Council of the European Union

**Brussels, 20 May 2015**
**(OR. en)**

**8646/15**

**Interinstitutional File:**
**2013/0314 (COD)**

**CODEC 668**
**EF 83**
**ECOFIN 302**
**PE 91**

**INFORMATION NOTE**

| | |
|---|---|
| From: | General Secretariat of the Council |
| To: | Permanent Representatives Committee/Council |
| Subject: | Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on indices used as benchmarks in financial instruments and financial contracts<br>– Outcome of the European Parliament's proceedings<br>(Strasbourg, 18 to 21 May 2015) |

## I. INTRODUCTION

The Committee on Economic and Monetary Affairs ("the Committee") presented a report consisting of one amendment to the proposal for a Regulation.

## II. DEBATE

The Rapporteur, Mrs Cora van NIEUWENHUIZEN (ALDE - NL), opened the debate, which took place on 18 May 2015, and:

- recalled the LIBOR and other benchmark manipulation scandals;
- stressed the need to ensure that benchmarks do not impair financial stability;
- argued that competition promotes innovation, limits systemic risk and leads to greater market discipline;
- stated that the Committee's amendment promotes balance between larger and smaller benchmarks, between financial and commodity benchmarks, and between EU and non-EU benchmarks;

- noted the large amount of cross-party support for the Committee's amendment; and
- looked forward to an early and successful conclusion of trilogue negotiations.

Commissioner HILL:

- stressed the need to rebuild trust by ensuring that benchmark providers are properly regulated and supervised. They should establish governance controls and manage conflicts of interest. They should make benchmark-setting more transparent and ensure that contributors to benchmark-setting are properly supervised;
- stated that the Commission had, for critical benchmarks with cross-border impacts, proposed the establishment of colleges of national supervisors. The European Securities and Markets Authority (ESMA) would be involved. This would ensure appropriate supervision and the continuous availability of the benchmarks by requiring contributions from firms if necessary;
- noted the need to take account of the differing characteristics of both large and small benchmarks. The Commission's proposal had contained elements of proportionality, but the Committee on Economic and Monetary Control had proposed a more risk-based approach for non-critical benchmarks. He would welcome the Parliament's thinking on this point. He looked forward to helping to strike the right balance; and
- noted that the EU would be the first jurisdiction to establish such a wide-ranging benchmark regulation. There is a need to address the question of access for third-country benchmarks. Whilst it is desirable to keep the EU's borders open, it is necessary to avoid importing risks linked to benchmarks that are not robust. He looked forward to discussions on achieving this objective.

Speaking on behalf of the Committee on Industry, Research and Energy, Mrs Marisa MATIAS (EUL/NGL - PT):

- referred to the issue of conflicts of interest and argued that self-regulation had proved ineffective;
- stressed the need for proportionality and to define what is a critical benchmark and what is a reference index; and
- regretted the rejection at Committee level of the amendments of the Greens/EFA and S&D political groups. These amendments would ensure that the proposed regulation would actually achieve something - as opposed to merely giving the appearance of doing something.

Speaking on behalf of the EPP political group, Mr Luděk NIEDERMAYER (EPP - CZ):

- stated that the Commission's decision to submit a wide-ranging and deep proposal gave ground for concern regarding small indices;
- noted the many questions regarding the proposal's consistency with the international environment and possible problems with third-country regimes;
- welcomed the Rapporteur's preference for a balanced and proportional approach;
- stated that the Committee had struck the right balance between the responsibility of national supervisors and the responsibility of ESMA; and
- called on the plenary to provide a strong mandate for trilogue negotiations, because the Parliament and the Commission have differing opinions.

Speaking on behalf of the S&D political group, Mr Jonás FERNÁNDEZ (S&D - ES):

- called for a definition of qualitative critical benchmarks that would permit the definition of national critical benchmarks;
- argued that commodity benchmarks should be defined as critical; and
- stated that non-EU benchmarks should not prevent EU consumers enjoying the benefits of robust and reliable benchmarks.

Speaking on behalf of the ECR political group, Mrs Kay SWINBURNE (ECR - UK):

- stated that the Committee's text would provide a good framework for national competent authorities to supervise benchmark administrators within a sound European framework. Investors and consumers will be protected throughout the EU;
- welcomed the regime's focus on critical benchmarks, whilst avoiding placing an excessive burden on non-critical benchmarks;
- welcomed the focus on transparency, which will allow investors and consumers to judge the method by which benchmarks are compiled and to decide whether to use alternatives;
- called for Member States to be able to choose to define as critical a benchmark that would not naturally be defined as critical, should they feel that it is systematically important for their national market. They should also be able to define as critical any benchmark that is particularly susceptible to manipulation;

- called on all parties to the forthcoming trilogue negotiations to pay particular attention to the way in which third-country provisions interact, with a proportionate approach being proposed for non-critical benchmarks; and
- stressed the importance that the use of internationally agreed IOSCO principles to measure equivalence has in improving the standards that benchmark administrators are held to globally - without creating the many problems observed with other legislation that has had an extra-territorial effect.

