

# Benchmarks Legislative Tracker

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## The Simmons & Simmons Benchmarks Regulation Legislative Tracker

This Legislative Tracker provides you with an update on the Benchmarks Regulation, setting out:

- a high level background to, and summary of the main aims of, the Benchmarks Regulation
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents) and
- a table setting out what is currently known about the consultation process for Level 2/Level 3 measures.

## Background

The European Commission's (Commission) proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts (the "Regulation") followed a public *consultation* in the wake of concerns about the integrity and accuracy of benchmarks.

The Regulation addresses concerns raised by the manipulation of interest rate benchmarks such as the London Interbank Offered Rate (LIBOR), the Euro Interbank Offered Rate (EURIBOR) and the Tokyo Interbank Offered Rate (TIBOR). The regulatory investigations, enforcement actions and settlements reached by several regulatory authorities concerning LIBOR and EURIBOR in 2012 have served to highlight the importance of benchmarks and their vulnerabilities.

The Regulation is intended to prohibit the use by a "supervised entity" (as defined at Article 3(1)(17) of the Regulation) in the European Union (EU) of unauthorised benchmarks, including benchmarks prepared by unregistered non-EU administrators from non-equivalent jurisdictions and to enhance the single market by creating a common framework across Member States. By limiting the ability of national administrators to set benchmark rates using their own discretion, it is hoped that conflicts of interests will be reduced and confidence will be restored in the accuracy and integrity of benchmarks.

The Commission issued its proposal for this Regulation in association with:

- the revision of MiFID which aims to strengthen the provision of benchmarks by increasing both market transparency and the availability of more robust data
- amendments which bring benchmarks within the scope of the Market Abuse Regulation, and the recast Market Abuse Directive introducing sanctions for the manipulation of benchmarks
- the *Principles for benchmark-setting processes in the EU* published by the European Securities and markets Authority (ESMA) and the European Banking Authority (EBA) in June 2013, and

- IOSCO's *Principles for Oil Price Reporting Agencies* (October 2012) and *Principles for Financial Market Benchmarks* (July 2013).

## Summary

The Regulation seeks to:

- improve governance and controls over the benchmark process, in particular to ensure that administrators avoid conflicts of interest, or at least manage them adequately
- improve the quality of input data and methodologies used by benchmark administrators
- ensure that contributors to benchmarks and the data they provide are subject to adequate controls, in particular to avoid conflicts of interest
- protect consumers and investors through greater transparency and adequate rights of redress.

The Regulation aims to address potential issues at each stage of the benchmark process and will apply in respect of:

- the provision of benchmarks
- the contribution of input data to a benchmark, and
- the use of a benchmark by a “supervised entity” within the EU.

### *Key aspects of the Regulation*

#### **(i) Definition of “benchmark”**

The Regulation defines a "benchmark" as “any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of financial instrument is determined or an index that is used to measure the performance of an investment fund.”

#### **(ii) Administrator requirements**

An administrator is defined in the Regulation as a natural or legal person that has control over the provision of a benchmark, and in particular administers the arrangements for determining the benchmark, collects and analyses the input data, determines the benchmark, and either directly publishes or outsources the publication or the calculation of the benchmark to a third party.

In order to ensure the integrity of benchmarks, administrators are subject to a number of requirements, including:

- implementation of adequate governance arrangements
- establishment of a permanent and effective oversight function
- outsourcing limitations
- adoption of a code of conduct specifying obligations of contributors in respect of input data and, in particular, its reliability and consistency with the benchmark administrator’s controls and methodology
- publication of benchmark statements providing key information to users in relation to the benchmarks measures and their vulnerabilities
- systems and controls to ensure integrity of data
- complaints handling mechanisms
- adequate record keeping requirements

Administrators providing benchmarks must be authorised. Alternatively, when benchmarks are non-significant or provided by a supervised entity other than an administrator, they can apply for registration with a competent authority.

ESMA will establish and maintain a public register of authorised and registered administrators.

### **(iii) Input data**

To ensure that only sufficient and accurate data is used in determination of benchmarks, the Regulation sets out five requirements for benchmark administrators. They must:

- ensure that the input data accurately and reliably represents the market or economic reality that the benchmark measures
- obtain the input data from a reliable and representative panel or sample of contributors
- ensure that the input data is verifiable
- publish clear guidelines regarding the types of input data, the priority of their use and the exercise of expert judgement
- not use input data from contributors who do not adhere to the code of conduct

### **(iv) Benchmark categories**

The Regulation sets three main categories of benchmarks:

- *Critical benchmarks*
  - These are benchmarks used for financial instruments, contracts and performance of investment funds having a total value of at least EURO 500bn, and meeting qualitative criteria such as location of contributors and importance of the benchmark in the country where a majority of contributors is located
  - Administrators of critical benchmarks have to comply with all requirements set out in the Regulation
- *Significant benchmarks*
  - These are benchmarks used for financial instruments, contracts and performance of investment funds having a total value of at least EUR 50bn over a period of six months, and meeting qualitative criteria such as the benchmark has no reliable substitute, and its absence would lead to market disorder
  - Administrators of significant benchmarks do not have the mandatory obligation to comply with all the rules related to governance, control of administrators and input data, but have to comply with the other provisions in the Regulation
- *Non-significant benchmarks*
  - These are benchmarks that do not fulfill the conditions set for critical or significant benchmarks
  - Administrators of non-significant benchmarks are subject to a lighter regulatory regime based on a compliance statement – administrators are exempt from governance, control of administrators and input data, but have to comply with the code of conduct rules.

### **(v) Contributor requirements**

The Regulation imposes obligations on supervised contributors making them subject to adequate governance and controls requirements, specifically to avoid conflicts of interest.

Contributors are also required to adhere to a legally binding code of conduct adopted by administrators, and can be required by competent authorities to contribute to critical benchmarks to preserve their credibility.

