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## "I" ITEM NOTE

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
No. Cion doc.:	COM(2013) 641 final
Subject:	Proposal for a Regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts - Negotiating mandate

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## I. INTRODUCTION

1. On 24 September 2013, the Commission transmitted to the Council its proposal for a Regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts. The main objectives of the proposal are:
  - to improve the governance and controls over the benchmark process and in particular ensure that administrators avoid conflicts of interest, or at least manage them adequately;
  - to improve the quality of the input data and methodologies used by benchmark administrators and in particular ensure that sufficient and accurate data is used in the determination of benchmarks;
  - to ensure that contributors to benchmarks are subject to adequate controls, in particular to avoid conflicts of interest and that their contributions to benchmarks are subject to adequate controls. Where necessary the relevant competent authority should have the power to mandate contributors to continue to contribute to benchmarks; and

- to ensure adequate protection for consumers and investors using benchmarks by enhancing transparency, ensuring adequate rights of redress and ensuring suitability is assessed where necessary.

2. The European Central Bank and the European Economic and Social Committee adopted their opinions respectively on 7 January 2014 and on 21 January 2014. The report of the ECON Committee of the European Parliament is still pending; the Committee is expected to vote on its report in early March 2015.

## **II. STATE OF PLAY**

3. The proposal has been examined by the Working Party on Financial Services in 14 meetings during the Hellenic, Italian and Latvian Presidencies, and six compromise proposals have been prepared with a view to reaching an agreement on a negotiating mandate for the Presidency for the negotiations with European Parliament.

4. Following deliberations in the Working Party of Financial Services (Attachés) on 28 January 2015, and a silence procedure within the framework of the Working Party thereafter, which ended on 4 February 2015, the latest compromise proposal for a negotiating mandate, as set out in Annex, is now supported by all delegations.

## **III. CONCLUSION**

5. Against this background it is recommended that the Permanent Representatives Committee:
- agree on the negotiating mandate with regard to the proposed Regulation, as set out in Annex,
  - invite the Presidency to start, when practicable, negotiations with the European Parliament on the basis of that mandate with a view to reaching an agreement at first reading, and
  - enter into its minutes the statements set out in Addendum 1 to this document.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the European Central Bank,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>1</sup> [ xxx ]

- (1) The pricing of many financial instruments and financial contracts depends on the accuracy and integrity of benchmarks. Cases of manipulation of interest rate benchmarks such as LIBOR and EURIBOR, as well as allegations that energy, oil and foreign exchange benchmarks have been manipulated, have demonstrated that benchmarks whose setting processes share certain characteristics, such as being subject to conflicts of interest, the use of discretion and weak governance, may be vulnerable to manipulation. Failures in, or doubts about, the accuracy and integrity of indices used as benchmarks may undermine market confidence, cause losses to consumers and investors and distort the real economy. It is therefore necessary to ensure the accuracy, robustness and integrity of benchmarks and the benchmark setting process.
- (2) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments<sup>2</sup> contains certain requirements with respect to the reliability of benchmarks used to price a listed financial instrument. Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading<sup>3</sup> contains certain requirements on benchmarks used by issuers. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>4</sup> contains certain requirements on the use of benchmarks by UCITS investment funds. Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity<sup>5</sup> contains certain provisions which prohibit the manipulation of benchmarks that are used for wholesale energy products. However these legislative acts only cover certain aspects of certain benchmarks and they neither address all the vulnerabilities in the process of producing all benchmarks, nor do they cover all uses of financial benchmarks in the financial industry.

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<sup>3</sup> OJ L 345, 31.12.2003, p. 64.

<sup>4</sup> OJ L302, 17.11.2009, p. 32

<sup>5</sup> OJ L 326 , 8.12.2011, p. 1.

- (2a) The use of financial benchmarks is not limited to the issuance and manufacturing of financial instruments and contracts. The financial industry relies on benchmarks also for assessing the performance of an investment fund with the purposes of return tracking or of determining the asset allocation of a portfolio or of computing the performance fees. A certain benchmark may be used directly as a reference for financial instruments, financial contracts and investment funds, or indirectly within a combination of benchmarks. In the latter case, the setting and review of the weights to be assigned to various indices within a combination for the purpose of determining the pay-out or the value of a financial instrument or a financial contract or measuring the performance of an investment fund does also amount to use, as such an activity does not involve discretion as opposed to the activity of provision of benchmarks. The holding of financial instruments referencing a certain benchmark is not to be considered as use of the benchmark.
- (3) Benchmarks are vital in pricing cross-border transactions and thereby facilitating the effective functioning of the internal market in a wide variety of financial instruments and services. Many benchmarks used as reference rates in financial contracts, in particular mortgages, are produced in one Member State but used by credit institutions and consumers in other Member States. In addition, these credit institutions often hedge their risks or obtain the funding for granting these financial contracts in the cross border interbank market. Only two Member States have adopted national legislation on benchmarks, but their respective legal frameworks on benchmarks already show divergences regarding aspects such as the scope of application. In addition, the International Organisation Securities Commissions (IOSCO) has recently agreed principles on benchmarks and, since these principles provide a certain flexibility as to their exact scope and means of their implementation and in relation to certain terms, Member States are likely to adopt legislation at national level which would implement such principles divergently.

- (4) These divergent approaches would result in fragmentation of the internal market since administrators and users of benchmarks would be subject to different rules in different Member States and benchmarks produced in a Member State could be prevented from being used in other Member States. In the absence of a harmonised framework to ensure the accuracy and integrity of benchmarks used in financial instruments and financial contracts in the Union it is therefore likely that differences in Member States legislation will create obstacles to the smooth functioning of the internal market for the provision of benchmarks.
- (5) EU consumer protection rules do not cover the particular issue of adequate information on benchmarks in financial contracts. As a result of consumer complaints and litigation relating to the use of benchmarks in several Member States, it is likely that divergent measures, inspired by legitimate concerns of consumer protection, would be adopted at national level, which could result in fragmentation of the internal market due to the divergent conditions of competition attached to different levels of consumer protection.
- (6) Therefore to ensure the proper functioning of the internal market and improve the conditions of its functioning, in particular with regard to financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a regulatory framework for benchmarks at Union level.
- (7) It is appropriate and necessary for those rules to take the legislative form of a Regulation in order to ensure that provisions directly imposing obligations on persons involved in benchmark production, contribution and use are applied in a uniform manner throughout the Union. Since a legal framework for the provision of benchmarks necessarily involves measures specifying precise requirements on all different aspects inherent to the provision of benchmarks, even small divergences on the approach taken regarding one of these aspects could lead to significant impediments in the cross border provision of benchmarks. Therefore, the use of a Regulation, which is directly applicable without requiring national legislation, should reduce the possibility of divergent measures being taken at national level, and should ensure a consistent approach, greater legal certainty and prevent the appearance of significant impediments in the cross-border provision of benchmarks.

- (8) The scope of this Regulation should be as broad as necessary to create a preventive regulatory framework. The production of benchmarks involves discretion in their determination and is inherently subject to certain types of conflicts of interest, which implies the existence of opportunities and incentives to manipulate those benchmarks. These risk factors are common to all benchmarks, and all of them should be made subject to adequate governance and control requirements. Since the vulnerability and importance of a benchmark varies over time, restricting the scope by reference to currently important or vulnerable indices would not address the risks that any benchmark may pose in the future. In particular, benchmarks that are currently not widely used may be so used in the future, so that, in their regard, even a minor manipulation may have significant impact.
- (9) The critical determinant of the scope of this Regulation should be whether the output value of the benchmark determines the value of a financial instrument, financial contract or measures the performance of an investment fund. Therefore the scope should not be dependent on the nature of the input data. Benchmarks calculated from economic input data, such as share prices and non-economic number or values such as weather parameters should thus be included. The framework should cover those benchmarks subject to these risks, but should also provide for a proportionate response to the risks that different benchmarks pose. This Regulation should therefore cover all benchmarks which are used to price financial instruments listed or traded on regulated venues.
- (10) A large number of consumers are parties to financial contracts, in particular consumer credit agreements secured by mortgages, that reference benchmarks that are subject to the same risks. This Regulation should therefore cover the indices or reference rates referred to in Directive 2014/17/EU of the European Parliament and of the Council.

- (11) Many investment indices involve significant conflicts of interest and are used to measure the performance of a fund such as a UCITS fund. Some of these benchmarks are published and others are made available, for free or on payment of a fee, to the public or a section of the public and their manipulation may adversely affect investors. This Regulation should therefore cover indices or reference rates that are used to measure the performance of an investment fund.
- (12) All benchmark administrators are potentially subject to conflicts of interest, exercise discretion and may have inadequate governance and control systems in place. Further, as administrators control the benchmark process, requiring authorisation or registration and supervision of administrators is the most effective way of ensuring the integrity of benchmarks.
- (13) Contributors are subject to potential conflicts of interest, exercise discretion and so may be the source of manipulation. Contributing to a benchmark is a voluntary activity. If any initiative requires contributors to significantly change their business models, they may cease to contribute. However, for entities already subject to regulation and supervision, requiring good governance and control systems is not expected to lead to substantial costs or disproportionate administrative burden. Therefore this Regulation imposes certain obligations on supervised contributors. When a benchmark is determined on the basis of publicly available data, the source of such data should not be considered a contributor.
- (14) An administrator is the natural or legal person that has control over the provision of a benchmark, in particular who administers the benchmark, collects and analyses the input data, determines the benchmark and either directly publishes the benchmark or outsources the publication or the calculation of the benchmark to another person. However, where a person merely publishes or refers to a benchmark as part of his or her journalistic activities but does not have control over the provision of that benchmark, that person should not be subject to the requirements imposed on administrators by this Regulation.



- (15) An index is calculated using a formula or some other methodology on the basis of underlying values. Discretion exists in constructing this formula, performing the calculation or determining the input data. This discretion creates a risk of manipulation and therefore all benchmarks sharing this characteristic should be covered by this Regulation. However where a single price or value is used as a reference to a financial instrument, for example where the price of a single security is the reference price for an option, there is no calculation, input data or discretion. Therefore single price or single value reference prices should not be considered benchmarks for the purposes of this Regulation. Reference prices or settlement prices produced by Central Counterparties (CCPs) should not be considered benchmarks because they are used to determine settlement, margins and risk management and thus do not determine the amount payable under a financial instrument or the value of a financial instrument.
- (16) Benchmarks that are provided by central banks are subject to control by public authorities and meet principles, standards and procedures which ensure the accuracy, integrity and independence of their benchmarks. It is therefore not necessary that these benchmarks should be subject to this Regulation. Also benchmarks produced by public authorities or under the control of public authorities in the Union, including national statistic agencies, shall not be subject to this Regulation.
- (17) Vulnerabilities in the process of providing a benchmark that are not subject to adequate governance create the possibility to manipulate a benchmark. Where benchmarks are available to the public the full extent of these risks may not be taken into account and so insufficient controls and governance may be implemented. In order to ensure the integrity of benchmarks, benchmark administrators should be required to implement adequate governance arrangements to control these conflicts of interest and to safeguard confidence in the integrity of benchmarks. Even where effectively managed, most administrators are subject to some conflicts of interest and may have to make judgements and decisions which affect a diverse group of stakeholders. It is therefore necessary that administrators have an independent function to oversee the implementation and effectiveness of the governance arrangements that provide effective oversight.

- (18) The manipulation or unreliability of benchmarks can cause damage to investors and consumers. Therefore, this Regulation should set out a framework for retention of records by administrators and contributors as well as providing transparency about a benchmark's purpose and methodology which facilitates more efficient and fairer resolution of any potential claims in accordance with national or Union law.
- (19) Auditing and the effective enforcement of this Regulation requires ex post analysis and evidence and it is therefore necessary that benchmark administrators keep adequate records relating to the calculation of the benchmark for a sufficient period of time. The reality that a benchmark seeks to measure and the environment in which it is measured are likely to change over time. Therefore it is necessary that the process and methodology of the provision of benchmarks are audited or reviewed on a periodic basis to identify shortcomings and possible improvements. Many stakeholders may be impacted by failures in the provision of the benchmark and can help identify these shortcomings. It is therefore necessary that an independent complaints procedure is established to ensure that those stakeholders are able to notify the benchmark administrator of complaints and that the benchmark administrator objectively evaluates the merits of any complaint.
- (20) The provision of benchmarks frequently involves the outsourcing of important functions such as calculating the benchmark, gathering the input data and disseminating the benchmark. In order to ensure the effectiveness of the governance arrangements, it is necessary to ensure that any such outsourcing does not relieve a benchmark administrator of any of its obligations and responsibilities, and is done in such a way that it does not interfere with either the administrators ability to meet these obligations or responsibilities, or the relevant competent authority's ability to supervise them.
- (21) The benchmark administrator is the central recipient of the input data and is able to evaluate the integrity and accuracy of this input data on a consistent basis. It is therefore necessary that the benchmark administrator has adequate controls to assess accuracy of input data, including comparison against historical patterns where applicable, and notifies the relevant competent authority of suspicious data.

- (22) Employees of the administrator may identify possible infringements of this Regulation or potential vulnerabilities that could lead to manipulation or attempted manipulation. This Regulation should therefore ensure that adequate arrangements are in place to enable employees to alert administrators confidentially of possible infringements of this Regulation.
- (23) Any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark. As a general rule benchmark administrators should use actual transaction input data where possible but other data may be used in those cases where the transaction data is insufficient to ensure the integrity and accuracy of the benchmark.
- (24) The accuracy and reliability of a benchmark in measuring the economic reality it is intended to track depends on the methodology and input data used. It is therefore necessary to adopt a transparent methodology that ensures the benchmark's reliability and accuracy. The transparency of the methodology should not be meant as the publication of the formula applied for the determination of a certain benchmark, but rather as the disclosure of the elements sufficient to allow stakeholders to understand how this benchmark is derived and to assess its representativeness, relevance and appropriateness for the inherent uses.
- (25) It may be necessary to change the methodology to ensure the continued accuracy of the benchmark, but any changes in the methodology have an impact on the users and stakeholders in the benchmark. It is therefore necessary to specify the procedures to be followed when changing the benchmark methodology, including the need for consultation, so that users and stakeholders can take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes.

- (26) The integrity and accuracy of benchmarks depends on the integrity and accuracy of the input data provided by contributors. It is essential that the obligations of the contributors in respect of this input data are clearly specified, can be relied on and are consistent with the benchmark administrator's controls and methodology. It is therefore necessary that the benchmark administrator produces a code of conduct to specify these requirements and report to the competent authority any misconduct of contributors.
- (27) Many benchmarks are determined by the application of a formula from input data that is provided by regulated venues, approved publication arrangements or reporting mechanisms, energy exchanges or emission allowance auctions. In these cases, existing regulation and supervision ensures the integrity and transparency of the input data, provides for governance requirements and procedures for the notification of infringements. Therefore these benchmarks are less vulnerable, less susceptible to manipulation, subject to independent verifications and are accordingly released from certain obligations.
- (28) Contributors may be subject to conflicts of interest and may exercise discretion in the determination of the input data. Therefore it is necessary that contributors are subject to governance arrangements to ensure that these conflicts are managed and that the input data is accurate, conforms to the administrator's requirements and can be validated.
- (29) Different types of benchmark and different benchmark sectors have different characteristics, vulnerabilities and risks. The provisions of this Regulation should be further specified for particular benchmark sectors and types. Interest rate benchmarks are benchmarks that play an important role in the transmission of monetary policy and so it is necessary to specify how these provisions would apply to these benchmarks in this Regulation. Commodity benchmarks are widely used and have sector specific characteristics and so it is necessary to specify how these provisions would apply to these benchmarks in this Regulation.