Speaking on behalf of the ALDE political group, Mrs Sylvie GOULARD (ALDE - FR):

- welcomed the balanced outcome of the Committee's work;
- stated her personal preference for an even stronger role for ESMA. She expressed her concern that ESMA might not be adequately funded; and
- noted that some trial and error may well be needed before the right balance can be struck on proportional supervision.

Speaking on behalf of the Greens/EFA political group, Mr Philippe LAMBERTS (Greens/EFA - BE):

- regretted the fact that some Member States' taxation regimes allow banks to deduct fines paid for benchmarking infractions;
- stated that his political group had supported the draft compromise in the Committee up to the last moment, when some last minute amendments removed a range of benchmarks from the definition of critical benchmarks;
- welcomed the fact that the United Kingdom - the Member State which has the greatest control over benchmarks - had not waited for the Parliament before adopting a regulatory regime that is much stricter than that which the Committee had submitted to the plenary;
- questioned whether too much would be left for national regulators and too little would be entrusted to ESMA; and
- opposed the idea of leaving the definition of critical benchmark to the Member States.

Mrs Pervenche BERÈS (S&D - FR):

- stated that the Committee-level compromise did not give sufficient powers to ESMA; and
- regretted the margin of manoeuvre given to Member States to define what is a critical benchmark.

Commissioner HILL once more took the floor and expressed his hope that the forthcoming trilogue negotiations would be constructive and provide a swift resolution to a pressing and important issue.

The Rapporteur once more took the floor and called for an efficient and effective negotiation during the trilogue phase.

## III. VOTE

When it voted on 19 May 2015, the Parliament in plenary adopted the Committee's sole amendment. No other amendments were adopted. The text of the adopted amendment is annexed to this note. The vote on the legislative resolution was postponed to a later session, thereby not closing the first reading. The matter was then referred back to the Committee, pursuant to Rule 61(2) of the Parliament's Rules of Procedure.

**ANNEX**

**(19.5.2015)**

# Indices used as benchmarks in financial instruments and financial contracts ***I

**Amendments adopted by the European Parliament on 19 May 2015 on the proposal for a regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts (COM(2013)0641 – C7-0301/2013 – 2013/0314(COD))**[1]

**(Ordinary legislative procedure: first reading)**

**[Amendment No 1]**

AMENDMENTS BY THE EUROPEAN PARLIAMENT*

to the Commission proposal

---

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on indices used as benchmarks in financial instruments and financial contracts**

(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,

---

1 The matter was referred back to the committee responsible for reconsideration pursuant to Rule 61(2), second subparagraph (A8-0131/2015).

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

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[2],

Having regard to the opinion of the European Central Bank[3],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The pricing of many financial instruments and financial contracts depends on the accuracy and integrity of benchmarks. ***Serious*** *cases* of manipulation of interest rate benchmarks such as LIBOR***,*** EURIBOR, ***as well as foreign exchange benchmarks, causing considerable losses to consumers and investors and further shattering the confidence of citizens in the financial sector,*** as well as allegations that energy, oil and foreign exchange benchmarks have been manipulated, ***demonstrate*** that benchmarks ***can be*** subject to conflicts of interest ***and have discretionary*** and weak governance ***regimes that are*** 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 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[4] 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[5] 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)[6] contains certain requirements on the use of benchmarks

2 OJ C 177, 11.6.2014, p. 42.
3 OJ C 113, 15.4.2014, p. 1.
4 OJ L 145, 30.4.2004, p. 1.
5 OJ L 345, 31.12.2003, p. 64.
6 OJ L 302, 17.11.2009, p. 32.

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[7] 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 do not address all the vulnerabilities in the process of producing all benchmarks.

(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) ▌ agreed principles on benchmarks ***in 2013*** and, since ***those*** principles provide a certain flexibility as to their exact scope and means of ▌ implementation ▌, Member States are likely to adopt legislation at national level which would implement such principles divergently.