### **(vi) Use of a benchmark**

The definition of “use of a benchmark” extends the scope of the Regulation to the following activities:

- issuance of a financial instrument which references an index or a combination of indices
- determination of the amount payable under a financial instrument or financial contract by referencing an index or combination of indices
- being party to a financial contract which references an index or combination of indices
- providing a borrowing rate calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference for a financial contract, and
- determination of the performance of an investment fund through an index or combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees.

The Regulation imposes a ban on supervised entities using benchmarks that are not included in the ESMA's register or provided by administrators who are not included in the register.

The definition at Article 3(1)(17) of the Regulation contains a list of the types of entity which is a "supervised entity" – this includes credit institutions, investment firms, UCITS and AIFMs.

### **(vii) Third country regime**

To ensure investor protection, the Regulation provides for the following mechanisms under which third country benchmarks can be used by supervised entities in the EU:

- *Equivalence* – the Commission takes a positive decision on equivalence of a third country regime or specific rules/ requirements of a third country with respect to individual and specific benchmarks/ administrators. Co-operation arrangements with the relevant third country competent authorities must follow the equivalence decision.
- *Recognition* – national competent authorities assess the application of IOSCO Principles by a third country administrator, and determine whether such application is equivalent to compliance with the requirements established in the Regulation. A third country administrator must also have a legal representative in the EU. Recognition is intended as a temporary measure until such time as an equivalence decision is adopted by the Commission.
- *Endorsement* – administrators or supervised entities located in the EU can apply to their competent authority to endorse third country benchmarks.

## **Next steps**

The Regulation has applied, with some exceptions, from 01 January 2018.

## Review of the Benchmarks Regulation following the Commission's Proposal to reform the European System of Financial Supervision

On 20 September 2017, the Commission adopted a [Proposal for a Regulation](#) (the ESA Proposal) to amend (among other measures) the Regulations which established the European Supervisory Authorities (i.e., the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority).

On 12 September 2018, the Commission adopted an [amended proposal](#) and a [proposal for a Directive](#). Between them, these would extend the ESA reforms to MLD4, MiFID/MiFIR and Solvency II.

As part of the ESA Proposals, the Commission put forward changes to the Benchmarks Regulation, under which ESMA would be established as the competent authority for administrators of critical benchmarks and of all benchmarks used in the EU but administered in a third country. ESMA would also be established as the competent authority for the recognition and approval of endorsements of third country administrators and benchmarks respectively.

Under the ESA Proposals, the Benchmarks Regulation would also be amended to grant ESMA the power to conduct investigations and on-site inspections.

Following scrutiny of the ESA Proposals by the EP and the Council, trilogue negotiations started in February 2019 with a view to agreeing a final version of a Regulation and a Directive. Political agreement of a Level 1 text was reached on 21 March 2019, this enables the legislative institution to achieve the Commission's intention to finalise the proposals in time to enter into force before the European Parliamentary elections in May 2019.



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## Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
<i>Commission Proposal</i>	18 September 2013
<i>Council General Approach</i>	13 February 2015
<i>ECON Final Report</i>	31 March 2015
<i>Political Agreement</i>	25 November 2015
<i>European Parliament adoption</i>	28 April 2016
<i>Council of the EU adoption</i>	17 May 2016
<i>Publication in OJ</i>	29 June 2016
Entry into force	<b>30 June 2016</b>
Application Date	<b>01 January 2018</b>
<b><u>ESA Proposal</u></b>	
Commission <i>ESA Proposal</i>	<b>20 September 2017</b>

Table 2: Development of Level 2 / Level 3 measures

Paper	Covers	Published	Closed	Outcome
DP	<i>Future proposals on draft Regulatory Technical Standards (RTS) and Technical Advice (TA) to the European Commission</i>	15 Feb 2016	31 Mar 2016	27 May 2016 <i>Consultation Paper</i>
CP	<i>Draft technical advice under the Benchmarks Regulation</i>	27 May 2016	30 Jun 2016	10 November 2016 <i>ESMA Technical Advice</i>
CP	<i>Draft technical standards under the Benchmarks Regulation</i>	29 Sept 2016	02 Dec 2016	30 March 2017 <i>ESMA Final Report</i> 01 June 2017 <i>ESMA Final Report</i>
CP	<i>Draft guidelines on non-significant benchmarks</i>	29 Sept 2017	30 Nov 2017	20 December 2018 <i>ESMA Final Report</i>

**Table 3: UK implementation**

<u>Paper</u>	<u>Covers</u>	<u>Published</u>	<u>Closed</u>	<u>Outcome</u>
FCA CP17/17	<i>Handbook changes to reflect the application of the EU Benchmarks Regulation</i>	22 June 2017	22 August 2017	20 Dec 2017 <i>FCA Policy Statement</i>
PRA CP18/17, FCA CP17/34	<i>Form, PRA Rulebook, and FCA Handbook changes</i>	03 Oct 2017	03 Nov 2017	
FCA CP18/5	<i>EU Benchmarks Regulation Implementation (DEPP and EG)</i>	05 Feb 2018	05 Mar 2018	

**Table 4: Draft and Adopted Level 2 measures**

<u>Level 2 measure</u>	<u>European Commission</u>	<u>Official Journal</u>
<b>Delegated Acts</b>		
<i>Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards for the procedures and characteristics of the oversight function</i>	13 July 2018	05 November 2018
<i>Commission Delegated Regulation (EU) 2018/1638 of 13 July 2018 supplementing the Benchmarks with regulatory technical standards specifying how to ensure that input data is appropriate and verifiable, and the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark has to ensure are in place where the input data is contributed from a front office function</i>	13 July 2018	05 November 2018
<i>Commission Delegated Regulation (EU) 2018/1639 of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors</i>	13 July 2018	05 November 2018
<i>Commission Delegated Regulation (EU) 2018/1640 of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards on governance and control requirements for supervised contributors</i>	13 July 2018	05 November 2018

