information to the administrator, upon its request;
  - ii. regular reporting to the senior management of the contributor on the duties carried out by the three levels of control functions;
  - iii. the means of cooperation and flow of information between the three levels of control functions.
- b) establishment and maintenance of an internal function to serve as the first level of control for the contribution of input data and to be responsible for carrying out the following duties:
  - i. undertaking effective checking of input data prior to its contribution;
  - ii. checking that the submitter is authorised to contribute input data on behalf of the contributor in accordance with any requirement imposed under Article 15(2)(b) of BMR;
  - iii. ensuring that access to contributions of input data is restricted to persons involved in the contribution process, except where access is necessary for audit purposes, investigation purposes or purposes required by law.
- c) establishment and maintenance of an internal function to serve as the second level of control for the contribution of input data and to be responsible for carrying out the following duties:
  - i. establishing and maintaining a whistle-blowing procedure that includes appropriate safeguards for whistle-blowers;
  - ii. establishing and maintaining procedures for the internal reporting of any attempted or actual manipulation of the input data, for any failure to comply with the contributor's own benchmark-related policies and for the investigation of such events as soon as they become apparent;

- iii. oversight of relevant communications between front office function staff directly involved in contributing input data and also of relevant communications between such staff and other internal functions or external bodies when the controls performed by this second level function give rise to concerns;
- iv. establishing, maintaining and operating a conflict of interest policy regarding the actual or potential material conflicts of interest that ensures:
  - the identification and disclosure to the administrator of actual or potential material conflicts of interest concerning any of the contributor's front office function staff who are involved in the contribution process;
  - the absence of any direct or indirect link between the remuneration of a submitter and the value of the benchmark, the value of specific submissions made or the performance of any activity carried on by the contributor that might give rise to a conflict of interest related to the contribution of input data to the benchmark;
  - a clear segregation of duties between front office staff involved in contributing input data and other front office function staff, where appropriate, taking into account: the level of discretion involved in the process of contribution; the nature, scale and complexity of the contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor.
- d) establishment and maintenance of an internal function, independent from the first and second level of controls functions, to serve as the third level of control for the contribution of input data and to be responsible for performing checks, on a regular basis, on the controls exercised by the other two control functions.

### **V.III. Guidelines on transparency of methodology (Article 13 BMR)**

#### *Key elements of the methodology used to determine a NSB*

27. The information to be provided by an administrator of a NSB or family of NSBs in compliance with the requirement laid down in Article 13(1)(a) of BMR, should include at least the following elements, where applicable:
- a) a definition and description of the benchmark or family of NSBs and of the market or economic reality that it is intended to measure;
  - b) the currency or other unit of measurement of the benchmark or family of NSBs;
  - c) the types of input data used to determine the benchmark or family of NSBs and the priority given to each type;

- d) a description of the constituents of the benchmark or family of NSBs and the criteria used for selecting and weighting them;
- e) any minimum requirements for the quantity of input data, and any minimum standards for the quality of input data used;
- f) the clear rules identifying how and when discretion may be exercised in the determination of the benchmark or family of NSBs;
- g) the composition of any panel of contributors and the criteria used to determine eligibility for panel membership;
- h) whether the benchmark or family of NSBs takes into account any reinvestment of dividends or coupons paid by its constituents;
- i) the potential limitations of the methodology and indications of any methodology to be used in exceptional circumstances, including in the case of an illiquid market or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable;
- j) if the methodology may be changed periodically to ensure the benchmark or family of NSBs remains representative of the relevant market or economic reality, any criteria to be used to determine when such a change is necessary.

#### *Details of the internal review and approval of the methodology*

28. The information to be provided by an administrator of a NSB or family of NSBs in compliance with the requirement laid down in Article 13(1)(b) of BMR, should include at least a description of the policies and procedures relating to the internal review and approval of the methodology.

#### *Material changes to the methodology*

29. The information to be provided by an administrator of a NSB or family of NSBs in compliance with the requirement laid down in Article 13(1)(c) of BMR, should include at least a description of the information to be disclosed by the administrator at the start of each consultation exercise, including a requirement to disclose the key elements of the methodology that would, in its view, be affected by the proposed material change.

### **V.VI. Guidelines on governance and control requirements for supervised contributors (Article 16 BMR)**

#### *Scope*

30. Notwithstanding the requirement of Article 26(4) of BMR, paragraphs 33, 34, 35 and 36 are not applicable to the contribution to NSBs for which the administrators chose not to apply Article 16(2) of BMR.

31. Notwithstanding the requirement of Article 26(4) of BMR, paragraph 37 is not applicable to the contribution to NSBs for which the administrators chose not to apply Article 16(3) of BMR.

*Control framework of supervised contributors to NSBs*

32. The control framework that a supervised contributor to NSBs is required to have in place pursuant to Article 16(1) of BMR should include the establishment and maintenance of at least the following controls:

- a) an effective oversight mechanism for overseeing the process for contributing input data that includes a risk management system, the identification of senior personnel who are responsible for the data contribution process and the involvement of any compliance and internal audit functions within the contributor's organisation;
- b) a policy on whistle-blowing, including appropriate safeguards for whistle-blowers;
- c) a procedure for detecting and managing breaches of BMR. The procedure for managing breaches should include reviewing any detected breach or error and recording the actions taken as a consequence.

*Controls on submitters of supervised contributors to NSBs*

33. The systems and controls that a supervised contributor to NSBs is required to have in place pursuant to Article 16(2)(a) of BMR should include a documented and effective process for contributing data and should include at least the following:

- a) a process for the designation of submitters and the designation of alternates;
- b) procedures and systems for monitoring the data used for the contributions, and the contributions themselves, that are capable of producing alerts in line with parameters predefined by the contributor.

*Management of conflicts of interest of supervised contributors to NSBs*

34. The measures for the management of conflicts of interest that a supervised contributor to a NSB is required to have in place pursuant to Article 16(2)(c) of BMR should include at least the following measures:

- a) a register of material conflicts of interest, that should be kept up to date and used to record any material conflicts of interest identified and any measures taken to manage them. The register should be accessible to internal or external auditors;
- b) physical separation of submitters from other employees of the contributor, where such separation is appropriate taking into account the level of discretion involved in the process of contribution; the nature, scale and complexity of the supervised contributor's activities; whether conflicts of interest may rise between the contribution

of input data to the benchmark and trading or other activities performed by the contributor. Alternatively, rules governing the interaction of submitters with front office employees.

35. The measures for the management of conflict of interest should also include remuneration policies in relation to submitters that ensure that the remuneration of a submitter of a supervised contributor to NSBs is not linked to the following:

- a) the value of the benchmark;
- b) the specific values of the submissions made; and
- c) the performance of any specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the NSB.

*Record-keeping requirements for supervised contributors to NSBs*

36. The records to be kept pursuant to Article 16(2)(d) of BMR of communications in relation to provision of input data by the supervised contributor of NSBs should include records of the contributions made (i.e. the figure submitted to the administrators) and the names of the submitters.

*Policies on expert judgement of supervised contributors to NSBs*

37. The policies that a supervised contributor to NSBs is required to establish pursuant to Article 16(3) of BMR where the input data relies on expert judgement should include at least the following elements:

- a) a framework for ensuring consistency between different submitters, and consistency over time, in relation to the use of expert judgement or the exercise of discretion;
- b) procedures for the review of any use of judgement or exercise of discretion on a regular basis.