***(3a) The use of financial benchmarks is not limited to the issuance and creation of financial instruments and contracts. The financial industry also relies on benchmarks for the assessment of the performance of an investment fund for the purpose of return tracking, of determining the asset allocation of a portfolio, or of computing the performance fees. The setting and review of the weights to be assigned to various indices within a combination of indices 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, also amounts to use, as such an activity does not involve any discretion as opposed to the activity of the provision of benchmarks. The holding of financial instruments referencing a particular benchmark should not to be considered to be use of the benchmark.***

[7] OJ L 326, 8.12.2011, p. 1.

(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***. Thus,*** benchmarks produced in ***one*** 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 the suitability of benchmarks in financial contracts. As a result of consumer complaints and litigation relating to the use of unsuitable 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. ***The degree of risk, however, varies, and the approach adopted in each case should therefore be tailored to the particular circumstances.*** 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 ***or*** financial contract . 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 ***acknowledge the existence of the large number of benchmarks provided around the world and the different impact that they have on financial stability and the real economy. This Regulation 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. ***All references to days in this Regulation should mean calendar days.***

(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[8].

(11) ***An index or combination of existing indices in which no new input data is included and which is used to measure the performance of a fund or a financial product should be considered to be use of a benchmark.***

---

[8] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

(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 and supervision ***or registration*** 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 obligation on supervised contributors.

(14) An administrator is the natural or legal person that has ***voluntary*** 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 its publication to a third party***. 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) ***The independence of the European Central Bank and of the national central banks of the European System of Central Banks in the performance of their powers, tasks and duties conferred on them by the Treaties, as well as the independence of national central banks inherent in the constitutional structures of the Member State or third country concerned, should be fully respected in the implementation of*** this Regulation.

(17) ▌ 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 ***important*** 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 input data 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***. This Regulation should*** therefore ***set out a framework for*** adequate ***recordkeeping by benchmark administrators*** 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. ***This Regulation should*** therefore ***set out a framework for the establishment of*** an independent complaints procedure ***by administrators to enable*** stakeholders ▌ to notify the benchmark administrator of complaints and ***ensure*** 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.

(22) Employees of the administrator may identify possible breaches of this Regulation or potential vulnerabilities that could lead to manipulation or attempted manipulation. This Regulation should therefore ***put*** in place ***a framework*** to enable employees to alert administrators confidentially of possible breaches of this Regulation.

(23) Any discretion that can be exercised in providing input data creates an opportunity to manipulate a benchmark. Where the input data is transaction based data, there is less discretion and therefore the opportunity to manipulate the data is reduced. As a general rule benchmark administrators should therefore 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.

(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 ***such*** input data are clearly specified, can be relied on and are consistent with the benchmark administrator's controls and methodology. Therefore***, where appropriate and possible, and in collaboration with its contributors,*** the benchmark administrator ***should***

***produce*** a code of conduct to specify these requirements and ***the contributors' responsibilities concerning the provision of input data***.

(27) Many benchmarks are determined ***by the application of a formula calculated using*** input data that is provided by regulated venues, ***approved publication arrangements or reporting mechanisms***, energy exchanges ***or*** emission allowance auctions. ***In those cases, existing*** regulation and supervision ***ensure*** the integrity ***and transparency*** of the input data ***and*** provide for governance requirements and procedures for the notification of ***infringements***. Therefore***, provided the underlying input data is in its entirety sourced from venues subject to post-trade transparency requirements, including a third country market considered to be equivalent to a regulated market in the Union,*** these benchmarks ***should not be subject to certain obligations in this Regulation,*** in order to avoid dual regulation and because their supervision ensures the integrity of the input data used.

(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***, where possible and appropriate, be made*** 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. ***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. ***In addition, some degree of flexibility should be foreseen in this Regulation in order to allow for a timely update of the differentiated requirements applying to different benchmark sectors in light of ongoing international developments, with particular regard to the work of the International Organisation of Securities Commissions (IOSCO)***.

***(29a) In order for a benchmark to be deemed critical under this Regulation it must be deemed systemic in nature or be used in a systemic manner and be vulnerable to manipulation, in order to ensure regulatory proportionality.***

(30) The failure of certain critical benchmarks may have a significant impact on financial stability, market orderliness or investors and it is therefore necessary that additional

requirements apply to ensure the integrity and robustness of those critical benchmarks. ***Those potentially destabilising effects of critical benchmarks can be felt in a single Member State or in more than one. The national competent authorities and ESMA will establish which benchmarks are to be classed as critical.***

***(30a) Given the strategic importance of critical benchmarks for the good functioning of the internal market, ESMA shall have the power to adopt decisions that are directly applicable to the administrator and where applicable, to contributors to the benchmark, where the national competent authority has not applied this Regulation or has breached Union law and following the procedure laid down in Article 17 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[9] .***

(31) Contributors ceasing to contribute may undermine the credibility of critical benchmarks***, as the capability of those 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 credibility of the benchmark in question. Mandatory contribution of input data is not intended to impose an obligation on supervised entities to enter into, or commit to entering into, transactions***.