- (30) The failure of critical benchmarks used as reference for a significant value of financial instruments and investment funds may impact the markets integrity, or the financing of households and corporations, or consumers, or the real economy, or the financial stability, and it is therefore necessary that additional requirements apply to ensure the integrity and robustness of these benchmarks. The failure of certain benchmarks may have impacts such as those referred to above also within a single Member State. It is therefore necessary that this Regulation provides for a process to determine those benchmarks that should be considered critical benchmarks. In order to determine critical benchmarks, an assessment should be made on the value of financial instruments and investment funds referencing the benchmark. This assessment should be made on the basis of all the range of maturities or tenors of the benchmark, where applicable.
- (31) Contributors ceasing to contribute may undermine the credibility of critical benchmarks as the capability of these benchmarks to measure the underlying market or economic reality would be impaired. It is therefore necessary to include a power for the relevant competent authority to require mandatory contributions from supervised entities to critical benchmarks in order to preserve the benchmark's credibility. Mandatory contribution of input data is not meant as an obligation for supervised entities to enter or commit to enter into transactions.
- (32) In order for users of benchmarks to make appropriate choices of, and understand the risks of, benchmarks, they need to know what the benchmark measures and their vulnerabilities. Therefore the benchmark administrator should publish a statement specifying these elements.

- (33) Consumers may enter into financial contracts, in particular mortgages and consumer credit contracts that reference a benchmark, but unequal bargaining power and the use of standard terms mean that they may have a limited choice about the benchmark used. It is therefore necessary to ensure, at least, that adequate information is provided by creditors or credit intermediaries to consumers, in order to enable them to assess whether a benchmark does fit their need. To this end, Directive 2008/48/EC of the European Parliament and of the Council and Directive 2014/17/EU of the European Parliament and of the Council should be correspondingly amended.
- (34) This Regulation should take into account the Principles for financial benchmarks issued by the International Organization of Securities Commissions (IOSCO) on the provision of financial benchmarks which serve as a global standard for regulatory requirements for benchmarks. As an overarching principle, it is necessary for investor protection that an assessment that the supervisions and regulation in any third country are equivalent to Union supervision and regulation of benchmarks takes place so that a benchmark provided from that third country can be used in the Union. However, in order to avoid the adverse impacts of a possible abrupt cessation of the use in the Union of benchmarks provided in a third country, this Regulation also provides for certain other conditions under which third country benchmarks can be used by supervised entities located in the Union as long as the provision of these benchmarks complies with requirements which are as stringent as those laid down in this Regulation.

- (34a) This Regulation introduces an endorsement regime allowing administrators located in the Union and authorised or registered in accordance with its provisions to endorse benchmarks provided in third countries, under certain conditions. In order to respond to concerns that lack of localisation in the Union may be a serious obstacle to effective supervision for the purposes of this Regulation, such an endorsement regime should be introduced for third country administrators that are affiliated or work closely with administrators located in the Union. An administrator that has endorsed benchmarks provided in a third country should be fully and unconditionally responsible for such endorsed benchmarks and for the fulfilment of the relevant conditions referred to in this Regulation.
- (34b) This Regulation also introduces a process of prior recognition of administrators located in a third country by the competent authority of the Member State of reference, under certain conditions. To address the aforementioned concerns that lack of localisation in the Union may be a serious obstacle to effective supervision for the purposes of this Regulation, the recognition process should be introduced for third country administrators which are supervised by a third country authority entering into an appropriate cooperation agreement with the competent authority of the Member State that is to be considered the Member State of reference on the basis of objective rules. The legal representative can be a natural or legal person.
- (35) The administrator should be authorised and supervised by the competent authority of the Member State where that administrator is located. Entities already subject to a supervisory regime providing financial benchmarks other than critical benchmarks should be registered with and supervised by the competent authority. Additionally, a transitional regime was foreseen, according to which entities providing benchmarks not widely referenced in one or more Member States could be registered, with a view to facilitate the initial phase of application of this Regulation. The registration of an administrator is not intended to affect the supervision by the relevant competent authorities. ESMA shall maintain a register of administrators at the Union level.

- (36) In some circumstances a person may provide an index but be unaware that this index is being used as a reference for a financial instrument, a financial contract or an investment fund. This is particularly the case where the users and benchmark administrator are located in different Member States. It is therefore necessary to increase the level of transparency concerning the relevant uses of benchmarks. This can be achieved by improving the contents of the prospectuses by the existent legislation and of the notifications and list of financial instruments required by Regulation (EU) No 596/2014.
- (37) A set of effective tools and powers and resources for the competent authorities of Member States guarantees supervisory effectiveness. This Regulation therefore should in particular provide for a minimum set of supervisory and investigative powers with which competent authorities of Member States should be entrusted in accordance with national law. When exercising their powers under this Regulation competent authorities and ESMA should act objectively and impartially and remain autonomous in their decision making.
- (38) For the purpose of detecting infringements of this Regulation, it is necessary for competent authorities to be able to access, in accordance with national law, the premises of legal persons in order to seize documents. The access to such premises is necessary when there is reasonable suspicion that documents and other data related to the subject matter of an inspection or investigation exist and may be relevant to prove an infringement of this Regulation. Additionally the access to such premises is necessary where: the person to whom a demand for information has already been made fails to comply with it; or where there are reasonable grounds for believing that if a demand were to be made, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed. If prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, such power for access into premises shall be used after having obtained that prior judicial authorisation.



- (39) Existing recordings of telephone conversations and data traffic records from supervised entities may constitute crucial, and sometimes the only evidence to detect and prove the existence of infringements of this Regulation, notably the compliance with governance and control requirements. Such records and recordings can help to verify the identity of the person responsible for the submission, those responsible for its approval, and whether organisational separation of employees is maintained. Therefore, competent authorities should be able to require existing recordings of telephone conversations, electronic communications and data traffic records held by supervised entities, in those cases where a reasonable suspicion exists that such recordings or records related to the subject-matter of the inspection or investigation may be relevant to prove an infringement of this Regulation.
- (40) Some of the provisions of this Regulation apply to natural or legal persons in third countries who may use benchmarks or be contributors to benchmarks or may be otherwise involved in the benchmark process. Competent authorities should therefore enter into arrangements with supervisory authorities in third countries. ESMA should coordinate the development of such cooperation arrangements and the exchange between competent authorities of information received from third countries.
- (41) This Regulation respects the fundamental rights and observes the principles recognised in the Treaty on the Functioning of the European Union (TFEU) and in the Charter of Fundamental Rights of the European Union, in particular the right to respect for private and family, the protection of personal data, the right to freedom of expression and information, the freedom to conduct a business, the right to property, the right to consumer protection, the right to an effective remedy, the right of defence. Therefore, this Regulation should be interpreted and applied in accordance with those rights and principles.
- (42) The rights of defence of the persons concerned should be fully respected. In particular, persons subject to proceedings shall be provided with access to the findings upon which the competent authorities has based the decision and shall be given the right to be heard.

- (43) Transparency regarding benchmarks is necessary for reasons of financial market stability and investor protection. Any exchange or transmission of information by competent authorities should take place in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>6</sup>. Any exchange or transmission of information by ESMA should take place in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>7</sup>.
- (44) Taking into consideration the principles set out in the Commission's communication on reinforcing sanctioning regimes in the financial services sector and legal acts of the Union adopted as a follow-up to that Communication, Member States should lay down rules on sanctions and administrative measures applicable to infringements of the provisions of this Regulation and should ensure that they are implemented. Those sanctions and administrative measures should be effective, proportionate and dissuasive.

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<sup>6</sup> OJ L 281, 23.11.1995, p. 31.

<sup>7</sup> OJ L 8, 12.1.2001, p. 1.

- (45) Therefore, a set of administrative measures, sanctions and fines should be provided for to ensure a common approach in Member States and to enhance their deterrent effect. Sanctions applied in specific cases should be determined taking into account where appropriate factors such as the repayment of any identified financial benefit, the gravity and duration of the infringement, any aggravating or mitigating factors, the need for fines to have a deterrent effect and, where appropriate, include a reduction in return for cooperation with the competent authority. In particular, the actual amount of administrative fines to be imposed in a specific case may reach the maximum level provided for in this Regulation, or the higher level provided for in national law, for very serious infringements, while fines significantly lower than the maximum level may be applied to minor infringement or in case of settlement. The possibility to impose a temporary ban to exercise management functions within benchmark administrators or contributors should be available to the competent authority.
- (45a) This Regulation should not limit Member States in their ability to provide for higher levels of administrative sanctions and should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.
- (45b) Even though nothing prevents Member States from laying down rules for administrative and criminal sanctions for the same infringements, Member States should not be required to lay down rules for administrative sanctions for the infringements of this Regulation which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they should be able to do so if their national law so permits. However, the maintenance of criminal sanctions instead of administrative sanctions for infringements of this Regulation should not reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Regulation, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.

- (45c) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.
- (46) In order to ensure that decisions made by competent authorities have a deterrent effect on the public at large, they should normally be published. The publication of decisions is also an important tool for competent authorities to inform market participants of what behaviour is considered constitute a violation of this Regulation and to promote wider good behaviour amongst market participants. If such publication risks causing disproportionate damage to the persons involved, jeopardises the stability of financial markets or an on-going investigation the competent authority should publish the sanctions and measures on an anonymous basis or delay the publication. Competent authorities should have the option not to publish sanctions where anonymous or delayed publication is considered insufficient to ensure that the stability of financial markets are not be jeopardised. Competent authorities are also not required to publish measures which are deemed to be of a minor nature where publication would be disproportionate.

- (47) Critical benchmarks may involve contributors, administrators and users in more than one Member State. Thus, the cessation of the provision of such a benchmark or any events that may significantly undermine its integrity may have an impact in more than one Member State meaning that the supervision of such a benchmark by the competent authority of the Member State in which it is located alone will not be efficient and effective in terms of addressing the risks that the critical benchmark poses. In such a case, in order to ensure the effective exchange of supervisory information among competent authorities, coordination of their activities and supervisory measures, colleges of competent authorities should be formed. The activities of the colleges should contribute to the harmonised application of rules under this Regulation and to the convergence of supervisory practices. For the decisions pertaining to the mandatory contribution of input data by supervised contributors, ESMA's legally binding mediation is a key element of the achievement of coordination, supervisory consistency and convergence of supervisory practices.
- (47a) Benchmarks may reference financial instruments and financial contracts that have a long duration. In certain cases such benchmarks may no longer be permitted to be provided once this Regulation comes into effect because they have characteristics that cannot be adjusted to conform to the requirements of this Regulation. However, prohibiting the continued provision of such a benchmark may result in the termination or frustration of the financial instruments or financial contracts and so harm investors. It is therefore necessary to make provision to allow for the continued provision of such benchmarks for a transitional period.

- (48) In order to ensure uniform conditions for the implementation of this Regulation and further specify technical elements of the proposal, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of the specification of technical elements of definitions and of calculation of the value of financial instruments and investment funds referencing a benchmark to determine whether such benchmark is critical, in respect of reviewing the relevant threshold for the determination of critical benchmarks, of establishing the objective reasons for the endorsement of a benchmark or family of benchmarks provided in a third country and the elements to assess whether the changing of an existing benchmark result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark, and in respect of the extension of the five-year period envisaged for the endorsement of benchmarks provided by an administrator located in a third country, and of the 24-month period envisaged for the registration instead of authorisation of certain administrators.
- (49) Technical standards should ensure consistent harmonisation of the requirements for the provision of and contribution to indices used as benchmarks and adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA with the elaboration of draft regulatory technical standards which do not involve policy choices, for submission to the Commission. The Commission should adopt draft regulatory technical standards developed by ESMA, by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, regarding the characteristics of an administrator's oversight function, some of the controls that an administrator has to conduct on the input data, the process to deal with complaints and the frequency of the external audits, the elements of the methodology to be disclosed, the terms of the code of conduct, some of the requirements to supervised contributors, the detailed contents of the benchmark statement, the minimum content of cooperation arrangements with the competent authorities of third countries, the form and content of the application for recognition of an administrator located in a third country, and the information to be provided in applications for authorisation or registration of administrators.

- (50) In order to ensure uniform conditions for the implementation of this Regulation, in regard to certain of its aspects implementing powers should be granted to the Commission. Those aspects concern the ascertainment of the equivalence of the legal framework to which providers of benchmarks of third countries are subject, as well of the fact that a benchmark widely used across the Union is critical in nature. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011<sup>8</sup> laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
- (51) The Commission should also be empowered to adopt implementing technical standards developed by ESMA establishing procedures and forms for exchange of information between competent authorities and ESMA, by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010. Since the objectives of this Regulation, namely to lay down a consistent and effective regime to address the vulnerabilities that benchmarks pose cannot be sufficiently achieved by the Member States, given that the overall impact of the problems relating to benchmarks can be fully perceived only in a Union context, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

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<sup>8</sup> OJ L 55, 28.2.2011, p. 13.

HAVE ADOPTED THIS REGULATION:

TITLE 1  
SUBJECT MATTER, SCOPE AND DEFINITIONS

*Article 1*

*Subject matter*

This Regulation introduces a common framework to ensure the accuracy and integrity of indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds in the Union. The Regulation thereby contributes to the proper functioning of the internal market while achieving a high level of consumer and investor protection.

*Article 2*

*Scope*

1. This Regulation shall apply to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the Union.
2. This Regulation shall not apply to the provision of benchmarks by
  - (a) central banks;
  - (b) public authorities which provide or have the control over the provision of benchmarks provided for public policy purposes, including measures of employment, economic activity, and inflation.
3. (deleted).