<p><i>Commission Delegated Regulation (EU) 2018/1641</i> of 13 July 2018 supplementing the Benchmarks Regulation (EU) with regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) 2018/1642</i>. of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards specifying further the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) 2018/1643</i> of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards specifying further the contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) 2018/1644</i> of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards on the minimum content of cooperation arrangements with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) No 2018/1645</i> of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards for the form and content of the application for recognition with the competent authority of the Member State of reference and of the presentation of information in the notification to European Securities and Markets Authority (ESMA)</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) No 2018/1646</i> of 13 July 2018 supplementing the Benchmarks Regulation with regulatory technical standards for the information to be provided in an application for authorisation and in an application for registration</p>	13 July 2018	05 November 2018
<p><i>Commission Delegated Regulation (EU) 2018/64</i> specifying how the criteria referred to in Article 20(1)(c)(iii) of the Benchmarks Regulation are to be applied to assess the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States</p>	29 Sept 2017	17 Jan 2018

<i>Commission Delegated Regulation (EU) 2018/65</i> specifying the meaning of two technical elements of the definitions set out in the Benchmarks Regulation: public availability and administering the arrangements for determining a benchmark	29 Sept 2017	17 Jan 2018
<i>Commission Delegated Regulation (EU) 2018/66</i> specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed	29 Sept 2017	17 Jan 2018
<i>Commission Delegated Regulation (EU) 2018/67</i> on the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks	03 Oct 2017	17 Jan 2018
<b>Implementing Technical Standards</b>		
<i>Commission Implementing Regulation (EU) 2016/1368</i> establishing a list of critical benchmarks used in financial markets pursuant to the Benchmarks Regulation	11 Aug 2016	12 Aug 2016
<i>Commission Implementing Regulation (EU) 2018/1105</i> laying down implementing technical standards on procedures and forms for the provision of information by competent authorities to ESMA	08 Aug 2018	09 Aug 2018
<i>Commission Implementing Regulation (EU) 2018/1106</i> laying down implementing technical standards on templates for the compliance statement to be published and maintained by administrators of significant and non-significant benchmarks	08 Aug 2018	09 Aug 2018
<i>Commission Implementing Regulation</i> amending <i>Implementing Regulation (EU) 2018/1557</i> establishing a list of critical benchmarks used in financial markets (18 October 2018)	17 Oct 2018	18 Oct 2018

**Table 5: Other documents**

Document	Published
ESMA <i>Q&amp;As</i> on the Benchmarks Regulation	Last updated 07 November 2018

**Table 6: UK implementing legislation**

Document	Published
<i>The Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018</i>	20 Feb 2018

# Annex

## Note

Article numbers referred to below are those contained in the text of the political agreement on Level 1. These may differ from those in the version eventually published in the Official Journal (OJ), following review by the Commission's legal services.

The Benchmarks Regulation contains a number of provisions in respect of which the Commission and/or ESMA are mandated to develop the following Level 2 or Level 3 measures:

### Level 2 measures

- A. Subject matter, scope and definitions (Article 3(2) & (3))
- B. Oversight function requirements (Article 5(5) & (6))
- C. Input data (Article 11(5) & (6))
- D. Transparency of methodology (Article 13(3) & (4))
- E. Code of conduct (Article 15(6))
- F. Governance and control requirements for supervised contributors (Article 16 (5) & (6))
- G. Critical benchmarks (Article 20(1) & (6))
- H. Significant benchmarks (Article 24(2))
- I. Exemptions from specific requirements for significant benchmarks (Article 25 (8) & (9))
- J. Non-significant benchmarks (Article 26(5))
- K. Benchmark statement (Article 27(3))
- L. Equivalence (Article 30(5))
- M. Recognition of an administrator located in a third country (Article 32(9))
- N. Endorsement of benchmarks provided in a third country (Article 33(7))
- O. Authorisation and registration of an administrator (Article 34(8))
- P. Cooperation with ESMA (Article 47(3))
- Q. Transitional provisions (Article 51(6))
- R. Review (Article 54(3))

### Level 3 measures

- A. Oversight function requirements (Article 5(6))
- B. Input data, methodology and reporting of infringements (Article 11(6))
- C. Transparency of methodology (Article 13(4))
- D. Governance and control requirements for supervised contributors (Article 16(6))

**Looking at each of these in turn:**

## Level 2 Measures

### A. SUBJECT MATTER, SCOPE AND DEFINITIONS

#### (i) What does Level 1 say?

**Article 3(1)** of the Regulation states that:

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

(1) ‘index’ means any figure:

(a) that is published or made available to the public;

(b) that is regularly determined:

(i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and

(ii) on the basis of the value of one or more underlying assets or prices, including estimated

#### (ii) What is the Commission’s mandate?

**Article 3(2)** of the Regulation states that:

“The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to specify further technical elements of the definitions laid down in paragraph 1 of this Article, in particular specifying what constitutes making available to the public for the purposes of the definition of an index”.

“Where applicable, the Commission shall take into account the market or technological developments and the international convergence of supervisory practice in relation to benchmark”.

**Article 3(3)** of the Regulation states that:

“The Commission shall adopt implementing acts in order to establish and review a list of public authorities in the Union falling within the definition under point (29) of paragraph 1 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 50(2)”.

“Where applicable, the Commission shall take into account the market or technological developments and the international convergence of supervisory practice in relation to benchmarks”.

#### (iii) Timing

ESMA consulted on measures under **Article 3(2)** in its *Consultation Paper ESMA/2016/288*. The consultation period closed on **31 March 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **10 November 2016**. The European Commission adopted a draft *Delegated Regulation* on **29 September 2017**. The European Commission’s *Delegated Regulation (EU) 2018/65* was published in the OJ on **17 January 2018** and entered into force on and applied from **06 February 2018**.

The Regulation does not specify a time by which the Commission must adopt the implementing acts referred to in **Article 3(3)**. No implementing acts have been published to date.