***(31a) Once a benchmark has been classed as critical, its administrator could exploit a monopoly position over the users of that benchmark. With that in mind, the college of competent authorities for that critical benchmark will need to oversee the sale price and the administrator's costs in order to prevent market abuse.***

(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 . ***The administrator should, upon request, make its input data available to the relevant competent authority in the context of an investigation.***

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

(34) This Regulation should take into account the Principles for financial benchmarks issued by the International Organization of Securities Commissions (IOSCO) ('IOSCO ***Financial Benchmark*** Principles') on 17 July 2013 ***as well as the Principles for Oil Price Reporting Agencies issued by IOSCO on 5 October 2012 ('IOSCO PRA Principles') which serve as a global standard for regulatory requirements for benchmarks***.

***(34a) Physical commodities markets present unique characteristics which must be taken account of in order to avoid undermining the integrity of commodity benchmarks and negatively impacting commodity market transparency, European security of supply, competitiveness and the interests of consumers. Accordingly, certain provisions of this Regulation are not appropriate to apply to commodity benchmarks. Principles developed for commodity benchmarks by IOSCO in collaboration with the International Energy Agency and the International Energy Forum, among others, are specifically designed to apply to all commodity benchmarks and therefore this Regulation provides that certain requirements will not apply to commodity benchmarks.***

***(34b) This Regulation also introduces a recognition regime allowing administrators of benchmarks located in a third country to provide their benchmarks in the Union provided they fully comply with the requirements set out in this Regulation or with the provisions in the relevant IOSCO principles.***

***(34c) 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. 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 responsible for such endorsed benchmarks and ensure that they fulfil the relevant conditions referred to in this Regulation or that they fully fulfil the requirements of the relevant IOSCO principles.***

(35) The administrator ***of a critical benchmark*** should be authorised and supervised by the competent authority of the Member State where that administrator is located. ***An administrator that only provides benchmarks determined by the application of a formula using input data contributed entirely and directly by regulated venues, approved publication arrangements or reporting mechanisms, energy exchanges or emission allowance auctions and/or an administrator that provides only non-critical benchmarks,***

***should be registered with, and supervised by, the competent authority. The registration of an administrator is not intended to affect supervision by the relevant competent authorities. ESMA should maintain a register of administrators at 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. 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 with regard to which benchmark is being used. This can be achieved by improving the content of the prospectuses or key information documents required by the Union law and the content of the notifications and list of financial instruments required by Regulation (EU) No 596/2014 of the European Parliament and of the Council***[10].

(37) A set of effective tools and powers and resources for the competent authorities of Member States ***and for ESMA*** guarantees supervisory effectiveness. This Regulation therefore should in particular provide for a minimum set of supervisory and investigative powers ▌ which ***should be entrusted to*** competent authorities of Member States in accordance with national law ***and to ESMA***. 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 ***and ESMA*** to be able to access, in accordance with national law, the premises of natural and 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

---

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

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 ***('the Charter')***, in particular the right to respect for private and family ***life***, 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. ***Accordingly***, this Regulation should be interpreted and applied in accordance with those rights and principles. ***In particular, where this Regulation refers to rules governing the freedom of expression in other media and the rules or codes governing journalist professions, consideration should be given to those freedoms as they are guaranteed in the Union and in the Member States and as recognised under Article 11 of the Charter and under other relevant provisions. This Regulation should not apply to the press, other***

***media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with no control over the provision of that benchmark.***

(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[11]. 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[12].

(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 penalties and administrative measures applicable to infringements of the provisions of this Regulation and should ensure that they are implemented. Those penalties and administrative measures should be effective, proportionate and dissuasive.

(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 presence or absence of intent,*** 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.

---

**11** OJ L 281, 23.11.1995, p. 31.

**12** OJ L 8, 12.1.2001, p. 1.

(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. To ensure the effective exchange of supervisory information among competent authorities, coordination of their activities and supervisory measures, colleges of competent authorities, ***with ESMA in the lead,*** 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. ESMA's legally binding mediation is a key element of the achievement of coordination, supervisory consistency and convergence of supervisory practices. 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.