*Article 3*  
*Definitions*

1. For the purposes of this Regulation, the following definitions shall apply:
  - (1) ‘index’ means any figure:
    - (a) that is published or made available to the public; and
    - (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and
    - (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, quotes or other values.
  - (2) ‘benchmark’ means any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument is determined or an index that is used to measure the performance of an investment fund with the purposes to track the return of such index or to define the asset allocation of a portfolio or to compute the performance fees;
  - (2a) ‘family of benchmarks’ means the group of benchmarks provided by the same administrator determined from input data of the same nature, which provide specific measures of the similar market or economic reality;
  - (3) ‘provision of a benchmark’ means:
    - (a) administering the arrangements for determining a benchmark; and
    - (b) collecting, analysing or processing input data for the purpose of determining a benchmark; and
    - (c) determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose.
  - (4) ‘administrator’ means the natural or legal person that has control over the provision of a benchmark;

- (5) ‘use of a benchmark’ means:
- (a) the issuance of a financial instrument which references an index or a combination of indices,
  - (b) the determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices,
  - (c) being party to a financial contract which references an index or a combination of indices,
  - (d) the determination of the performance of an investment fund through an index or a combination of indices with the purposes to track the return of such index or combination of indices or to define the asset allocation of a portfolio or to compute the performance fees.
- (6) ‘contribution of input data’ means providing any input data to an administrator, or to another person for the purposes of passing to an administrator, that is required in connection with the determination of that benchmark, and is provided for that purpose;
- (7) ‘contributor’ means a natural or legal person contributing input data;
- (8) ‘supervised contributor’ means a supervised entity that contributes input data to an administrator located in the Union;
- (9) ‘submitter’ means the natural person employed by the contributor for the purpose of contributing input data;
- (9-a) ‘assessor’ means the employee of an administrator , or any other natural person whose services are placed at its disposal or under its control, who is responsible for applying a methodology and/or judgement to market data and other information to reach a conclusive assessment about the price of a certain commodity;

- (9-b) ‘expert judgment’ means the exercise of discretion by an administrator or contributor with respect to the use of data in determining a benchmark. Expert judgment includes extrapolating values from prior or related transactions, adjusting values for factors that might influence the quality of data such as market events or impairment of a buyer or seller’s credit quality, or weighting firm bids or offers greater than a particular concluded transaction;
- (10) ‘input data’ means the data in respect of the value of one or more underlying assets, or prices, including estimated prices, quotes, committed quotes or other values, used by the administrator to determine the benchmark;
- (11) (deleted)
- (12) ‘transaction data’ means observable prices, rates, or values representing transactions between unaffiliated counterparties in an active market subject to competitive supply and demand forces;
- (13) ‘financial instrument’ means any of the instruments listed in Section C of Annex I to Directive 2014/65/EU for which a request for admission to trading on a trading venue, as defined in point (24) of Article 4(1) of Directive 2014/65/EU, has been made or which are traded on a trading venue or on a systematic internaliser, as defined in point (20) of Article 4(1) of Directive 2014/65/EU;
- (14) ‘supervised entity’ means the following entities:
- (a) credit institutions as defined in point (1) of Article 3 of Directive 2013/36/EU<sup>9</sup>;
  - (b) investment firms as defined in point (1) of paragraph 1 of Article 4 of Directive 2014/65/EU;
  - (c) insurance undertakings as defined in point (1) of Article 13 Directive 2009/138/EC<sup>10</sup>;
  - (d) reinsurance undertakings as defined in point (1) of Article 13 Directive 2009/138/EC;

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<sup>9</sup> OJ L 176 27.6.2013 p. 338.

<sup>10</sup> OJ L 335, 17.12.2009, p. 1.

- (e) undertakings for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Directive 2009/65/EU<sup>11</sup>;
  - (f) alternative investment fund managers (AIFMs) as defined in point (b) of Article 4(1) of Directive 2011/61/EU<sup>12</sup>;
  - (f-a) institutions for occupational retirement provision as defined in Article 6(a) of Directive 2003/41/EC;
  - (f-b) creditors as defined in point (b) of Article 3 of Directive 2008/48/EC for the purposes of credit agreements under point (c) of Article 3 of Directive 2008/48/EC;
  - (f-c) non-credit institutions as defined in point (10) of Article 4 of Directive 2014/17/EU for the purposes of credit agreements as defined in point (3) of Article 4 of Directive 2014/17/EU;
  - (f-d) market operators as defined in point (18) of Article 4(1) of Directive 2014/65/EU;
  - (g) central counterparties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012<sup>13</sup>;
  - (h) trade repositories as defined in point (2) of Article 2 of Regulation (EU) No 648/2012;
  - (i) an administrator;
- (15) ‘financial contract’ means:

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<sup>11</sup> OJ L302 17.11.2009 p. 32.

<sup>12</sup> OJ L 174, 1.7.2011, p. 1.

<sup>13</sup> OJ L 174, 1.7.2011, p. 1.

- (a) any credit agreement as defined in point (c) of Article 3 of Directive 2008/48/EC of the European Parliament and of the Council<sup>14</sup>;
  - (b) any credit agreement as defined in point 3 of Article 4 of Directive 2014/17/EU of the European Parliament and of the Council;
- (16) ‘investment fund’ means AIFs as defined in point (a) of paragraph 1 of Article 4 of Directive 2011/61/EU of the European Parliament and of the Council, or collective investment undertakings falling within the scope of Directive 2009/65/EU of the European Parliament and of the Council;
- (17) ‘management body’ means the body or bodies of an administrator or another supervised entity, which are appointed in accordance with national law, which are empowered to set the entity’s strategy, objectives and overall direction, and which oversee and monitor management decision-making and include persons who effectively direct the business of the entity;
- (18) ‘consumer’ means a natural person who, in financial contracts covered by this Regulation is acting for purposes which are outside his trade, business or profession;
- (19) ‘interest rate benchmark’ means a benchmark where the underlying asset for the purposes of point (1)(c) of this Article is the rate at which banks may lend to, or borrow from other banks or agents, other than banks, in the money market;
- (20) ‘commodity benchmark’ means a benchmark where the underlying asset for the purposes of point (1)(c) of this Article is a commodity within the meaning of point (1) of Article 2 of Commission Regulation (EC) No 1287/2006<sup>15</sup>; Emission allowances as defined in point (11) of Section C of Annex I of Directive 2014/65/EU shall not be considered commodities for the purpose of this Regulation;

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<sup>14</sup> *OJ L 133, 22.5.2008, p. 66.*

<sup>15</sup> *OJ L 241, 2.9.2006 p. 1.*

(20a) ‘regulated-data benchmark’ means a benchmark determined by the application of a formula from:

- (i) input data contributed entirely and directly from
  - (a) a trading venue as defined in point (24) of paragraph 1 of Article 4 of Directive 2014/65/EU, or
  - (b) an approved publication arrangement as defined in point (52) of paragraph 1 of Article 4 of Directive 2014/65/EU or a consolidated tape provider as defined in point (53) of paragraph 1 of Article 4 of Directive 2014/65/EU, in accordance with mandatory post-trade transparency requirements, however, only with reference to data of transactions concerning financial instruments that are traded on a trading venue, or
  - (c) an approved reporting mechanism as defined in point (54) of paragraph 1 of Article 4 of Directive 2014/65/EU, however, only with reference to data of transactions concerning financial instruments that are traded on a trading venue and that must be disclosed in accordance with mandatory post-trade transparency requirements, or
  - (d) an electricity exchange as referred to in point (j) of paragraph 1 of Article 37 of Directive 2009/72/EC<sup>16</sup>, or
  - (e) a natural gas exchange as referred to in point (j) of paragraph 1 of Article 41 of Directive 2009/73/EC<sup>17</sup>, or
  - (f) an auction platform referred to in Article 26 or in Article 30 of Regulation (EU) No 1031/2010 of the European Parliament and of the Council;
- (ii) net asset values of the units of undertakings for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Directive 2009/65/EU.

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<sup>16</sup> OJ L 211 14.8.2009 p. 55.

<sup>17</sup> OJ L 9 14.8.2009 p. 112.

- (21) ‘critical benchmark’ means a benchmark, other than a regulated-data benchmark, whose cessation or provision on the basis of input data or a panel of contributors no longer representative of the market or economic reality the benchmark itself seeks to measure would have an adverse impact on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States, and included in the list referred to in Article 13;
- (22) ‘located’ means in relation to a legal person, the Member State or third country where that person’s registered office or other official address is situated and in relation to a natural person, the Member State or third country where that person is resident for tax purposes.
- (23) ‘public authority’ means:
- (a) any government or other public administration of the European Union, including the entities charged with or intervening in the management of the public debt;
  - (b) any entity or person, either performing public administrative functions under national law, or having public responsibilities or functions or providing public services, including measures of inflation, labour and economic activities, under the control of an entity falling within (a).

2. The Commission shall be empowered to:

- (i) adopt delegated acts in accordance with Article 37 in order to:
- specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index,
- (ii) adopt implementing acts in accordance with the examination procedure referred to in Article 38(2) in order to establish and review a list of public authorities in the Union falling within the definition under point (23) of paragraph 1.

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

#### *Article 4*

##### *Exclusion of some index providers*

1. This Regulation shall not apply to an index provider in respect of an index provided by him where that provider is unaware and could not reasonably have been aware that the index is used for the purposes referred to in point (2) of Article 3(1).
2. (deleted).

## TITLE II

### BENCHMARK INTEGRITY AND RELIABILITY

#### Chapter 1

##### Governance and Control of Administrators

#### *Article 5*

##### *Governance and conflicts of interest requirements*

1. The administrator shall have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent roles and responsibilities for all persons involved in the provision of a benchmark.

The administrator shall take all necessary steps to identify and to prevent or manage conflicts of interests between itself, including its managers, employees or any person directly or indirectly linked to it by control and the contributors or users and to ensure that, where any discretion or judgement in the benchmark process is required, it is independently and honestly exercised.



2. The provision of a benchmark shall be operationally separated from any part of the administrator's business that may create an actual or potential conflict of interest . If these conflicts cannot be managed, the benchmark operator shall cease any activities or relationships that create these conflicts or cease producing the benchmark.
3. The administrator shall publish, or disclose all existing or potential conflicts of interest to the contributors and users of the benchmark and the relevant competent authority, including conflicts of interest arising from the ownership or control of the administrator.
4. The administrator shall establish and operate adequate policies and procedures as well as effective organisational arrangements for the identification, disclosure, management or mitigation and avoidance of conflicts of interest in order to protect the integrity and independence of benchmark determinations. These should be reviewed regularly and updated. The policies and procedures should take into account and address the level of conflicts of interest, the degree of discretion exercised in the benchmark process and the risks that the benchmark poses, and shall ensure:
  - (a) the confidentiality of information contributed to or produced by the administrator, subject to the disclosure and transparency obligations under this Regulation; and
  - (b) shall specifically mitigate conflicts due to the administrator's ownership or control, or due to other interests in its group or as a result of other persons that may exercise influence or control over the administrator in relation to setting the benchmark.
5. The administrator shall ensure employees and any other natural persons whose services are placed at its disposal or under its control and who are directly involved in the provision of a benchmark:
  - (a) have the necessary skills, knowledge and experience for the duties assigned and are subject to effective management and supervision;
  - (b) are not subject to undue influence or conflicts of interest and that the compensation and performance evaluation of these persons do not create conflicts of interest or otherwise impinge on the integrity of the benchmark process;

- (c) their interests and business connections shall not compromise the administrator's functions;
  - (d) shall be prohibited from contributing to a benchmark determination by way of engaging in bids, offers and trades on a personal basis or on behalf of market participants, except where such way of contribution is explicitly required as part of the benchmark methodology and is subject to specific rules therein; and
  - (e) are subject to effective procedures to control the exchange of information with other employees, any other involved in activities that may create a risk of conflicts of interest or where that information may affect the benchmark.
6. The administrator shall establish specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, including at least internal sign-off by management before the dissemination of the benchmark.

#### *Article 5a*

##### *Oversight function requirements*

1. The administrator shall establish and maintain a permanent and effective oversight function to provide oversight of all aspects of the provision of its benchmarks.
2. The oversight function shall operate with integrity and shall have some, or all, of the following responsibilities, which shall be adjusted for the complexity, use and vulnerability of the benchmark:
  - (a) reviewing the benchmark's definition and methodology;
  - (b) overseeing any changes to the benchmark methodology and the consultation that the administrator shall undertake on such changes;

- (c) overseeing the administrator's control framework and the code of conduct and the management and operation of the benchmark;
  - (d) reviewing and approving procedures for cessation of the benchmark, including any consultation about a cessation;
  - (e) overseeing any third party involved in the benchmark provision, including calculation or dissemination agents;
  - (f) assessing internal and external audits or reviews, and monitoring the implementation of identified actions;
  - (g) monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;
  - (h) taking effective measures in respect of any breaches of the code of conduct; and
  - (i) reporting to the relevant competent authorities any misconduct by contributors or administrators of which the oversight function becomes aware, and any anomalous or suspicious input data.
3. ESMA shall develop draft regulatory technical standards to determine the characteristics that the oversight function shall have in terms of composition as well as of positioning within the organisational structure of the administrator, so as to ensure the integrity of the function and the absence of conflicts of interest.

ESMA shall distinguish for different types of benchmarks and sectors as set 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.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

## *Article 5b*

### *Control framework requirements*

1. The administrator shall have a control framework that ensures that the benchmark is provided and published or made available in accordance with this Regulation.
2. The control framework should be proportionate to the level of conflicts identified, the extent of discretion in the benchmark process and the nature of benchmark input data, and include:
  - (a) the management of operational risk;
  - (b) adequate and effective business continuity and disaster recovery plans.
  - (c) the contingency procedures that are in place in the event of a disruption to the benchmark provision process.
3. The administrator shall:
  - (a) establish measures to ensure that contributors comply with the code of conduct and the applicable standards for the input data.
  - (b) establish measures to monitor input data including, where feasible, monitoring the input data before publication of the benchmark and validation of input data after publication to identify errors and anomalies.
4. The control framework shall be documented, reviewed and updated as appropriate and, upon request, made available to users and the relevant competent authority.

*Article 5c*

*Accountability framework requirements*

1. The administrator shall have an accountability framework covering record keeping, auditing and review, and complaints process, that provides evidence of compliance with the requirements of this Regulation.
2. The administrator shall appoint an internal function, with the necessary capability to review and report on the administrator's adherence to the benchmark methodology and this Regulation.
3. For critical benchmarks, the administrator shall appoint an independent external auditor to review and report on the administrator's adherence to the benchmark methodology and this Regulation, at least annually.
4. Upon the request of the relevant competent authority or any user of the benchmark the administrator shall provide or publish details of the reviews in paragraph 2 or audits under paragraph 3.
5. ESMA shall develop draft regulatory technical standards to specify the process to deal with complaints in order to provide for adequate communication, management and timely resolution of complaints.

ESMA shall take into consideration the different types of benchmarks and sectors as set in this Regulation, the vulnerability of the benchmarks to manipulation and the importance of benchmarks to financial stability, markets and investors and the principle of proportionality, also in light of market and technological evolution and international developments.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

*Article 5d*

*Record keeping*

1. The administrator shall keep records of:
  - (a) all input data;
  - (b) the use of this input data to determine the benchmark and the methodology utilized;
  - (c) any exercise of judgment or discretion by the administrator and, where applicable, by assessors, in the benchmark determination, including the full reasoning for the judgement or discretion, records of the disregard of any input data, in particular where it conformed to the requirements of the benchmark methodology, and the rationale for its disregard;
  - (d) the identities of the submitters and of the natural persons employed by the administrators for determining the benchmarks;
  - (e) all documents relating to any complaint, including those submitted by the complainant as well as the administrator's records; and
  - (f) the recording of telephone conversations or electronic communications between any person employed by the administrator and the contributors or submitters in respect of the benchmark.
  
2. The administrator shall keep the records set out in paragraph 1 for at least five years in such a form that it is possible to replicate and fully understand the benchmark calculations and enable an audit or evaluation of the input data, calculations, judgements and discretion. Records of telephone conversation or electronic communications recorded in accordance with paragraph 1(f) shall be provided to the persons involved in the conversation or communication upon request and shall be kept for a period of three years.