## B. OVERSIGHT FUNCTION REQUIREMENT

### (i) What does Level 1 say?

**Article 5(1)** of the Regulation states that:

“Administrators shall establish and maintain a permanent and effective oversight function to ensure oversight of all aspects of the provision of their benchmarks”.

**Article 5(2)** of the Regulation states that:

“Administrators shall develop and maintain robust procedures regarding their oversight function, which shall be made available to the relevant competent authorities”.

**Article 5(3)** of the Regulation states that:

“The oversight function shall operate with integrity and shall have the following responsibilities, which shall be adjusted by the administrator based on the complexity, use and vulnerability of the benchmark:

- (a) reviewing the benchmark's definition and methodology at least annually;
- (b) overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes;
- (c) overseeing the administrator's control framework, the management and operation of the benchmark, and, where the benchmark is based on input data from contributors, the code of conduct referred to in Article 15;
- (d) reviewing and approving procedures for cessation of the benchmark, including any consultation about a cessation;
- (e) overseeing any third party involved in the provision of the benchmark, including calculation or dissemination agents;
- (f) assessing internal and external audits or reviews, and monitoring the implementation of identified remedial actions;
- (g) where the benchmark is based on input data from contributors, monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;
- (h) where the benchmark is based on input data from contributors, taking effective measures in respect of any breaches of the code of conduct referred to in Article 15; and
- (i) reporting to the relevant competent authorities any misconduct by contributors, where the benchmark is based on input data from contributors, or administrators, of which the oversight function becomes aware, and any anomalous or suspicious input data.

**Article 5(4)** of the Regulation states that:

“The oversight function shall be carried out by a separate committee or by means of another appropriate governance arrangement”.

## (ii) What is the Commission's mandate?

**Article 5(5)** of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under **Article 5(5)** in its *Consultation Paper ESMA/2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, on 30 March 2017.

**Commission Delegated Regulation (EU) 2018/1637** was published in the OJ on **05 November 2018**.

## C. INPUT DATA

### (i) What does Level 1 say?

**Article 11(1)** of the Regulation states that:

“The provision of a benchmark shall be governed by the following requirements in respect of its input data:

- (a) the input data shall be sufficient to represent accurately and reliably the market or economic reality that the benchmark is intended to measure. The input data shall be transaction data, if available and appropriate. If transaction data is not sufficient or is not appropriate to represent accurately and reliably the market or economic reality that the benchmark is intended to measure, input data which is not transaction data may be used, including estimated prices, quotes and committed quotes, or other values;
- (b) the input data referred to in point (a) shall be verifiable;
- (c) the administrator shall draw up and publish clear guidelines regarding the types of input data, the priority of use of the different types of input data and the exercise of expert judgement, to ensure compliance with point (a) and the methodology;
- (d) where a benchmark is based on input data from contributors, the administrator shall obtain, where appropriate, the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure;
- (e) the administrator shall not use input data from a contributor if the administrator has any indication that the contributor does not adhere to the code of conduct referred to in Article 15, and in such a case shall obtain representative publicly available data”.

**Article 11(3) (b)** of the Regulation states that:

“Where the input data of a benchmark is contributed from a front office function, meaning 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, the administrator shall:

- (a) obtain data from other sources that corroborate that input data; and
- (b) ensure that contributors have in place adequate internal oversight and verification procedures”.

## (ii) What is the Commission’s mandate?

**Article 1 (5)** of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under **Article 11(5)** in its *Consultation Paper ESMA 2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on 30 March 2017.

**Commission Delegated Regulation (EU) 2018/1638** was published in the OJ on **05 November 2018**.

## D. TRANSPARENCY METHODOLOGY

### (i) What does Level 1 say?

**Article 13(1)** of the Regulation states that:

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

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

**Article 13(2)** of the Regulation states that:

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

- (a) advance notice, with a clear time frame, that gives the opportunity to analyse and comment upon the impact of such proposed material changes; and
- (b) the comments referred to in point (a) of this paragraph, and the administrator's response to those comments, to be made accessible after any consultation, except where confidentiality has been requested by the originator of the comments.

## (ii) What is the Commission's mandate?

**Article 13(3)** of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under **Article 13(3)** in its *Consultation Paper ESMA 2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on 30 March 2017.

**Commission Delegated Regulation (EU) 2018/1641** was published in the OJ on **05 November 2018**.

## E. CODE OF CONDUCT

### (i) What does Level 1 say?

**Article 15(1)** of the Regulation states that:

“Where a benchmark is based on input data from contributors, its administrator shall develop a code of conduct for each benchmark clearly specifying contributors' responsibilities with respect to the contribution of input data and shall ensure that such code of conduct complies with this Regulation. The administrator shall be satisfied that contributors adhere to the code of conduct on a continuous basis and at least annually and in case of changes to it”.

**Article 15(2)** of the Regulation states that:

The code of conduct shall include at least the following elements:

- (a) a clear description of the input data to be provided and the requirements necessary to ensure that input data is provided in accordance with Articles 11 and 14;
- (b) identification of the persons that may contribute input data to the administrator and procedures to verify the identity of a contributor and any submitters, as well as authorisation of any submitters that contribute input data on behalf of a contributor;
- (c) policies to ensure that a contributor provides all relevant input data;
- (d) the systems and controls that a contributor is required to establish, including:
  - (i) procedures for contributing input data, including requirements for the contributor to specify whether input data is transaction data and whether input data conforms to the administrator's requirements;
  - (ii) policies on the use of discretion in contributing input data;
  - (iii) any requirement for the validation of input data before it is provided to the administrator;
  - (iv) record-keeping policies;

- (v) reporting requirements concerning suspicious input data;
- (vi) requirements concerning the management of conflicts of interest.

## (ii) What is the Commission's mandate?

Article 15(6) of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under Article 15(6) in its *Consultation Paper ESMA 2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on 30 March 2017.

**Commission Delegated Regulation (EU) 2018/1639** was published in the OJ on **05 November 2018**.

## F. GOVERNANCE AND CONTROL REQUIREMENTS FOR SUPERVISED CONTRIBUTORS

### (i) What does Level 1 say?

Article 16(1) of the Regulation states that:

"The following governance and control requirements shall apply to a supervised contributor:

- (a) the supervised contributor shall ensure that the provision of input data is not affected by any existing or potential conflict of interest and that, where any discretion is required, it is independently and honestly exercised based on relevant information in accordance with the code of conduct referred to in Article 15;
- (b) the supervised contributor shall have in place a control framework that ensures the integrity, accuracy and reliability of input data and that input data is provided in accordance with this Regulation and the code of conduct referred to in Article 15".

Article 16(2) of the Regulation states that:

"A supervised contributor shall have in place effective systems and controls to ensure the integrity and reliability of all contributions of input data to the administrator, including:

- (a) controls regarding who may submit input data to an administrator including, where proportionate, a process for sign-off by a natural person holding a position senior to that of the submitter;
- (b) appropriate training for submitters, covering at least this Regulation and Regulation (EU) No 596/2014;
- (c) measures for the management of conflicts of interest, including organisational separation of employees where appropriate and consideration of how to remove incentives, created by remuneration policies, to manipulate a benchmark;

- (d) record-keeping, for an appropriate period of time, of communications in relation to provision of input data, of all information used to enable the contributor to make each submission, and of all existing or potential conflicts of interest including, but not limited to, the contributor's exposure to financial instruments which use a benchmark as a reference;
- (e) record-keeping of internal and external audits”.

**Article 16(3)** of the Regulation states that:

“Where input data relies on expert judgement, supervised contributors shall establish, in addition to the systems and controls referred to in paragraph 2, policies guiding any use of judgement or exercise of discretion and shall retain records of the rationale for any such judgement or discretion. Where proportionate, supervised contributors shall take into account the nature of the benchmark and its input data”.

## (ii) What is the Commission’s mandate?

**Article 16(5)** of the Regulation states that:

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

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

## (iii) Timing

ESMA consulted on measures under **Article 16(5)** in its *Consultation Paper ESMA 2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on 30 March 2017.

**Commission Delegated Regulation (EU) 2018/1640** was published in the OJ on **05 November 2018**.

## G. CRITICAL BENCHMARKS

### (i) What does Level 1 say?

**Article 20(1)** of the Regulation states that:

“The Commission shall adopt implementing acts in accordance with the examination procedure referred to in Article 50(2) to establish and review at least every two years a list of benchmarks provided by administrators located within the Union which are critical benchmarks, provided that one of the following conditions is fulfilled:

- (a) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable;

- (b) the benchmark is based on submissions by contributors the majority of which are located in one Member State and is recognised as being critical in that Member State in accordance with the procedure laid down in paragraphs 2, 3, 4 and 5 of this Article;
- (c) the benchmark fulfils all of the following criteria:
  - (i) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds having a total value of at least EUR 400 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, but not exceeding the value provided for in point (a);
  - (ii) the benchmark has no, or very few, appropriate market-led substitutes;
  - (iii) in the event that the benchmark ceases to be provided, or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or on the basis of unreliable input data, there would be significant and adverse impacts on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States”.

## (ii) What is the Commission’s mandate?

**Article 20(6)** of the Regulation states that:

- (a) specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed, including in the event of an indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 of this Article and in point (a) of Article 24(1);
- (b) review the calculation method used to determine the thresholds referred to in paragraph 1 of this Article in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts, or investment funds referencing them that is close to the thresholds; such review shall take place at least every two years as from 1 January 2018;
- (c) specify how the criteria referred to in point (c)(iii) of paragraph 1 of this Article are to be applied, taking into consideration any data which helps assess on objective grounds the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States”.

## (iii) Timing

### **Article 20(1) Implementing Acts**

ESMA submitted draft implementing technical advice (ITS) referred to in **Article 20(1)** to the European Commission in its *Final Report* dated **10 November 2016**.

### **Article 20(6)**

- (a) ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **10 November 2016**. The European Commission adopted a draft *Delegated Regulation* on **29 September 2017**. The European Commission’s *Delegated Regulation (EU) 2018/66*, dated was published in the OJ on **17 January 2018**.
- (b) ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **10 November 2016**.

- (c) ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **10 November 2016**. The European Commission adopted a draft *Delegated Regulation* on **29 September 2017**. The European Commission's *Delegated Regulation (EU) 2018/66*, dated was published in the OJ on **17 January 2018**.

## H. SIGNIFICANT BENCHMARKS

### (i) What does Level 1 say?

Article 24(1) of the Regulation states that:

"A benchmark which does not fulfil any of the conditions laid down in Article 20(1) is significant when:

- (a) it is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investments funds having a total average value of at least EUR 50 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, over a period of six months; or
- (b) it has no or very few appropriate market-led substitutes and, in the event that the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or unreliable input data, there would be a significant and adverse impact on market integrity, financial stability, consumers, the real economy or the financing of households or businesses in one or more Member States".

### (ii) What is the Commission's mandate?

Article 24(2) of the Regulation states that:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to review the calculation method used to determine the threshold referred to in point (a) of paragraph 1 of this Article in the light of market, price and regulatory developments as well as the appropriateness of the classification of benchmarks with a total value of financial instruments, financial contracts or investment funds referencing them that is close to that threshold. Such review shall take place at least every two years as from 1 January 2018".

### (iii) Timing

*Commission Delegated Regulation (EU) 2018/1642* was published in the OJ on **05 November 2018**.