*Article 6*  
*Outsourcing*

1. Administrators shall not outsource functions in the provision of a benchmark in such a way as to impair materially the administrator's control over the provision of the benchmark or the ability of the relevant competent authority to supervise the benchmark.
2. (deleted).
3. Where an administrator outsources functions or any relevant services and activities in the provision of a benchmark to any service provider, it shall remain fully responsible for discharging all of its obligations under this Regulation.
  - 3a. Where outsourcing takes place, the administrator shall ensure that the following conditions are satisfied:
    - (a) the service provider shall have the ability, capacity, and any authorisation required by law to perform the outsourced functions, services or activities reliably and professionally;
    - (b) the administrator shall take appropriate action if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;
    - (c) the administrator shall retain the necessary expertise to supervise the outsourced functions effectively and to manage the risks associated with the outsourcing;
    - (d) the service provider shall disclose to the administrator any development that may have a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;
    - (e) the service provider shall co-operate with the relevant competent authority in connection with the outsourced activities, and the administrator and the relevant competent authority shall have effective access to data related to the outsourced activities, as well as to the business premises of the service provider, and the relevant competent authority shall be able to exercise these rights of access;
    - (f) the administrator shall be able to terminate the arrangements where necessary.

Chapter 2  
Input data and methodology and reporting of infringement

*Article 7*  
*Input data*

1. 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. If transaction data is not sufficient 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 firm and executable bid and offer quotes, indicative bids and offers quotes and estimates, provided that such data is verifiable;

- (aa) the administrator shall establish 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, in compliance with point (a) of this paragraph and the methodology;
- (b) The administrator shall obtain the input data from a reliable and representative panel or sample of contributors so as to ensure that the resultant benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure;
- (c) The administrator shall use input data from contributors which adhere to the code of conduct referred to in Article 9, or obtain representative public available data.

2. The administrator shall ensure that the controls in respect of the input data include:

- (a) criteria that defines who may contribute input data to the administrator and a process for selecting the contributors;



- (b) a process for evaluating the contributor's input data, and stopping the contributor from providing further input data, or applying other penalties for non-compliance against the contributor, where appropriate; and
  - (c) a process for validating the input data, including against other indicators or data, to ensure its integrity and accuracy.
- 3. Where input data is contributed from front office function which means 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 can corroborate that input data;
  - (b) ensure that any contributors have adequate internal oversight and verification procedures.
- 4. Where the administrator considers that the input data does not represent a market subject to competitive supply and demand forces, it shall either change the input data, the contributors or the methodology to ensure that the input data represents a market subject to competitive supply and demand forces, or cease to provide that benchmark.
- 5. ESMA shall develop draft regulatory technical standards to further specify how to ensure the verifiability of the input data other than transaction data, as required under point (a) of paragraph 1, as well as the internal oversight and verification procedures of a contributor that the administrator shall seek for, in compliance with paragraph 3, in order to ensure the integrity and accuracy of input data.

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

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

*Article 7a*

*Robust and reliable methodology*

1. The administrator shall use a methodology for the determination of the benchmark that
  - a) is robust and reliable;
  - b) has clear rules identifying how and when discretion may be exercised in the determination of that benchmark;
  - c) is rigorous, continuous and capable of validation including, where appropriate, back-testing against available transaction data;
  - d) is resilient and ensure that the benchmark can be calculated in the widest set of possible circumstances, without compromising its integrity;
  - e) is traceable and verifiable.
2. When developing the benchmark methodology the benchmark administrator shall,
  - (a) take into account factors including the size and normal liquidity of the market, the transparency of trading and the positions of market participants, market concentration, market dynamics, and the adequacy of any sample to represent the market or the economic reality that the benchmark is intended to measure;
  - (b) determine what constitutes an active market for the purposes of that benchmark; and
  - (c) establish the priority given to different types of input data.
3. The administrator shall have in place clear published arrangements that identify those circumstances where the quantity or quality of input data falls below the standards necessary for the methodology to determine the benchmark accurately and reliably, and that describe whether and how the benchmark will be calculated in such circumstances.

*Article 7b*

*Transparency of methodology*

1. The administrator shall develop, operate and administer the benchmark data and methodology transparently. To this end, the administrator shall publish or make available, :
  - (i) the key elements of the methodology it uses for each of the benchmark produced and published or, when applicable, for each family of benchmarks produced and published,
  - (i-a) the procedure for internal review and approval of a given methodology, as well as the frequency of this review,
  - (iii) the procedures to consult on any proposed material change in its methodology and the rationale for such changes, including a definition of what constitutes a material change and when it will notify users of any changes.
2. The procedures required under paragraph 1 point (iii) shall:
  - (a) provide advance notice, with a clear timeframe, that gives the opportunity to analyse and comment on the impact of such proposed changes; and
  - (b) provide for comments, and the administrator's response to those comments, to be made accessible after any consultation, except where confidentiality has been requested.
3. ESMA shall develop draft regulatory technical standards to specify the information to be provided by an administrator in compliance with the requirements laid down in paragraph 1, distinguishing for different types of benchmarks and sectors as set in this Regulation. ESMA shall take into account the need to disclose those elements of the methodology that provide for sufficient detail to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts and the principle of proportionality.  
  
ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

## *Article 8*

### *Reporting of infringements*

1. The administrator shall ensure that there are adequate systems and effective controls to ensure the integrity of the input data for the purpose of paragraph 2.
2. The administrator shall monitor the input data and contributors in order to identify infringements of the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 and any conduct that may involve manipulation or attempted manipulation of the benchmark and notify the relevant competent authority in accordance with Article 16 (2) of the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 and provide all relevant information where it suspects that, in relation to the benchmark, there has been:
  - (a) a material infringement of the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014
  - (b) collusion to manipulate or to attempt to manipulate a benchmark.
3. An administrator shall have procedures for the managers, employees and any other natural persons whose services are placed at its disposal or under its control to report infringements of this Regulation internally.

Chapter 3  
Code of conduct and requirements for contributors

*Article 9*  
*Code of conduct*

1. The administrator shall develop a code of conduct for each benchmark clearly specifying the contributors' responsibilities with respect to the contribution of input data and shall ensure that the code of conduct complies with this Regulation and that all contributors adhere to the code of conduct. The administrator shall verify adherence to the code of conduct at least annually and in case of changes in it.
2. 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 the input data is provided in accordance with Articles 7 and 8;
  - (aa) who may contribute input data to the administrator and procedures to evaluate the identity of a contributor and any submitters and the authorisation of any submitters to contribute input data on behalf of a contributor;
  - (b) policies to ensure contributors provide all relevant input data; and
  - (c) the systems and controls that the contributor is required to establish, including:
    - procedures for submitting input data, including requirements for the contributor to specify whether the input data is transactions data and whether the input data conforms with the administrator's requirements;
    - policies on the use of discretion in providing input data;
    - any requirement for the validation of input data before it is provided to the administrator;
    - record keeping policies;
    - suspicious input data reporting requirements;
    - conflict management requirements.
- 2a. The administrator of benchmarks may develop a single code of conduct for each family of benchmarks it provides.

- 2b. In case the relevant competent authority , in the use of its powers referred to in Article 30, finds elements of the code of conduct which do not comply with the requirements of this Regulation, it shall inform the administrator. The administrator shall adjust the code of conduct to ensure that it complies with the requirements of this Regulation within 30 days of such a request.
- 2c. Within 15 working days from the date of application of the decision of including a critical benchmark in the list referred to in paragraph 1 of Article 13, the administrator of that critical benchmark shall notify the code of conduct to the relevant competent authority. The relevant competent authority shall verify within 30 days whether the content of the code of conduct complies with the requirements of this Regulation. In case the relevant competent authority finds elements which do not comply with the requirements of this Regulation, paragraph 2b shall apply.
3. ESMA shall develop draft regulatory technical standards to further specify the terms of the code of conduct in paragraph 2 for different types of benchmarks, and in order to take account of developments in benchmarks and financial markets.

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

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

*Article 10*  
*Regulated data*

(deleted).

*Article 11*  
*Governance and controls*

1. 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;
  - (b) The supervised contributor shall have a control framework that ensures the integrity, accuracy and reliability of the input data and that the input data is provided in accordance with the provisions of this Regulation and the code of conduct.
2. (deleted)
- 2a. A supervised contributor shall have 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 senior to the submitter;
  - (b) appropriate training for submitters, covering at least this Regulation and the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014;
  - (c) conflict management measures, including organisational separation of employees where appropriate and consideration of how to remove incentives to manipulate any benchmark created by remuneration policies;

- (d) the record keeping of communications in relation to provision of input data, all information used to enable the contributor to make each submission, all existing or potential conflict of interest including, but not limited to, the contributor's exposure to financial instruments which use the benchmark as a reference, for an appropriate period of time.
- 2b. Where input data relies on expert judgement, supervised contributors shall establish in addition to the systems and controls referred to in paragraph 2a policies guiding any use of judgment or exercise of discretion and retain records of the rationale for any such judgement or discretion, where proportionate taking into account the nature of the benchmark and input data.
3. A supervised contributor shall fully cooperate with the administrator and the relevant competent authority in the auditing and supervision of the provision of a benchmark and make available the information and records kept in accordance with paragraphs 2a and 2b.
4. ESMA shall develop draft regulatory technical standards to further specify the requirements concerning systems and controls set out in paragraphs 1, 2a and 2b for different types of benchmarks.

ESMA shall take into account the different characteristics of benchmarks and supervised contributors, notably in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors, and the developments in benchmarks and financial markets in light of international convergence of supervisory practices in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.



TITLE III  
REQUIREMENTS FOR DIFFERENT  
TYPES OF BENCHMARKS AND SECTORS

*Article 12a*

*Regulated-data benchmarks*

Articles 7(1)(b), 7(1)(c), 7(2), 7(3), 8(1), 8(2), 9 and 11 shall not apply to the provision of and the contribution to regulated-data benchmarks. Article 5d(1)(a) shall not apply to the provision of regulated-data benchmarks with reference to input data that are contributed entirely and directly as specified in Article 3(1)(20a).

*Article 12b*

*Interest rate benchmarks*

1. The specific requirements laid down in Annex I shall apply to the provision of and contribution to interest rate benchmarks in addition or in substitution to the requirements of the Title II.

*Article 13*

*Critical benchmarks*

1. The Commission shall adopt implementing acts in accordance with the examination procedure referred to in Article 38(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, in accordance with the definition laid down in Article 3(21), provided that one of the following conditions is verified:

- (i) the benchmark is based on submissions by contributors which are in majority supervised entities and is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or for the determination of the performance of investment funds, having a total value of at least 500 billion euro on the basis of all the range of maturities or tenors of the benchmark, where applicable;
- (ii) the benchmark is based on submissions by contributors which are in majority supervised entities located in one Member State and is recognized as being critical in this Member State in accordance with the procedure laid down in paragraphs 2a, 2b, 2c and 2g;
- (iii) The benchmark fulfils all the following criteria
  - i. The benchmark is based on submissions by contributors which are in majority supervised entities and is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for the determination of the performance of investment funds having a total value of at least 400 billion euro but not exceeding the value defined under Art13 (1) (i);
  - ii. The benchmark has no or very few appropriate market-led substitutes;
  - iii. In case 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 significant and adverse impacts on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member State.

2. *(deleted)*

2a. Where a competent authority of a Member State considers that an administrator under its supervision provides a benchmark that should be recognised as critical it may notify it to ESMA and transmit a documented assessment.

- 2b. The competent authority shall assess whether the cessation of the benchmark or its provision on the basis of input data or of a panel of contributors no longer representative of the underlying market or economic reality would have an adverse impact on markets integrity, or financial stability, or the financing of households and corporations in its Member State . The competent authority shall take into consideration in its assessment:
- the value of financial instruments and financial contracts that reference the benchmark within the Member State and its relevance in terms of the total value of financial instruments and of financial contracts outstanding in the Member State;
  - the value of financial instruments and financial contracts that reference the benchmark within the Member State and its relevance in terms of the gross national product of the Member State;
  - any other figure to assess on an objective ground the potential impact of the discontinuity or unreliability of the benchmark on markets integrity, or financial stability, or the financing of households and corporations of the Member State.

The competent authority shall review its assessment of the criticality of a benchmark provided in its Member State at least every two years, and shall notify and transmit the new assessment to ESMA.

- 2c. Within 6 weeks of receiving the notification referred to in paragraph 2a, ESMA shall issue an opinion on whether the assessment of the national competent authority complies with the provisions referred to in paragraph 2b and shall transmit this opinion to the Commission, together with the competent authority assessment.

2d. *(deleted)*

2e. *(deleted)*

2f. *(deleted)*

- 2g. The Commission, after receiving the opinion referred to in paragraph 2c , shall adopt implementing acts in accordance with paragraph 1. The Commission shall take into consideration whether, in case the relevant benchmark ceases to be provided or is provided on the basis of input data or a panel of contributors no longer fully representative of the underlying market or economic reality, there would be adverse impacts on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 in order to:
- specify how the market value of financial instruments other than derivatives , the notional value of derivatives and the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1;
  - review the thresholds, referred to in paragraph 1 at least every two years after the entry into application of this Regulation;
  - specify how the criteria referred to in paragraph 1(iii), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on markets integrity, or financial stability, or the financing of households and corporations in one or more Member States.

Where applicable, the Commission shall take into account relevant market or technological developments.

## *Article 14*

### *Mandatory contribution to critical benchmarks*

11. The administrator of one or more critical benchmarks shall submit every two years to its competent authority an assessment of the capability of each critical benchmark it provides to measure the underlying market or economic reality.
2. If one or more supervised contributors to a critical benchmark intend to cease contributing input data, they shall promptly notify in writing the benchmark administrator, which shall inform without delay its competent authority. Where the supervised contributor is located in another Member State, the competent authority of the administrator shall inform, without delay, the competent authority of that contributor. The benchmark administrator shall submit to its competent authority an assessment of the implications on the capability of the benchmark to measure the underlying market or economic reality as soon as possible but no more than 14 days after the aforementioned notification.
3. Upon receipt of an assessment of the benchmark administrator referred to in paragraphs 1 and 2 and on the basis of this assessment, the competent authority shall promptly inform ESMA and, where applicable, the college, and make its own assessment on the capability of the benchmark to measure the underlying market and economic reality.
- 3a. Since the competent authority has been notified the intention of contributors to leave the panel and until it has finished its assessment referred to in paragraph 3, it shall have the power to require the contributors which made the notification in accordance with paragraph 2 to continue contributing input data, without incurring an obligation on supervised entities to either trade or commit to trade, in any case for no more than 4 weeks and to require the administrator to continue publishing the benchmark.
4. In case the competent authority, after the period specified in the paragraph 3a and on the basis of its own assessment referred to in paragraph 3 considers that the representativeness of a critical benchmark is put at risk, it shall have the power to:
  - (a) require supervised entities selected in accordance with paragraph 5, including those which are not already contributors to the relevant critical benchmark, to contribute input data to the administrator in accordance with the methodology, code of conduct or other rules;

- (b) determine the form in which, and the time by which, any input data is to be contributed without incurring an obligation on supervised entities to either trade or commit to trade;
  - (c) change the code of conduct, methodology or other rules of the critical benchmark;
- 5. The supervised entities that are required to contribute in accordance with paragraph 4 shall be determined by the competent authority of the administrator, with the close cooperation of the competent authority of the supervised entities, on the basis of the size of the supervised entity's actual and potential participation in the market that the benchmark seeks to measure;
- 6. The competent authority of a supervised contributor that has been required to contribute to a benchmark through measures taken in accordance with points (a) and (b) of paragraph 4 shall cooperate with the competent authority of the administrator in the enforcement of such measures.
- 7. The competent authority of the administrator shall review annually the measures adopted under paragraph 4 . It shall revoke any of them if:
  - (a) judges that the contributors are likely to continue contributing input data for at least 1 year if the power were revoked which shall be evidenced by at least:
    - (1) a written commitment by the contributors to the administrator and the competent authority to continue contributing input data to the critical benchmark for at least one year if the mandatory contribution power were revoked;
    - (2) a written report by the administrator to the competent authority providing evidence for its assessment that the critical benchmark's continued viability can be assured once mandatory participation has been revoked.
  - (b) judges that an acceptable substitute benchmark is available and users of the critical benchmark can switch to this substitute at minimal costs which shall be evidenced by at least a written report by the administrator detailing the means of transition to a substitute benchmark and the ability and costs to users of transferring to this benchmark.