## I. EXEMPTIONS FROM SPECIFIC REQUIREMENTS FOR SIGNIFICANT BENCHMARKS

### (i) What does Level 1 say?

Article 25(3) of the Regulation states that:

"A competent authority may decide that the administrator of a significant benchmark is nevertheless to apply one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) if it considers that it would be appropriate taking into account the nature or the impact of the benchmarks or the size of the administrator. In its assessment, the competent authority shall, based on the information provided by the administrator, take into account the following criteria:

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

**Article 25(7)** of the Regulation states that:

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

#### **(ii) What is the Commission’s mandate?**

**Article 25(8)** of the Regulation states that:

“ESMA shall develop draft implementing technical standards to develop a template for the compliance statement referred to in paragraph 7”.

**Article 25(9)** of the Regulation states that:

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

#### **(iii) Timing**

ESMA consulted on measures under **Article 25(8)** in its *Consultation Paper ESMA/2016/1406*. ESMA submitted draft Implementing technical standards (ITS) to the European Commission in its *Final Report* dated **30 March 2017**.

ESMA consulted on measures under **Article 25(9)** in its *Consultation Paper ESMA/2016/1406*. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **30 March 2017**.

## **J. NON-SIGNIFICANT BENCHMARKS**

#### **(i) What does Level 1 say?**

**Article 26(2)** of the Regulation states that:

“An administrator shall immediately notify its competent authority when the administrator's non-significant benchmark exceeds the threshold mentioned in point (a) of Article 24(1). In that case, it shall comply with the requirements applicable to significant benchmarks within three months”.

**Article 26(3)** of the Regulation states that:

“Where an administrator of a non-significant benchmark chooses not to apply one or more of the provisions referred to in paragraph 1, it shall publish and maintain a compliance statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions. The administrator shall provide the compliance statement to its competent authority”.

#### (ii) What is the Commission’s mandate?

**Article 26(5)** of the Regulation states that:

“ESMA shall develop draft implementing technical standards to develop a template for the compliance statement referred to in paragraph 3”.

#### (iii) Timing

ESMA consulted on measures under **Article 26(5)** in its *Consultation Paper ESMA/2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted draft Implementing technical standards (ITS) to the European Commission in its *Final Report* dated **30 March 2017**.

## K. BENCHMARK STATEMENT

#### (i) What does Level 1 say?

**Article 27(1)** of the Regulation states that:

“Within two weeks of the inclusion of an administrator in the register referred to in Article 36, the administrator shall publish, by means that ensure fair and easy access, a benchmark statement for each benchmark or, where applicable, for each family of benchmarks, that may be used in the Union in accordance with Article 29”.

#### (ii) What is the Commission’s mandate?

**Article 27(3)** of the Regulation states that:

“ESMA shall develop draft regulatory technical standards to specify further the contents of a benchmark statement and the cases in which an update of such statement is required”.

#### (iii) Timing

ESMA consulted on measures under **Article 27(3)** in its *Consultation Paper ESMA/2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **30 March 2017**.

**Commission Delegated Regulation** (EU) 2018/1643 was published in the OJ on **05 November 2018**.

## L. EQUIVALENCE

#### (i) What does Level 1 say?

**Article 30(1)** of the Regulation states that:

In order for a benchmark or a combination of benchmarks provided by an administrator located in a third country to be used in the Union in accordance with Article 29(1), the benchmark and the administrator shall be included in the register referred to in Article 36. The following conditions shall be complied with in order to be included in the register:

- (a) an equivalence decision is adopted by the Commission in accordance with paragraph 2 or 3 of this Article;
- (b) the administrator is authorised or registered, and is subject to supervision, in the third country in question;
- (c) ESMA is notified by the administrator of its consent that its actual or prospective benchmarks may be used by supervised entities in the Union, of the list of the benchmarks for which they have given consent to be used in the Union and of the competent authority responsible for its supervision in the third country; and
- (d) the cooperation arrangements referred to in paragraph 4 of this Article are operational.

## (ii) What is the Commission's mandate?

Article 30(5) of the Regulation states that:

"ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 4 so as to ensure that the competent authorities and ESMA are able to exercise all their supervisory powers under this Regulation".

## (iii) Timing

ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **01 June 2017**.

**Commission Delegated Regulation** (EU) 2018/1644 was published in the OJ on **05 November 2018**.

# M. RECOGNITION OF AN ADMINISTRATOR LOCATED IN A THIRD COUNTRY

## (i) What does Level 1 say?

Article 32(1) of the Regulation states that:

"Until such time as an equivalence decision in accordance with Article 30(2) or (3) is adopted, a benchmark provided by an administrator located in a third country may be used by supervised entities in the Union provided that the administrator acquires prior recognition by the competent authority of its Member State of reference in accordance with this Article".

## (ii) What is the Commission's mandate?

Article 32(9) of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under Article 32(9) in its *Consultation Paper ESMA/2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **30 March 2017**.

## N. ENDORSEMENT OF BENCHMARKS PROVIDED IN A THIRD COUNTRY

### (i) What does Level 1 say?

**Article 33(1)** of the Regulation states that:

“An administrator located in the Union and authorised or registered in accordance with Article 34, or any other supervised entity located in the Union with a clear and well-defined role within the control or accountability framework of a third country administrator, which is able to monitor effectively the provision of a benchmark, may apply to the relevant competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, provided that all of the following conditions are fulfilled:

- (a) the endorsing administrator or other supervised entity has verified and is able to demonstrate on an on-going basis to its competent authority that the provision of the benchmark or family of benchmarks to be endorsed fulfils, on a mandatory or on a voluntary basis, requirements which are at least as stringent as the requirements of this Regulation;
- (b) the endorsing administrator or other supervised entity has the necessary expertise to monitor effectively the activity of the provision of a benchmark in a third country and to manage the associated risks;
- (c) there is an objective reason to provide the benchmark or family of benchmarks in a third country and for said benchmark or family of benchmarks to be endorsed for their use in the Union”.

### (ii) What is the Commission’s mandate?

**Article 33(7)** of the Regulation states that:

“The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions under which the relevant competent authorities may assess whether there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark intends to measure, the need for proximity of the provision of the benchmark to such market or economic reality, the need for proximity of the provision of the benchmark to contributors, the material availability of input data due to different time zones, and specific skills required in the provision of the benchmark”.