8. The administrator shall notify the relevant competent authority in the event that any contributors breach the requirements of paragraph 4 of this Article as soon as is technically possible.
9. In case a benchmark is critical in accordance with the procedure laid down in Article 13, paragraphs 2a, 2b and 2c, the competent authority of the administrator shall have the power to require input data in accordance with paragraph 3a and paragraph 4, points (a) and (b) only from supervised contributors located in its Member State.

#### *Article 14a*

##### *Commodity benchmarks*

1. The specific requirements laid down in Annex II shall apply in substitution of the requirements of the Title II, with the exception of Article 6, to the provision of and contribution to commodity benchmarks, unless the benchmark is a regulated-data benchmark or is based on submissions by contributors which are in majority supervised entities.
2. ESMA shall develop draft regulatory technical standards to specify or adjust the requirements laid down in Annex II, taking into account the opportunity to further distinguish the requirements for subsectors within the commodities sector, in light of market and technological evolution and international developments.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

TITLE IV  
TRANSPARENCY AND CONSUMER PROTECTION

*Article 15*  
*Benchmark statement*

1. Within 2 weeks of the inclusion in the register referred to in Article 25a, an administrator shall publish a benchmark statement, by means that ensure a fair and easy access, for each benchmark or, when applicable, for each family of benchmarks produced and published or endorsed in accordance with Article 21b, which:
  - (a) clearly and unambiguously defines the market or economic reality measured by the benchmark and the circumstances in which such measurement may become unreliable;
  - (b) ( deleted)
  - (c) lays down technical specifications that clearly and unambiguously identify the elements of the calculation in relation to which discretion may be exercised, the criteria applicable to the exercise of such discretion and the persons by whom discretion is exercised, and how such discretion may be subsequently evaluated;
  - (d) provides notice of the possibility that factors, including external factors beyond the control of the administrator, may necessitate changes to, or the cessation, of the benchmark; and
  - (e) advises that any financial contracts or investment funds or other financial instruments that reference the benchmark should be able to withstand, or otherwise address the possibility of changes to, or cessation of, the benchmark.
2. At minimum the benchmark statement shall contain:
  - (a) the definitions for all key terms in relation to the benchmark;
  - (b) the rationale for adopting a methodology and procedures for the review and approval of the methodology;



- (c) the criteria and procedures used to determine the benchmark, including a description of the input data, the priority given to different types of input data, the use of any models or methods of extrapolation and any procedure for rebalancing the constituents of a benchmark's index;
  - (d) the controls and rules that govern any exercise of discretion or judgement by the administrator or any contributors, to ensure consistency in the use of such discretion or judgment;
  - (e) the procedures which govern benchmark determination in periods of stress, or periods where transaction-data sources may be insufficient, inaccurate or unreliable and the potential limitations of the benchmark in such periods; and
  - (f) the procedures for dealing with errors in input data, or the benchmark determination, including when a re-determination of the benchmark will be required.
3. ESMA shall develop draft regulatory technical standards to further specify the contents of the benchmark statement and the cases in which an update of such statement is required, distinguishing for different types of benchmarks and sectors as set in this Regulation and taking into account the principle of proportionality.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

#### *Article 16*

#### *Transparency of input data*

(deleted).

*Article 17*  
*Cessation of a benchmark*

1. An administrator shall publish, along with the benchmark statement pursuant to Article 15, a procedure concerning the actions to be taken by the administrator in the event of changes to or the cessation of a benchmark or of the endorsement of a benchmark pursuant to Article 21b. The procedure may be drafted, when applicable, for families of benchmarks and shall be updated and published whenever a change to its essential elements renders such an update necessary.
  
2. Supervised entities, other than an administrator, that use a benchmark as specified in point (5) of Article 3 shall produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be produced. Where feasible and appropriate, such plans shall nominate one or several alternative benchmarks that might be referenced, provided the administrator of such alternative benchmark consents, to substitute the benchmarks no longer produced, indicating the reasons why such alternative benchmark would nevertheless be less suitable than the benchmark referenced originally. The supervised entities shall provide the relevant competent authority with these plans and inherent updates on request and shall fully reflect them in the contractual relationship with clients.

*Article 18*  
*Assessment of suitability*

(deleted).

## TITLE V

### USE OF BENCHMARKS IN THE UNION

#### *Article 19*

##### *Use of robust benchmarks*

1. A supervised entity may use a benchmark or a combination of benchmarks in the Union as specified in point (5) of paragraph 1 of Article 3 if these are provided by administrators authorised or registered in accordance with Article 23 or administrators located in third countries under the conditions laid down in Article 20 or Article 21a or Article 21b.
2. Where the object of a prospectus to be published under Directive 2003/71/EC or Directive 2009/65/EC is transferable securities or other investment products in the meaning of the referred legislations that reference a benchmark, the issuer, offeror, or person asking for admission to trading on a regulated market shall ensure that the prospectus also includes clear and prominent information stating whether this benchmark is provided by an administrator registered under Article 25a of this Regulation or is registered under Article 25a as an endorsed benchmark. Such a statement shall not in anyway impair the clear representation of the risks stemming from the referencing to the benchmark.

#### *Article 20*

##### *Equivalence decision*

1. Benchmarks provided by an administrator located in a third country may be used by supervised entities in the Union provided that the following conditions are complied with:
  - (a) the Commission has adopted an equivalence decision in accordance with paragraph 2;
  - (b) the administrator is authorised or registered in, and is subject to supervision in that third country;
  - (c) the competent authority responsible for the supervision of the administrator in the third country has notified ESMA of the consent of the administrator that its actual or prospective benchmarks may be used by supervised entities in the Union and the list of the benchmarks which may be used in the Union ;

- (d) the administrator is duly registered under Article 25a; and
- (e) the cooperation arrangements referred to in paragraph 3 of this Article are operational.

2. The Commission may adopt a decision stating that the legal framework and supervisory practice of a third country ensures that:

- (a) administrators authorised or registered in that third country comply with binding requirements which are equivalent to the requirements resulting from this Regulation, in particular taking into account if the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles on financial benchmarks published on 17 July 2013; and
- (b) the binding requirements are subject to effective supervision and enforcement on an on-going basis in that third country.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 38(2).

3. ESMA shall establish cooperation arrangements with the competent authorities of third countries whose legal framework and supervisory practice have been recognised as equivalent in accordance with paragraph 2. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the administrator authorised in that third country that is requested by ESMA;
- (b) the mechanism for prompt notification to ESMA where a third country competent authority deems that the administrator authorised in that third country that it is supervising is in breach of the conditions of its authorisation or other national legislation;
- (c) the procedures concerning the coordination of supervisory activities including on-site inspections.

4. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 3 so as to ensure that the competent authorities and ESMA are able to exercise all their supervisory powers under this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

#### *Article 21*

##### *Withdrawal of registration of an administrator located in a third country*

1. ESMA shall withdraw the registration of an administrator referred to in point (d) of paragraph 1 of Article 20 when:
  - (a) ESMA has well-founded reasons, based on documented evidence, to consider that the administrator is acting in a manner which is clearly prejudicial to the interests of users of its benchmarks or the orderly functioning of markets; or
  - (b) ESMA has well-founded reasons, based on documented evidence, to consider that the administrator has seriously infringed the national legislation or other provisions applicable to it in the third country and on the basis of which the Commission has adopted the decision in accordance with Article 20(2).
2. ESMA shall take a decision under paragraph 1 only if the following conditions are fulfilled:
  - (a) ESMA has referred the matter to the competent authority of the third country and that competent authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union, or has failed to demonstrate that the administrator concerned complies with the requirements applicable to it in the third country;

- (b) ESMA has informed the competent authority of the third country of its intention to withdraw the recognition of the administrator, at least 30 days before the withdrawal.
3. ESMA shall inform the other competent authorities of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.

### *Article 21a*

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

1. Until such time as an equivalence decision in accordance with Article 20(2) is adopted, benchmarks 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.
2. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall comply with all the requirements established in this Regulation except for Articles 7(4), 11, 13 and 14.

If and to extent that the administrator is able to demonstrate that a benchmark it provides is a regulated-data benchmark or a commodity benchmark that is not based on submissions by contributors which are in majority supervised entities, there shall be no obligation on the administrator to comply with the requirements not applicable to the provision of regulated-data benchmarks and of commodity benchmarks as provided for in Articles 12a and 14a respectively.

3. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall have a legal representative established in its Member State of reference. The legal representative shall be a natural person domiciled in the Union or a legal person with its registered office in the Union, and which, expressly designated by the administrator located in a third country, acts on behalf of such administrator vis-à-vis the authorities and any other person in the Union with regard to the administrator's obligations under this Regulation. The legal representative shall perform the oversight function relating to the provision activity performed by the administrator under this Regulation together with the administrator.

4. The Member State of reference of an administrator located in a third country shall be determined as follows:
- (a) if one or more benchmarks provided by the administrator are used as a reference for financial instruments admitted to trading in a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU in one or more Member States, the Member State of reference shall be the Member State where the financial instrument was admitted to trading or traded on a trading venue for the first time and is still traded. If the relevant financial instruments were admitted to trading or traded for the first time simultaneously on trading venues in different Member States, and are still traded: the Member State of reference will be the most relevant market in terms of liquidity, as determined in accordance with the [implementing text] of Article 26(9)(b) of Regulation (EU) 600/2014;
  - (b) if none of the administrator's benchmark is referenced in a financial instrument referred to under point (a) and if one or more benchmarks provided by the administrator are used by a supervised entity in more than one Member State, the Member State of reference shall be the Member State where the highest number of such supervised entities are located;
  - (c) if the conditions under points (a) and (b) do not apply, and if the administrator entered into an agreement to consent the use of a benchmark it provides with a supervised entity, the Member State of reference shall be the Member State where this supervised entity is located.
5. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with the competent authority of its Member State of reference. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 and shall indicate the list of its actual or prospective benchmarks which may be used in the Union and the competent authority responsible for its supervision in the third country.

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

If the competent authority considers that this is not the case, it shall refuse the recognition request explaining the reasons for the refusal.

Without prejudice to the third subparagraph, no recognition shall be granted unless the following additional conditions are met:

- (i) an appropriate cooperation arrangement is in place between the competent authority of the Member State of reference and the third country authority of the administrator, in compliance with the regulatory technical standards adopted pursuant to paragraph 4 of Article 20, in order to ensure at least an efficient exchange of information that allows the competent authority to carry out its duties in accordance with this Regulation;
- (ii) the effective exercise by the competent authority of its supervisory functions under this Regulation is neither prevented by the laws, regulations or administrative provisions of the third country of location of the administrator, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authority.

6. In case the competent authority of the Member State of reference considers that the administrator located in a third country may be exempted from compliance with the requirements not applicable to the provision of regulated-data benchmarks or commodity benchmarks that are not based on submissions by contributors which are in majority supervised entities, as provided for in Article 12a and 14a respectively, it shall, without undue delay, notify ESMA thereof. It shall support this assessment by the information provided by the administrator in the application for the recognition.

Within 1 month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the competent authority about the application of the exemption for compliance with the requirements not applicable to the provision of regulated-data benchmarks or commodity benchmarks that are not based on submissions by contributors which are in majority supervised entities, as provided for in Articles 12a and 14a. The advice may, in particular, address whether the conditions for such exemption appear to be fulfilled based on the information provided by the administrator in the application for recognition.



The term referred to in paragraph 5 shall be suspended until ESMA issued the advice in accordance with this paragraph.

If the competent authority of the Member State of reference proposes to grant recognition contrary to ESMA's advice referred to in the second subparagraph it shall inform ESMA, stating its reasons. ESMA shall publish the fact that the competent authority does not comply or intend to comply with that advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that advice. The competent authority concerned shall receive advance notice of such publication.

7. The competent authority shall notify ESMA of any decision to recognise an administrator located in a third country within 5 working days, along with the list of the benchmarks provided by the administrator which may be used in the Union and the competent authority responsible for its supervision in the third country.
8. The competent authority of the Member State of reference shall withdraw the recognition granted in accordance with paragraph 5 if it has well-founded reasons, based on documented evidence, to consider that the administrator is acting in a manner which is clearly prejudicial to the interests users of its benchmarks or the orderly functioning of markets or the administrator has seriously infringed the relevant requirements within this Regulation, or that the administrator made false statements or used any other irregular means to obtain the recognition.
9. In order to ensure uniform conditions of application of this Article, ESMA may develop draft regulatory technical standards to determine the form and content of the application referred to in paragraph 5 and, in particular, the presentation of the information required in paragraph 6.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

## *Article 21b*

### *Endorsement by an administrator located in the Union of benchmarks provided in a third country*

1. An administrator located in the Union and authorised or registered in accordance with Article 23 may apply to its competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, for a period of five years after the entry into application of this Regulation, provided that the following conditions are met:
  - (a) the provision of the benchmark or family of benchmarks to be endorsed is partially undertaken by the endorsing administrator or by an index provider belonging to the same group;
  - (b) the endorsing administrator 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 fulfills requirements which are at least as stringent as the requirements set out in this Regulation;
  - (c) the endorsing administrator has the necessary expertise to monitor the provision activities performed in a third country effectively and to manage the risks associated;
  - (d) there is an objective reason to provide the benchmark or family of benchmarks in a third country and endorse them for their use in the Union.
2. The applicant administrator shall provide all information necessary to satisfy the competent authority that, at the time of application, all the conditions referred to in paragraph 1 are fulfilled.
3. Within 90 working days of receipt of the application referred to in previous paragraphs, the relevant competent authority shall examine the application for an endorsement and adopt a decision to authorise or refuse it. A benchmark or a family of benchmarks endorsed shall be notified by the competent authority to ESMA.

4. A benchmark or family of benchmarks endorsed shall be considered to be a benchmark or family of benchmarks provided by the endorsing administrator. The endorsing administrator shall not use the endorsement with the intention of avoiding the requirements of this Regulation.
5. The administrator that has endorsed a benchmark or family of benchmarks provided in a third country shall remain fully responsible for such a benchmark or family of benchmarks and for the fulfillment of conditions set out therein.
6. Whenever the competent authority of the endorsing administrator has well-founded reasons to consider that the conditions laid down under paragraph 1 are no longer fulfilled it shall have the power to require the endorsing administrator to cease the endorsement and shall inform ESMA. Article 17 shall apply in case of cessation of the endorsement.
- 6a. At the end of the five year period referred to in paragraph 1, the use of the third country benchmarks for which there has been an endorsement shall be permitted under the conditions specified in paragraph 5 of Article 39, unless an equivalence decision has been taken by the Commission in accordance with Article 20(2), concerning the legal and supervisory framework of the third country where the administrator is located.
7. *(deleted)*
8. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark seeks to measure, the need for proximity of the benchmark provision with such a market or economic reality, the need for proximity of the benchmark provision to contributors, the material availability of input data due to different time zones, specific skills required in the benchmark provision.

TITLE VI  
AUTHORISATION, REGISTRATION AND SUPERVISION OF  
ADMINISTRATORS

Chapter 1  
Authorisation and registration

*Article 22*  
*Requirement for authorisation*

(deleted).

*Article 23*  
*Authorisation or registration of an administrator*

1. A natural or legal person located in the Union that intends to act as an administrator shall apply to the competent authority designated under Article 29 of this Regulation for the Member State in which this person is located, in order to receive:
  - (i) an authorisation if it provides indices which are used or intended to be used in the meaning of this Regulation,
  - (ii) a registration if it is a supervised entity, other than an administrator, that provides indices which are used or intended to be used in 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 is a critical benchmark in the meaning of this Regulation.
- 1a. An authorised or registered administrator shall comply at all times with the conditions laid down in this Regulation and shall notify the competent authority of any material changes thereof.

2. The application in accordance with paragraph 1 shall be made within 30 working days of any agreement entered into by a supervised entity to use an index provided by the person or supervised entity referred to under paragraph 1 as a reference to a financial instrument or financial contract or to measure the performance of an investment fund.
3. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation.
4. Within 15 working days of receipt of the application, the relevant competent authority shall assess whether the application is complete and shall notify the applicant accordingly. If the application is incomplete, then the applicant shall submit the additional information required by the relevant competent authority.
5. The relevant competent authority shall:
  - (i) examine the application for an authorisation and adopt a decision to authorise or refuse it within 4 months of receipt of a complete application;
  - (ii) adopt the decision to register or refuse registration of the applicant within 45 working days of receipt of a complete application for registration.

Within 5 working days of the adoption of a decision whether to authorise or refuse authorisation or of the registration, the competent authority shall notify it to the applicant administrator concerned. Where the competent authority refuses to authorise or to register the applicant administrator, it shall give reasons for its decision.

6. The competent authority shall notify ESMA of any decision to authorise and of any registration of an applicant administrator within 5 working days.
7. ESMA shall develop draft regulatory technical standards to further specify information to be provided in the application for authorisation and in the application for registration, taking into account the principle of proportionality the nature of the supervised entities seeking for registration under paragraph 1(iii) and the costs to the applicants and competent authorities.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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.

#### *Article 24*

##### *Withdrawal or suspension of authorisation or registration*

1. The competent authority may withdraw or suspend the authorisation or registration of an administrator where the administrator:
  - (a) expressly renounces the authorisation or registration or has provided no benchmarks for the preceding twelve months;
  - (b) has obtained the authorisation or registration, or has endorsed a benchmark in accordance with Article 21b by making false statements or by any other irregular means;
  - (c) no longer meets the conditions under which it was authorised or registered; or
  - (d) has seriously or repeatedly infringed the provisions of this Regulation.
2. The competent authority shall notify ESMA of its decision within 5 working days.
3. Following the adoption of a decision to suspend the authorisation or registration of an administrator, where ceasing the benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark, in the meaning specified by the Commission with delegated acts pursuant to Article 39(6), the provision of the benchmark may be permitted by the relevant competent authority of the Member State where the administrator is located until the decision of suspension has not been withdrawn. During this period of time the use of such benchmark by supervised entities shall be permitted only for financial instruments and contracts that already referenced them.
4. Following the adoption of a decision to withdraw the authorisation or registration of an administrator, Article 17 paragraph 2 shall apply.

*Article 25*

*Notification to ESMA of use of an index in a financial instrument*

(deleted)

*Article 25a*

*Administrators register*

1. ESMA shall establish and maintain a public register that contains the following information:
  - (i) the identities of the administrators authorised or registered under the provisions of Article 23 and the competent authority responsible for the supervision;
  - (ii) the identities of the administrators that have notified ESMA of their consent referred to in Article 20(1)(c) and the third-country competent authority responsible for the supervision;
  - (ii-a) the identities of the administrators that acquired recognition in accordance with Article 21a and the third-country competent authority responsible for the supervision;
  - (iii) the benchmarks that are endorsed in accordance with the procedure laid down in Article 21b and the identities of the endorsing administrators.
2. The register shall be updated within 7 working days of ESMA receiving the notifications referred to in Articles 20(1)(c), 21a(7), 21b(3), 21b(6), 23(6) and 24(2), or after the adoption of any measure referred to in Article 21(1), and shall be publicly accessible on the website of ESMA.

## Chapter 2

### Supervisory cooperation

#### *Article 26*

##### *Delegation of tasks between competent authorities*

1. In accordance with Article 28 of Regulation (EU) No 1095/2010 a competent authority may delegate its tasks under this Regulation to the competent authority of another Member State. Delegation of tasks shall not affect the responsibility of the delegating competent authority and the competent authorities shall notify ESMA of any proposed delegation 60 days prior to such delegation taking effect.
2. A competent authority may delegate some of its tasks under this Regulation to ESMA subject to the agreement of ESMA. Delegation of tasks shall not affect the responsibility of the delegating competent authority.
3. ESMA shall notify the Member States of a proposed delegation within seven days. ESMA shall publish details of any agreed delegation within five working days of notification.

#### *Article 27*

##### *Disclosure of information from another Member State*

1. The competent authority may disclose information received from another competent authority only if:
  - (a) it has obtained the written agreement of that competent authority and the information is disclosed only for the purposes for which that competent authority gave its agreement; or
  - (b) where such disclosure is necessary for legal proceedings.



## *Article 28*

### *Cooperation in case of a request with regard to on-site inspections or investigations*

1. The relevant competent authority may request the assistance of another competent authority with regard to on-site inspections or investigations.
2. The competent authority making the request referred to in paragraph 1 shall inform ESMA thereof. In the event of an investigation or inspection with cross-border effect, the competent authorities may request ESMA to coordinate the on-site inspection or investigation.
3. Where a competent authority receives a request from another competent authority to carry out an on-site inspection or an investigation, it may:
  - (a) carry out the on-site inspection or investigation itself;
  - (b) allow the competent authority which submitted the request to participate in an on-site inspection or investigation;
  - (c) appoint auditors or experts to carry out the on-site inspection or investigation.

## Chapter 3

### Role of Competent Authorities

## *Article 29*

### *Competent authorities*

1. For administrators and supervised entities, each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation and shall inform the Commission and ESMA thereof.
2. Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for coordinating cooperation and the exchange of information with the Commission, ESMA and other Member States' competent authorities.

3. ESMA shall publish on its website a list of the competent authorities designated in accordance with paragraph 1.

*Article 30*

*Powers of competent authorities*

1. In order to fulfil their duties under this Regulation, competent authorities shall have in conformity with national law, at least the following supervisory and investigatory powers:
  - (a) have access to any document and other data in any form, and to receive or take a copy thereof;
  - (b) require or demand information from any person involved in the activity of provision of and contribution to a benchmark, including any service provider pursuant to Article 6, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;
  - (c) in relation to commodity benchmarks, request information from contributors on related spot markets according, where applicable, to standardised formats and reports on transactions, and have direct access to traders' systems;
  - (d) carry out on-site inspections or investigations, at sites other than the private residences of natural persons;
  - (e) enter premises of legal persons in order to seize documents and other data in any form, where a reasonable suspicion exists that documents and other data related to the subject-matter of the inspection or investigation may be relevant to prove a breach of this Regulation. Where prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, such power shall only be used after having obtained that prior authorisation;
  - (f) require existing recordings of telephone conversations, electronic communications or other data traffic records held by supervised entities;
  - (g) request the freezing or sequestration of assets or both;
  - (h) (deleted)

- (i) require temporary cessation of any practice that the competent authority considers contrary to this Regulation;
- (j) impose a temporary prohibition on the exercise of professional activity;
- (k) take all necessary measures to ensure that the public is correctly informed about the provision of a benchmark, including by requiring an administrator under whose responsibility the publication or dissemination of the benchmark has been done to have a corrective statement about past contributions to or figures of the benchmark published.

2. The competent authorities shall exercise their functions and powers, referred to in paragraph 1, and the powers to impose sanctions referred to in Article 31, in accordance with their national legal frameworks in any of the following ways:

- (a) directly;
- (b) in collaboration with other authorities or with market undertakings;
- (c) under their responsibility by delegation to such authorities or to market undertakings;
- (d) by application to the competent judicial authorities.

For the exercise of those powers, competent authorities shall have in place adequate and effective safeguards in regard to the right of defence and fundamental rights.

3. Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties.

4. An administrator or any other supervised entity shall not be considered in breach of any restriction on disclosure of information posed by a contract or by any legislative, regulatory or administrative provision when making information available in accordance with paragraph 1.

### *Article 31*

#### *Administrative measures and sanctions*

1. Without prejudice to the supervisory powers of competent authorities in accordance with Article 30, Member States shall, in conformity with national law, provide for competent authorities to have the power to take appropriate administrative measures and impose administrative measures and sanctions at least for:
  - (a) the infringements of Articles 5, 5a, 5b, 5c, 5d, 6, 7, 7a, 7b, 8, 9, 11, 12a(2), 14, 15, 17, 18, 19 and 23 of this Regulation; and
  - (b) failure to cooperate or comply in an investigation or with an inspection or request covered by Article 30.
2. In case of an infringement referred to in paragraph 1, Member States shall, in conformity with national law, confer on competent authorities the power to apply at least the following administrative measures and sanctions:
  - (a) an order requiring the administrator or supervised entity responsible for the infringement to cease the conduct and to desist from repeating that conduct;
  - (b) the disgorgement of the profits gained or losses avoided because of the infringement where those can be determined;
  - (c) a public warning which indicates the administrator or supervised entity responsible and the nature of the infringement;
  - (d) withdrawal or suspension of the authorisation of an administrator;
  - (e) a temporary ban prohibiting any natural person, who is held responsible for such infringement, from exercising management functions in administrators or supervised contributors;

- (f) the imposition of maximum administrative pecuniary sanctions of at least twice the amount of the profits gained or losses avoided because of the infringement where those can be determined; or
- (1) in respect of a natural person maximum administrative pecuniary sanctions of at least:
- (i) for infringements of Articles 5, 5a, 5b, 5c, 5d, 6, 7, 7a, 7b, 8, 9, 11, 12a(2), 14, 15, 17, 18, 19 and 23, EUR 500,000 or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of entry to force of this Regulation; or
  - (ii) for infringements of point (b) of Articles 7(1) or of Article 7(4) EUR 100,000 or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of entry to force of this Regulation;
- (2) in respect of a legal person up to maximum administrative pecuniary sanctions of at least:
- (i) for infringements of Articles 5, 5a, 5b, 5c, 5d, 6, 7, 7a, 7b, 8, 9, 11, 12a(2), 14, 15, 17, 18, 19 and 23, whichever is the higher of EUR 1,000,000 or 10 % of its total annual turnover according to the last available accounts approved by the management body. Where the legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts according to Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant accounting directives - Directive 86/635/EC for banks and Directive 91/674/EC for insurance companies - according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking or if the person is an association, 10% of the aggregate turnovers of its members; or

(ii) for infringements of point (b) of Article 7(1) or of Article 7(4), whichever is the higher of EUR250,000 or 2 % of its total annual turnover according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts according to Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant accounting directives - Directive 86/635/EC for banks and Directive 91/674/EC for insurance companies - according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking or if the person is an association, 10% of the aggregate turnovers of its members.

3. By 12 months after entry into force of this Regulation Member States shall notify the rules regarding paragraphs 1 and 2 to the Commission and ESMA.

Member States may decide not to lay down rules for administrative sanctions for infringements which are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission and ESMA also the relevant criminal law provisions along with the notification referred to in the first subparagraph.

They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

4. Member States may provide competent authorities under national law to have other sanctioning powers in addition to those referred to in paragraph 1 and may provide for higher levels of sanctions than those established in that paragraph.

### *Article 32*

#### *Exercise of supervisory and sanctioning powers*

1. Member States shall ensure that, when determining the type and level of administrative sanctions, competent authorities take into account all relevant circumstances, including where appropriate:

- (a) the gravity and duration of the infringement;
- (b) the degree of responsibility of the responsible person;
- (c) the financial strength of the responsible person, as indicated, in particular, by the total annual turnover of the responsible legal person or the annual income of the responsible natural person;
- (d) the level of the profits gained or losses avoided by the responsible person, insofar as they can be determined;
- (e) the level of cooperation of the responsible person with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;
- (f) previous infringements by the person concerned;
- (g) measures taken, after the infringement, by a responsible person to prevent the repetition of the infringement.

2. In the exercise of their sanctioning powers under circumstances defined in Article 31 competent authorities shall cooperate closely to ensure that the supervisory and investigative powers and administrative sanctions produce the desired results of this Regulation. They shall also coordinate their action in order to avoid possible duplication and overlap when applying supervisory and investigative powers and administrative sanctions and fines to cross border cases.

#### *Article 32a*

##### *Obligation to cooperate*

1. Where Member States have chosen, in accordance with Article 31, to lay down criminal sanctions for infringements of the provisions referred to in that Article, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information relating to criminal investigations or proceedings commenced for possible infringements of this Regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation.

2. Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of fines.

In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate a single competent authority as a contact point for the purposes of this Regulation. Member States shall communicate to the Commission, ESMA and to the other Member States the names of the authorities which are designated to receive requests for exchange of information or cooperation pursuant to this paragraph. ESMA shall publish and keep up-to-date a list of those authorities on its website.