### (iii) Timing

ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **10 November 2016**.

## O. AUTHORISATION AND REGISTRATION OF AN ADMINISTRATOR

### (i) What does Level 1 say?

**Article 34(1)** of the Regulation states that:

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

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

## (ii) What is the Commission’s mandate?

**Article 34(8)** of the Regulation states that:

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

## (iii) Timing

ESMA consulted on measures under **Article 34(8)** in its *Consultation Paper ESMA/2016/1406*. The consultation period closed on **02 December 2016**. ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **30 March 2017**.

**Commission Delegated Regulation (EU) 2018/1646** was published in the OJ on **05 November 2018**.

## P. COOPERATION WITH ESMA

### (i) What does Level 1 say?

**Article 47(2)** of the Regulation states that:

“The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties, in accordance with Article 35 of Regulation (EU) No 1095/2010”.

### (ii) What is the Commission’s mandate?

**Article 47(3)** of the Regulation states that:

“ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraph 2”.

### (iii) Timing

ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission dated **30 March 2017**.

**Commission Delegated Regulation (EU) 2018/1645** was published in the OJ on **05 November 2018**.

## Q. TRANSITIONAL PROVISIONS

### (i) What does Level 1 say?

**Article 51(1)** of the Regulation states that:

“An index provider providing a benchmark on 30 June 2016 shall apply for authorisation or registration in accordance with Article 34 by 1 January 2020”.

**Article 51(2)** of the Regulation states that:

“By 1 January 2020, the competent authority of the Member State where an index provider applying for authorisation in accordance with Article 34 is located shall have the power to decide to register that index provider as an administrator even if it is not a supervised entity, under the following conditions:

- (a) the index provider does not provide a critical benchmark;
- (b) the competent authority is aware, on a reasonable basis, that the index or indices provided by the index provider are not widely used, within the meaning of this Regulation, in the Member State where the index provider is located as well as in other Member States.

The competent authority shall notify ESMA of its decision adopted in accordance with the first subparagraph.

The competent authority shall keep evidence of the reasons for its decision adopted in accordance with the first subparagraph, in such a form that it is possible to fully understand the evaluations of the competent authority that the index or indices provided by the index provider are not widely used, including any market data, judgement or other information, as well as information received from the index provider”.

### (ii) What is the Commission’s mandate?

**Article 51(6)** of the Regulation states that:

“The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning measures to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references such benchmark”.

### (iii) Timing

ESMA submitted its *Final Report*, containing draft technical advice, to the European Commission on **10 November 2016**. The consultation period closed on **02 December 2016**. The European Commission adopted a draft *Delegated Regulation* on **03 October 2017**. The European Commission’s *Delegated Regulation (EU) 2018/66*, dated was published in the OJ on **17 January 2018**.

## R. REVIEW

### (i) What does Level 1 say?

**Article 54(1)** of the Regulation states that:

“By 1 January 2020, the Commission shall review and submit a report to the European Parliament and to the Council on this Regulation and in particular on:

- (a) the functioning and effectiveness of the critical benchmark, mandatory administration and mandatory contribution regime under Articles 20, 21 and 23 and the definition of a critical benchmark in point (25) of Article 3(1);
- (b) the effectiveness of the authorisation, registration and supervision regime of administrators under Title VI and the colleges under Article 46 and the appropriateness of supervision of certain benchmarks by a Union body;
- (c) the functioning and effectiveness of Article 19(2), in particular the scope of its application”.

## (ii) What is the Commission’s mandate?

**Article 54(3)** of the Regulation states that:

“The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in order to extend the 42-month period referred to in Article 51(2) by 24 months, if the report referred to in point (b) of paragraph 1 of this Article provides evidence that the transitional registration regime under Article 51(2) is not detrimental to a common European supervisory culture and consistent supervisory practices and approaches among competent authorities”.

## (iii) Timing

No delegated acts have been published to date.

## Level 3 Measures

### A. OVERSIGHT FUNCTION REQUIREMENTS

#### (i) What does Level 1 say?

**Article 5(1)** of the Regulation states that:

“Administrators shall establish and maintain a permanent and effective oversight function to ensure oversight of all aspects of the provision of their benchmarks”.

**Article 5(2)** of the Regulation states that:

“Administrators shall develop and maintain robust procedures regarding their oversight function, which shall be made available to the relevant competent authorities”.

**Article 5(3)** of the Regulation states that:

“The oversight function shall operate with integrity and shall have the following responsibilities, which shall be adjusted by the administrator based on the complexity, use and vulnerability of the benchmark:

- (a) reviewing the benchmark's definition and methodology at least annually;
- (b) overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes;
- (c) overseeing the administrator's control framework, the management and operation of the benchmark, and, where the benchmark is based on input data from contributors, the code of conduct referred to in Article 15;

- (d) reviewing and approving procedures for cessation of the benchmark, including any consultation about a cessation;
- (e) overseeing any third party involved in the provision of the benchmark, including calculation or dissemination agents;
- (f) assessing internal and external audits or reviews, and monitoring the implementation of identified remedial actions;
- (g) where the benchmark is based on input data from contributors, monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;
- (h) where the benchmark is based on input data from contributors, taking effective measures in respect of any breaches of the code of conduct referred to in Article 15; and
- (i) reporting to the relevant competent authorities any misconduct by contributors, where the benchmark is based on input data from contributors, or administrators, of which the oversight function becomes aware, and any anomalous or suspicious input data”.

**Article 5(4)** of the Regulation states that:

“The oversight function shall be carried out by a separate committee or by means of another appropriate governance arrangement”.

**Article 5(5)** of the Regulation states that:

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

ESMA shall distinguish between the different types of benchmarks and sectors as set out in this Regulation and shall take into consideration the differences in the ownership and control structure of administrators, the nature, scale and complexity of the provision of the benchmark, and the risk and impact of the benchmark, also in light of international convergence of supervisory practice in relation to governance requirements of benchmarks.