### *Article 33*

#### *Publication of decisions*

1. A decision imposing an administrative sanction or measure for infringement of this Regulation shall be published by competent authorities on their official website immediately after the person sanctioned is informed of that decision. The publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible. This obligation does not apply to decisions imposing measures that are of an investigatory nature.
2. Where the publication of the identity of the legal persons or personal data of natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an on-going investigation, competent authorities shall either:
  - (a) delay the publication of the decision to impose a sanction or a measure until the moment where the reasons for non-publication cease to exist;



- (b) publish the decision to impose a sanction or a measure on an anonymous basis in a manner which is in conformity with national law, if such anonymous publication ensures an effective protection of the personal data concerned; In the case of a decision to publish a sanction or measure on an anonymous basis the publication of the relevant data may be postponed for a reasonable period of time if it is foreseen that within that period the reasons for anonymous publication shall cease to exist;
  - (c) not publish the decision to impose a sanction or measure at all in the event that the options set out in (a) and (b) above are considered insufficient to ensure:
    - (1) that the stability of financial markets would not be put in jeopardy; or
    - (2) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.
3. Where the decision to impose a sanction or measure is subject to an appeal before the relevant judicial or other authorities, competent authorities shall also publish, immediately, on their official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.
4. Competent authorities shall ensure that any publication, in accordance with this Article, shall remain on their official website for a period of at least five years after its publication. Personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.
5. Member States shall provide ESMA annually with aggregated information regarding all sanctions and measures imposed pursuant to Article 31. That obligation does not apply to measures of an investigatory nature. ESMA shall publish that information in an annual report.

Where Member States have chosen, in accordance with Article 31, to lay down criminal sanctions for infringements of the provisions referred to in that Article, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish data on criminal sanctions imposed in an annual report.

## *Article 34*

### *Colleges of competent authorities*

1. Within 30 working days from the inclusion of a benchmark referred to in Article 13(1), points (i) and (iii) , in the list of critical benchmarks, the competent authority shall establish a college of competent authorities.
2. The college shall comprise the competent authority of the administrator, ESMA, and the competent authorities of supervised contributors.
3. Competent authorities of other Member States shall have the right to be member of the college where, if that critical benchmark were to cease to be provided, it would have a significant adverse impact on the financial stability, or the orderly functioning of markets, or consumers, or the real economy of those Member States .

Where a competent authority intends to become a member of a college pursuant to the first subparagraph, it shall submit a request to the competent authority of the administrator containing evidence that the requirements of that provision are fulfilled. The relevant competent authority of the administrator shall consider the request and notify the requesting authority within 20 working days of receipt of the request whether or not it considers those requirements to be fulfilled. Where it considers those requirements not to be fulfilled, the requesting authority may refer the matter to ESMA in accordance with paragraph 10.

4. ESMA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of colleges of supervisors referred to in this Article in accordance with Article 21 of Regulation (EU) No 1095/2010. To that end, ESMA shall participate as appropriate and shall be considered to be a competent authority for that purpose.
5. The competent authority of the administrator shall chair the meetings of the college, coordinate the actions of the college and ensure efficient exchange of information among members of the college.

Where the administrator provides more than one critical benchmark, the competent authority of the administrator may establish a single college in respect of all the benchmarks provided by that administrator.

6. The competent authority of the administrator shall establish written arrangements within the framework of the college regarding the following matters:
- (a) information to be exchanged between competent authorities;
  - (b) the decision-making process, including detailed rules on voting procedures, between the competent authorities and the timeframe within which each decision has to be taken;
  - (c) cases in which the competent authorities must consult each other;
  - (d) the cooperation to be provided under Article 14(5) and 14(6) .
7. The competent authority of the administrator shall give due consideration to any advice provided by ESMA concerning the written coordination arrangements before agreeing their final text. The written coordination arrangements shall be set out in a single document containing full reasons for any significant deviation from the advice of ESMA. The competent authority of the administrator shall transmit the written coordination arrangements to the members of the college and to ESMA.
8. Before taking any measures referred to in Articles 14 (4), 14(5), 14(7), 14(8), 23, 24 and 31, the competent authority of the administrator shall consult the members of the college. The members of the college shall do everything reasonable within their power to reach an agreement within the timeframe specified in the written arrangements referred to in paragraph 6.

Any decision of the competent authority of the administrator to take such measures shall take account of the impact on the other competent authorities and their respective Member States, in particular the potential impact on the stability of the financial system in any other Member States concerned.

With particular regard to the decision to withdraw the authorisation or registration of an administrator in accordance with Article 24, whenever the cessation of a benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark in the Union, in the meaning specified by the Commission with delegated acts pursuant to Article 39(6), the competent authorities within the college shall agree any possible initiative to avoid the effects referred to in this paragraph, including:

- (i) the appointment of a substitute administrator,
- (ii) the change of the code of conduct, the methodology or other rules of the benchmark,
- (iii) a transitional period, during which the procedures envisaged under paragraph 2 of Article 17 shall apply.

9. In the absence of agreement between the members of the college, competent authorities other than ESMA may refer to ESMA any of the following situations:
- (a) where a competent authority has not communicated essential information;
  - (b) where, following a request made under paragraph 3, the competent authority of the administrator has notified the requesting authority that the requirements of that paragraph are not fulfilled or where it has not acted upon such request within a reasonable time;
  - (c) where the competent authorities have failed to agree the matters set out in paragraph 6;
  - (d) where there is a disagreement with the measure to be taken in accordance with Articles 23 and 31;
  - (e) where there is a disagreement with the measure to be taken in accordance with points (a) and (b) of paragraph 4 of Article 14;
  - (f) where there is a disagreement with the measure to be taken in accordance with points (i), (ii) and (iii) of paragraph 8 of this Article.
10. In the situations referred to under points (a), (b), (c), (d) and (f) of paragraph 9, where 30 days after referral to ESMA the issue is not settled, the competent authority of the administrator shall take the final decision and provide a detailed explanation of its decision in writing to the authorities referred to in the first subparagraph and to ESMA.
- The term referred to in point (i) of paragraph 5 of Article 23 shall be suspended until such time as the members of the college reach an agreement in accordance with the first subparagraph.

Where ESMA considers that the competent authority of the administrator has taken any measures referred to in paragraph 8 which may not be in conformity with Union law it shall act in accordance with Article 17 of Regulation (EU) No 1095/2010.

11. In the situations referred to under point (e) of paragraph 9, without prejudice to Article 258 TFEU, ESMA may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

In this case, to maintain the sustainability and integrity of the benchmark, mandatory contribution shall continue without incurring an obligation on supervised entities to either trade or commit to trade until ESMA has published its decision.

### *Article 35*

#### *Cooperation with ESMA*

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

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission by [XXXX].

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation 1095/2010.

*Article 36*  
*Professional secrecy*

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraph 2.
2. The obligation of professional secrecy applies to all persons who work or who have worked for the competent authority or for any authority or market undertaking or natural or legal person to whom the competent authority has delegated its powers, including auditors and experts contracted by the competent authority.
3. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by law.
4. All the information exchanged between the competent authorities under this Regulation that concerns business or operational conditions and other economic or personal affairs shall be considered confidential and shall be subject to the requirements of professional secrecy, except where the competent authority states at the time of communication that such information may be disclosed or such disclosure is necessary for legal proceedings.

TITLE VII  
DELEGATED AND IMPLEMENTING ACTS

*Article 37*

*Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Articles 3(2)(i), 13(2h), 21b(8), 39(6), 40(3) and 40(4) shall be conferred on the Commission for an indeterminate period of time from [date of entry into force of this Regulation].
3. The delegation of power referred to in Articles 3(2)(i), 13(2h), 21b(8), 39(6), 40(3) and 40(4) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Articles 3(2)(i), 13(2h), 21b(8), 39(6), 40(3) and 40(4) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

*Article 38*  
*Committee procedure*

1. The Commission shall be assisted by the European Securities Committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply, having regard to the provisions of Article 8 thereof.

TITLE VIII  
TRANSITIONAL AND FINAL PROVISIONS

*Article 39*  
*Transitional provisions*

1. A natural or legal person providing a benchmark on [the date of entry into force of this Regulation] shall apply for authorisation or registration under Article 23 within 24 months after the date of application.
  - 1a. Within 24 months after the date of application of this Regulation, the competent authority of the Member State where a natural or legal person applying for authorisation under Article 23 is located shall have the power to decide to register this person as an administrator even if it is not a supervised entity, under the following conditions:
    - (i) this person does not provide a critical benchmark;
    - (ii) the competent authority is aware, on a reasonable basis, that the index or indices provided by this person are not widely used, in the meaning of this Regulation, in both its jurisdiction and in other Member States.

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



The competent authority shall keep evidence of the reasons behind its decision adopted in accordance with paragraph 1a, in such a form that it is possible to fully understand the evaluations of the competent authority of the limited degree of use of the benchmark provided by the registered administrator, any market data, judgement or other information, included that received by the registered administrator.

2. A natural or legal person that submitted an application for authorisation or registration in accordance with paragraph 1 may continue to produce an existing benchmark which may be used by supervised entities unless and until such authorisation or registration is refused.
3. Where an existing benchmark does not meet the requirements of this Regulation, but ceasing or changing that benchmark to conform with the requirements of this Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark, the use of a benchmark shall be permitted by the relevant competent authority of the Member State where the providing natural or legal person is located . No financial instruments or financial contracts shall start to reference such an existing benchmark after the entry into application of this Regulation.
4. *(deleted)*
5. Unless the Commission has adopted an equivalence decision as referred to in paragraph 2 of Article 20, the use in the Union by supervised entities of a benchmark provided by an administrator located in a third country, which is already used in the Union as reference for financial instruments and financial contracts, shall be permitted only for the financial instruments and the financial contracts already referencing this benchmark in the Union at the time of entry into application of this Regulation. No financial instruments or financial contracts in the Union shall start to reference such benchmark after the entry into application of this Regulation.
6. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 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 which references such benchmark.

### *Article 39a*

#### *Deadline for updating the prospectuses and key information documents*

The provision of Article 19(2) is without prejudice to outstanding prospectuses approved under Directive 2003/71/EC prior to entry into application of this Regulation. For prospectuses approved prior to entry into application of this Regulation under Directive 2009/65/EC, the underlying documents shall be updated at the first occasion or at the latest within twelve months after the entry into application of this Regulation.

### *Article 39b*

#### *ESMA reviews*

1. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of Articles 21a and 21b. To that end, the recognitions granted in accordance with Articles 21a and the endorsements authorised in accordance with Articles 21b shall be reviewed by ESMA every two years.

ESMA shall issue an opinion to the competent authorities in question assessing the continued compatibility of each of the recognition or endorsement with the requirements established in this Regulation and any delegated act and regulatory or implementing technical standard based on this Regulation.

2. ESMA shall have the power to require a competent authority the documented evidence for any of the decision adopted in accordance with the first subparagraph of Article 39(1a).

### *Article 40*

#### *Review*

1. By [1 July 2018], the Commission shall review and report to the European Parliament and the Council on this Regulation and in particular:

- (a) the functioning and effectiveness of the critical benchmark and mandatory participation regime under Articles 13 and 14 and the definition of a critical benchmark in Article 3;
  - (b) the effectiveness of the authorisation, registration and supervision regime of administrators under Title VI and the colleges under Article 34 and the appropriateness of supervision of certain benchmarks by a Union body.
2. The Commission shall review the evolution of international principles applicable to financial benchmarks and of legal frameworks and supervisory practices in third-countries concerning the provision of financial benchmarks and report to the European Parliament and to the Council every five years of the entry into application of this Regulation. This report shall be accompanied by a legislative proposal, if appropriate, assessing in particular whether there is a need to amend this Regulation.
  3. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 in order to extend the five-year period referred to in Article 21b(1) by five years, with the only exception of those third countries for which the report referred to in paragraph 2 provides evidence that an equivalence decisions under Article 20 can be adopted.
  4. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 in order to extend the 24-month period referred to in Article 39(1a) by 24 months, if the report referred to in paragraph 1(b) provides evidence that the transitional registration regime under Article 39(1a) is not detrimental to a common European supervisory culture and consistent supervisory practices and approaches among competent authorities.

*Article 40a*  
*Amendment to Regulation (EU) No 596/2014*

In Article 4(1) of Regulation (EU) No 596/2014, the following subparagraph is added:

“Where a financial instrument references a benchmark, the notification shall include the name and description of the benchmark along with the name of the administrator that provides that benchmark.”

*Article 40b*  
*Amendments to Directive 2008/48/EC and to Directive 2014/17/EU*

1. Directive 2008/48/EC is amended as follows:

(a) the following Article is inserted:

‘Article 7a

Information on the benchmark

1. Member States shall ensure that, where the creditor or, where applicable, the credit intermediary proposes to the consumers a credit agreement which references a benchmark as defined in Article 3 paragraph 1 point (2) of Regulation [Benchmark Regulation], that creditor or credit intermediary obtains the necessary information regarding the consumer’s knowledge and experience with respect to benchmarks and provides adequate explanation to the consumer on the proposed benchmark in order to place the consumer in a position enabling him to assess whether the proposed benchmark is proper to his needs and financial situation. The explanation shall include in particular all the information contained in the benchmark statement published in accordance with Article 15 of Regulation [Benchmark Regulation] and inform about the specific effects the use of the benchmark may have on the consumer.

(b) in Article 27, the following paragraph is added:

‘3. By [transposition date], Member States shall adopt and publish and communicate to the Commission the provisions necessary to comply with Article 7a.’.

2. Directive 2014/17/EU is amended as follows:

(a) the following Article is inserted:

‘Article 16a

Information on the benchmark

1. Member States shall ensure that, where the creditor or, where applicable, the credit intermediary, offers to the consumers a credit agreement which references a benchmark as defined in Article 3 paragraph 1 point (2) of Regulation [Benchmark Regulation], that creditor or credit intermediary obtains the necessary information regarding the consumer’s knowledge and experience with respect to the benchmarks and provides adequate explanation to the consumer on the proposed benchmark in order to place the consumer in a position enabling him to assess whether the proposed benchmark is proper to his needs and financial situation. The explanation shall include in particular all the information contained in the benchmark statement published in accordance with Article 15 of Regulation [Benchmark Regulation] and inform about the specific effects the use of the benchmark may have on the consumer.

(b) in Article 42, the following paragraph is added:

‘4. By [transposition date], Member States shall adopt and publish and communicate to the Commission the provisions necessary to comply with Article 16a.’.

*Article 41*  
*Entry into force*

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

It shall apply from [12 months after entry into force].

Notwithstanding the second subparagraph, Articles 3(2), 5a(3), 5c(5), 7(5), 7b(3), 9(3), 11(4), 12b(2), 13, 14a(2), 15(3), 20(4), 21a(9), 21b(8), 23(7), 34, 35(3), 39(6) and 40a shall apply immediately following the entry into force of this Regulation.

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

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*

## ANNEX I

### Interest Rate Benchmarks

1. (Deleted.)
2. ( Deleted.)

#### Accurate and Sufficient Data

3. *(Deleted)*
4. For the purposes of point (a) and (aa) of Article 7(1) in general the priority of use of input data shall be:
  - (a) a contributor's transactions in the underlying market the benchmarks seeks to measure or, if not sufficient, its transactions in related markets, such as:
    - the unsecured inter-bank deposit market;
    - other unsecured deposit markets, including certificates of deposit and commercial paper; and
    - other markets such as overnight index swaps, repurchase agreements, foreign exchange forwards, interest rate futures and options,provided that these transactions correspond with the input data requirements in the code of conduct.
  - (b) A contributor's observations of third party transactions in the markets described in point a.
  - (c) Firm and executable bid and offer quotes.
  - (d) Indicative bids and offers quotes or expert judgements.

The administrator shall establish and publish clear guidelines about the use of expert judgement.

Input data may be adjusted to ensure the input data is representative of, and consistent with, the underlying market.

In particular, the input data may be adjusted by application of the following criteria:

- (a) proximity of transactions to the time of provision of the input data and the impact of any market events between the time of the transactions and the time of provision of the input data;
- (b) interpolation or extrapolation from transactions data; and
- (c) adjustments to reflect changes in credit standing of the contributors and other market participants.

5. (Deleted).

#### Transparency of Input Data

6. (deleted).

#### Oversight Function

7. Article 5a shall not apply, except for paragraph 3.

8. Administrators shall have an independent oversight committee. Details of the membership shall be made public, along with any declarations of conflicts of interests and the processes for election or nomination of the oversight committee members.

9. The oversight committee shall hold no less than one meeting every four months and shall keep minutes thereof.

10. The responsibilities of the oversight function shall include:

- (a) reviewing the benchmark's definition and methodology;
- (b) overseeing any changes to the benchmark methodology and authorising the administrator to undertake a consultation on such changes;



- (c) overseeing the administrator’s control framework and the code of conduct and the management and operation of the benchmark;
- (d) reviewing and approving procedures for cessation of the benchmark, including any consultation about a cessation;
- (e) overseeing any third party involved in the benchmark provision, such as a calculation or dissemination agents;
- (f) assessing internal and external audits or reviews, and monitoring the implementation of identified actions;
- (g) monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;
- (h) imposing penalties for breaches of the code of conduct where appropriate; and
- (i) reporting to the relevant competent authorities any misconduct by contributors or administrators of which they become aware, and any anomalous or suspicious input data.

## Auditing

- 11. Articles 5c(2) shall not apply.
- 12. An external audit of the administrator shall be carried out every two years, the first six months after the introduction of the code of conduct, and subsequently every two years.

The oversight committee may require an external audit of contributing firms if dissatisfied with any aspects of their conduct.

## Contributor Systems and Controls

- 14. The following requirement shall apply to contributors in addition to the requirements set out in Articles 11. Paragraph 4 of Article 11 shall not apply.

15. Each contributor's submitter and their direct managers shall acknowledge in writing that they have read the code of conduct and that they will comply with it.
16. A contributor's systems and controls shall include:
  - (a) an outline of responsibilities within each firm, including internal reporting lines and accountability, including the location of submitters and managers and the names of relevant individuals and alternates;
  - (b) internal procedures for sign-off of contributions of input data;
  - (c) disciplinary procedures in respect of attempts to manipulate, or any failure to report, actual or attempted manipulation by parties external to the contribution process;
  - (d) effective conflicts of interest management procedures and communication controls, both within contributors and between contributors and other third parties, to avoid any inappropriate external influence over those responsible for submitting rates. Submitters shall work in locations physically separated from interest rate derivatives traders;
  - (e) effective procedures to prevent or control the exchange of information between persons engaged in activities involving a risk of conflict of interests where the exchange of that information may affect the benchmark data contributed;
  - (f) rules to avoid collusion among contributors, and between contributors and the benchmark administrators;
  - (g) measures to prevent, or limit, any person from exercising inappropriate influence over the way in which persons involved in the provision of input data carries out those activities;
  - (h) the removal of any direct link between the remuneration of employees involved in the provision of input data and the remuneration of, or revenues generated by, persons engaged in another activity, where a conflict of interest may arise in relation to those activities;
  - (i) controls to identify any reverse transaction subsequent to the provision of input data.

17. A contributor shall keep detailed records of:
- (a) all relevant aspects of contributions of input data;
  - (b) the process governing input data determination and the sign-off of input data;
  - (c) the names of submitters and their responsibilities;
  - (d) any communications between the submitters and other persons, including internal and external traders and brokers, in relation to the determination or contribution of input data;
  - (e) any interaction of submitters with the administrator or any calculation agent;
  - (f) any queries regarding the input data and their outcome of these queries;
  - (g) sensitivity reports for interest rate swap trading books and any other derivative trading book with a significant exposure to interest rates fixings in respect of the input data; and
  - (h) the findings of any internal and external audits.
18. Records shall be kept in a medium that allows the storage of information to be accessible for future reference with a documented audit trail.
19. The compliance function of the contributor shall report any findings, including reverse transactions to management on a regular basis.
20. Input data and procedures shall be subject to regular internal reviews.
21. An external audit of the contributor's input data, compliance with code of conduct and the provisions of this regulation shall be carried out every two years, the first six months after the introduction of the code of conduct, and subsequently every two years.

## ANNEX II

### Commodity Benchmarks

#### Methodology

1. The administrator shall formalise, document, and make public any methodology that it uses for a benchmark calculation. At a minimum, a methodology shall contain and describe:
  - (a) all criteria and procedures that are used to develop the benchmark, including how the administrator uses the input data including the specific volume, concluded and reported transactions, bids, offers and any other market information in its assessment and/or assessment time periods or windows, why a specific reference unit is used, how the administrator collects such input data, the guidelines that control the exercise of judgment by assessors and any other information, such as assumptions, models and/or extrapolation from collected data that are considered in making an assessment;
  - (b) its procedures and practices that are designed to ensure consistency between its assessors in exercising their judgment;
  - (c) the relative importance that shall be assigned to each criterion used in benchmark calculation, in particular the type of market data used, and the type of criterion used to guide judgement so as to ensure the quality and integrity of the benchmark calculation;
  - (d) criteria that identify the minimum amount of transaction data required for a particular benchmark calculation. If no such threshold is provided for, the reasons why a minimum threshold is not established shall be explained, including setting out the procedures where there is no transaction data;
  - (e) criteria that address the assessment periods where the submitted data fall below the methodology's recommended transaction data threshold or the requisite administrator's quality standards, including any alternative methods of assessment including theoretical estimation models. These criteria shall explain the procedures used where no transaction data exist;

- (f) criteria for timeliness of contributions of input data and the means for such contributions of input data whether electronically, by telephone or otherwise;
  - (g) criteria and procedures that address assessment periods where one or more contributors submit market data that constitute a significant proportion of the total input data for that benchmark. The administrator shall also define in its criteria and procedures for what constitutes a significant proportion for each benchmark calculation;
  - (h) criteria according to which transaction data may be excluded from a benchmark calculation.
- 1a. The administrator shall publish or make available the key elements of the methodology it uses for each of the benchmark produced and published or, when applicable, for each family of benchmarks produced and published.
2. Along with the methodology, the administrator shall also describe and publish the:
- (a) rationale for adopting a particular methodology, including any price adjustment techniques and a justification of why the time period or window within which input data is accepted is a reliable indicator of physical market values;
  - (b) procedure for internal review and approval of a given methodology, as well as the frequency of this review; and
  - (c) procedure for external review of a given methodology, including the procedures to gain market acceptance of the methodology through consultation with users on important changes to their benchmark calculation processes.

#### Changes to a Methodology

3. The administrator shall adopt and make public to users' explicit procedures and the rationale of any proposed material change in its methodology. Those procedures shall be consistent with the overriding objective that an administrator must ensure the continued integrity of its benchmark calculations and implement changes for good order of the particular market to which such changes relate. Such procedures shall provide:

- (a) advance notice in a clear timeframe that gives users sufficient opportunity to analyse and comment on the impact of such proposed changes, having regard to the administrator's calculation of the overall circumstances;
  - (b) for users' comments, and the administrator's response to those comments, to be made accessible to all market users after any given consultation period, except where the commenter has requested confidentiality.
4. The administrator shall regularly examine its methodologies for the purpose of ensuring that they reliably reflect the physical market under assessment and shall include a process for taking into account the views of relevant users.

#### Quality and Integrity of Benchmark Calculations

5. The administrator shall:
- (a) specify the criteria that define the physical commodity that is the subject of a particular methodology;
  - (b) give priority to input data in the following order, where consistent with the administrators methodologies:
    - (1) concluded and reported transactions;
    - (2) bids and offers;
    - (3) other information.

If concluded and reported transactions are not given priority, the reasons should be explained as called for in point 6(b).

- (c) employ sufficient measures designed to use market data submitted and considered in a benchmark calculation, which are bona fide, meaning that the parties submitting the market data have executed, or are prepared to execute, transactions generating such market data and the concluded transactions were executed at arms-length from each other and particular attention shall be paid to inter-affiliate transactions;

- (d) establish and employ procedures to identify anomalous or suspicious transaction data and keep records of decisions to exclude transaction data from the administrator’s benchmark calculation process;
  - (e) encourage contributors to submit all of their market data that falls within the administrator’s criteria for that calculation. Administrators shall seek, so far as they are able and is reasonable, ensure that data submitted are representative of the contributors’ actual concluded transactions; and
  - (f) employ a system of appropriate measures so to ensure that contributors comply with the administrator’s applicable quality and integrity standards for market data.
6. The administrator shall describe and publish with each calculation, to the extent reasonable without prejudicing due publication of the benchmark:
- (a) a concise explanation, sufficient to facilitate a benchmark subscriber’s or competent authority’s ability to understand how the calculation was developed, including, at a minimum, the size and liquidity of the physical market being assessed (such as the number and volume of transactions submitted), the range and average volume and range and average of price, and indicative percentages of each type of market data that have been considered in a calculation; terms referring to the pricing methodology shall be included such as “transaction-based”, “spread-based” or “interpolated or extrapolated”;
  - (b) a concise explanation of the extent to which, and the basis upon which, judgment including the exclusions of data which otherwise conformed to the requirements of the relevant methodology for that calculation, basing prices on spreads or interpolation, extrapolation, or weighting bids or offers higher than concluded transactions, if any, was used in any calculation.

#### Integrity of the Reporting Process

7. The administrator shall:
- (a) specify the criteria that define who may submit market data to the administrator;

- (b) have quality control procedures to evaluate the identity of a contributor and any employee of a contributor who reports input data and the authorization of such person to report input data on behalf of a contributor;
- (c) specify the criteria applied to employees of a contributor who are permitted to submit input data to an administrator on behalf of a contributor; encourage contributors to submit transaction data from back office functions and seek corroborating data from other sources where transaction data is received directly from a trader; and
- (d) implement internal controls and written procedures to identify communications between contributors and assessors that attempt to influence a calculation for the benefit of any trading position (whether of the contributor, its employees or any third party), attempt to cause an assessor to violate the administrator's rules or guidelines or identify contributors that engage in a pattern of submitting anomalous or suspicious transaction data. Those procedures shall include provision for escalation by the administrator of inquiry within the contributor's company. Controls shall include cross-checking market indicators to validate submitted information.

#### Assessors

8. In relation to the role of an assessor, the administrator shall:
- (a) adopt and have explicit internal rules and guidelines for selecting assessors, including their minimum level of training, experience and skills, as well as the process for periodic review of their competence;
  - (a-a) have arrangements to ensure that calculations can be made on a consistent and regular basis;
  - (b) maintain continuity and succession planning in respect of its assessors in order to ensure that calculations are made consistently and by employees who possess the relevant levels of expertise;
  - (c) institute internal control procedures to ensure the integrity and reliability of calculations. At a minimum, such internal controls and procedures shall require the on-going supervision of assessors to ensure that the methodology was properly applied and procedures for internal sign-off by a supervisor prior to releasing prices for dissemination to the market.



## Audit Trails

9. The administrator shall have rules and procedures in place to document contemporaneously relevant information, including:
  - (a) all market data;
  - (b) the judgments that are made by assessors in reaching each benchmark calculation;
  - (c) whether a calculation excluded a particular transaction, which otherwise conformed to the requirements of the relevant methodology for that calculation, and the rationale for doing so;
  - (d) the identity of each assessor and of any other person who submitted or otherwise generated any of the information in points (a), (b) or (c).
10. The administrator shall have rules and procedures in place to ensure that an audit trail of relevant information is retained for at least five years in order to document the construction of its calculations.

## Conflicts of Interest

11. The administrator shall establish adequate policies and procedures for the identification, disclosure, management or mitigation and avoidance of conflicts of interest and the protection of integrity and independence of calculations. These policies and procedures shall be reviewed and updated regularly and shall:
  - (a) ensure that benchmark calculations are not influenced by the existence of, or potential for, a commercial or personal business relationship or interest between the administrator or its affiliates, its personnel, clients, any market participant or persons connected with them;
  - (b) ensure that administrator personnel's personal interests and business connections are not permitted to compromise the administrator's functions, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by administrator's clients or other commodity market participants;

- (c) ensure, in respect of identified conflicts, appropriate segregation of functions within the administrator by way of supervision, compensation, systems access and information flows;
  - (d) protect the confidentiality of information submitted to or produced by the administrator, subject to the disclosure obligations of the administrator;
  - (e) prohibit administrator managers, assessors and other employees from contributing to a benchmark calculation by way of engaging in bids, offers and trades on either a personal basis or on behalf of market participants;
  - (f) effectively address identified conflicts of interest which may exist between its benchmark provision (including all employees who perform or otherwise participate in benchmark calculation responsibilities), and any other business of the administrator.
12. The administrator shall ensure that its other business operations have in place appropriate procedures and mechanisms designed to minimise the likelihood that conflicts of interest will affect the integrity of benchmark calculations.
13. The administrator shall ensure it has segregated reporting lines amongst its managers, assessors and other employees and from the managers to the administrator's most senior level management and its board to ensure:
- (a) that the administrator satisfactorily implements the requirements of the Regulation; and
  - (b) that responsibilities are clearly defined and do not conflict or cause a perception of conflict.
14. The administrator shall disclose to its users as soon as it becomes aware of a conflict of interest arising from the ownership of the administrator.

## Complaints

15. The administrator shall have in place and publish written procedures for receiving, investigating and retaining records concerning complaints made about an administrator's calculation process. Such complaint mechanisms shall ensure that:

- (a) an administrator shall have in place a mechanism detailed in a written complaints handling policy, by which its subscribers may submit complaints on whether a specific benchmark calculation is representative of market value, proposed benchmark calculation changes, applications of methodology in relation to a specific benchmark calculation and other editorial decisions in relation to the benchmark calculation processes;
- (b) an administrator shall ensure that its written complaints handling policy includes, among other things, the process and target timetable for handling of complaints;
- (c) formal complaints made against an administrator and its personnel are investigated by that administrator in a timely and fair manner;
- (d) the inquiry is conducted independently of any personnel who may be involved in the subject of the complaint;
- (e) an administrator aims to complete its investigation promptly;
- (f) an administrator advises the complainant and any other relevant parties of the outcome of the investigation in writing and within a reasonable period;
- (g) there is recourse to an independent third party appointed by the administrator. if a complainant is dissatisfied with the way a complaint has been handled by the relevant administrator or the administrator's decision in the situation no later than six months from the time of the original complaint; and
- (h) all documents relating to a complaint, including those submitted by the complainant as well as an administrator's own record, are retained for a minimum of five years.

16. Disputes as to daily pricing determinations, which are not formal complaints, shall be resolved by the administrator with reference to its standard appropriate procedures. If a complaint results in a change in price, that shall be communicated to the market as soon as possible.

## External auditing

17. The administrator shall appoint an independent, external auditor with appropriate experience and capability to review and report on the administrator's adherence to its stated methodology criteria and with the requirements of this Regulation. Audits shall take place annually and be published three months after each audit is completed with further interim audits carried out as appropriate.
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