However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks. ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

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

## **(ii) What is the ESMA mandate?**

**Article 5(6)** of the Regulation states that:

“ESMA may issue guidelines [...], addressed to administrators of non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article”.

### (iii) Timing

On **29 September 2017**, ESMA consulted on the guidelines referred to in Article 5(6) in its *Consultation Paper ESMA70-145-105*.

ESMA's *Final Report* 'Guidelines on non-significant benchmarks under the Benchmarks Regulation' was published on **20 December 2018**.

## B. INPUT DATA, METHODOLOGY AND REPORTING OF INFRINGEMENTS

### (i) What does Level 1 say?

**Article 11(1)** of the Regulation states that:

"The provision of a benchmark shall be governed by the following requirements in respect of its input data:

- (a) the input data shall be sufficient to represent accurately and reliably the market or economic reality that the benchmark is intended to measure. The input data shall be transaction data, if available and appropriate. If transaction data is not sufficient or is not appropriate to represent accurately and reliably the market or economic reality that the benchmark is intended to measure, input data which is not transaction data may be used, including estimated prices, quotes and committed quotes, or other values;
- (b) the input data referred to in point (a) shall be verifiable;
- (c) the administrator shall draw up and publish clear guidelines regarding the types of input data, the priority of use of the different types of input data and the exercise of expert judgement, to ensure compliance with point (a) and the methodology;
- (d) where a benchmark is based on input data from contributors, the administrator shall obtain, where appropriate, the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure;
- (e) the administrator shall not use input data from a contributor if the administrator has any indication that the contributor does not adhere to the code of conduct referred to in Article 15, and in such a case shall obtain representative publicly available data".

**Article 11(3) (b)** of the Regulation states that:

"Where the input data of a benchmark is contributed from a front office function, meaning 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, the administrator shall:

- (a) obtain data from other sources that corroborate that input data; and
- (b) ensure that contributors have in place adequate internal oversight and verification procedures".

**Article 11(5)** of the Regulation states that:

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

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

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

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

## (ii) What is the ESMA mandate?

**Article 11(6)** of the Regulation states that:

“ESMA may issue guidelines [...], addressed to administrators of non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article”.

## (iii) Timing

On **29 September 2017**, ESMA consulted on the guidelines referred to in Article 11(6) in its *Consultation Paper ESMA70-145-105*.

ESMA’s *Final Report* ‘Guidelines on non-significant benchmarks under the Benchmarks Regulation’ was published on **20 December 2018**.

# C. TRANSPARENCY OF METHODOLOGY

## (i) What does Level 1 say?

**Article 13(1)** of the Regulation states that:

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

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

**Article 13(2)** of the Regulation states that:

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

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

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

**Article 13(3)** of the Regulation states that:

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

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

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

#### (ii) What is the ESMA mandate?

**Article 13(4)** of the Regulation states that:

“ESMA may issue guidelines [...], addressed to administrators of non-significant benchmarks to specify further the elements referred to in paragraph 3 of this Article”.

#### (iii) Timing

On **29 September 2017**, ESMA consulted on the guidelines referred to in Article 13(4) in its *Consultation Paper ESMA70-145-105*.

ESMA's *Final Report* ‘Guidelines on non-significant benchmarks under the Benchmarks Regulation’ was published on **20 December 2018**.

## D. GOVERNANCE AND CONTROL REQUIREMENTS FOR SUPERVISED CONTRIBUTORS

#### (i) What does Level 1 say?

**Article 16(1)** of the Regulation states that:

“The following governance and control requirements shall apply to a supervised contributor:

- (a) the supervised contributor shall ensure that the provision of input data is not affected by any existing or potential conflict of interest and that, where any discretion is required, it is independently and honestly exercised based on relevant information in accordance with the code of conduct referred to in Article 15;
- (b) the supervised contributor shall have in place a control framework that ensures the integrity, accuracy and reliability of input data and that input data is provided in accordance with this Regulation and the code of conduct referred to in Article 15”.

**Article 16(2)** of the Regulation states that:

“A supervised contributor shall have in place effective systems and controls to ensure the integrity and reliability of all contributions of input data to the administrator, including:

- (a) controls regarding who may submit input data to an administrator including, where proportionate, a process for sign-off by a natural person holding a position senior to that of the submitter;
- (b) appropriate training for submitters, covering at least this Regulation and Regulation (EU) No 596/2014;
- (c) measures for the management of conflicts of interest, including organisational separation of employees where appropriate and consideration of how to remove incentives, created by remuneration policies, to manipulate a benchmark;
- (d) record-keeping, for an appropriate period of time, of communications in relation to provision of input data, of all information used to enable the contributor to make each submission, and of all existing or potential conflicts of interest including, but not limited to, the contributor's exposure to financial instruments which use a benchmark as a reference;
- (e) record-keeping of internal and external audits".

**Article 16(3)** of the Regulation states that:

"Where input data relies on expert judgement, supervised contributors shall establish, in addition to the systems and controls referred to in paragraph 2, policies guiding any use of judgement or exercise of discretion and shall retain records of the rationale for any such judgement or discretion. Where proportionate, supervised contributors shall take into account the nature of the benchmark and its input data".

**Article 16(5)** of the Regulation states that:

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

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

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

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

## **(ii) What is the ESMA mandate?**

**Article 16(6)** of the Regulation states that:

"ESMA may issue guidelines [...], addressed to supervised contributors to non-significant benchmarks to specify the elements referred to in paragraph 5 of this Article".

## **(iii) Timing**

On **29 September 2017**, ESMA consulted on the guidelines referred to in Article 16(6) in its ***Consultation Paper ESMA70-145-105***.

ESMA's ***Final Report*** 'Guidelines on non-significant benchmarks under the Benchmarks Regulation' was published on **20 December 2018**.