***(47a) In cases where this Regulation captures or potentially captures supervised entities and markets covered by Regulation (EU) No 1227/2011 of the European Parliament and the***

***Council[13] (REMIT), the Agency for the Cooperation of Energy Regulators (ACER) should be fully consulted by ESMA in order to draw upon ACER's expertise in energy markets and to mitigate any dual regulation.***

***(47b) Where an existing benchmark does not comply with the requirements of this Regulation but changing the benchmark to bring it into compliance with this Regulation would result in a force majeure event or breach the terms of a financial contract or financial instrument, the relevant competent authority may permit the continued use of the benchmark until such a time as it is possible for the benchmark to cease being used or to be substituted by another benchmark to avoid adverse effects on consumers caused by a disorderly and abrupt cessation of the benchmark.***

(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 . ***When proposing those acts, the prevailing international standards for administration, contribution and the use of benchmarks should be taken into account, especially the results of the work of IOSCO. Proportionality, especially in the case of non-critical benchmarks and commodity benchmarks, must be respected.***

(49) The Commission should adopt draft regulatory technical standards developed by ESMA ***concerning governance and control requirements and*** establishing the minimum content of cooperation arrangements with the competent authorities of third countries, ***amongst others,*** by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

(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 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[14] laying

---

*13.* ***Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).*** OJ L 55, 28.2.2011, p. 13.

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,

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 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 ***, where they are exercising powers or carrying out the tasks and duties conferred on them by the Treaties and by the Statute of the European System of Central Banks (ESCB) and of the ECB, or for which their independence is inherent in the constitutional structures of the Member State or third country concerned;***

***(aa) public authorities, where they provide, or have control over the provision of, benchmarks for public policy purposes, including measures of employment, economic activity, and inflation;***

***(ab) central counterparties;***

***(ac) administrators where they provide single prices or single value reference prices;***

***(ad) the press, other media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with no control over the provision of that benchmark;***

***(ae) credit unions within the meaning of Directive 2013/36/EU of the European Parliament and the Council[15].***

▌

***2a. Article 5(1), (2a), (3b), (3c), and (3d), Articles 5a and 5b, Article 5d(b) to (g), Article 7(1)(aa), (b), (ba), (bb), (bc) and (c), Article 7(2a), (3a) and (3b), Article 7a, Article 8(1) and (2), Article 9(1) and (2), Article 11 and Article 17(1) shall not apply to administrators in respect of their non-critical benchmarks.***

▌

Article 3

Definitions

1. For the purposes of this Regulation, the following definitions ▌ apply:

---

**15** Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

(1) ‘index’ means any figure:

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

(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, ***actual or estimated interest rates,*** or other values ***or surveys***;

***(1a)*** ‘***index provider***’ ***means a natural or legal person that has control over the provision of an index;***

(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 ;

***(2a) ‘family of benchmarks’ means a group of benchmarks provided by the same administrator determined from input data of a similar nature which provides specific measures of the same or similar market or economic reality;***

(3) ‘provision of a benchmark’ means:

(a) administering the arrangements for determining a benchmark;

(b) collecting, analysing or processing input data for the purpose of determining a benchmark; and

(c) determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose;

(4) ‘administrator' means ***a*** natural or legal person that has control over the provision of a benchmark;

(5) ‘***use*** of a benchmark’ means***:***

***(a) issuance of*** a financial instrument ***which references an index or a combination of indices;***

***(b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;***

***(c) being*** party to a financial contract which references ***an index or a combination of indices;***

***(d) determination of the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio or of computing the performance fees;***

(6) 'contribution of input data' means providing any input data ***not publicly available*** to an administrator, or to another person for the purposes of passing to an administrator, that is required in connection with the determination of ***a*** benchmark, and is provided for that purpose;

(7) 'contributor' means a natural or legal person contributing input data ***that is not regulated data***;

(8) 'supervised contributor' means a supervised entity that contributes input data to an administrator located in the Union;

(9) 'submitter' means ***a*** natural person employed by the contributor for the purpose of contributing input data;

***(9a) 'assessor' means an employee of an administrator of a commodity benchmark, or any other natural person or third party, whose services are placed at the administrator's disposal or under its control and who is responsible for applying a methodology or judgement to input data and other information to reach a conclusive assessment about the price of a certain commodity;***

(10) 'input data' means the data in respect of the value of one or more underlying assets, or prices, including estimated prices, or other values, used by the administrator to determine the benchmark;

(11) 'regulated data' means***:***

***(i)*** input data that is contributed ***entirely*** from***:***

***(a)*** a trading venue as defined in point (***24***) of ▌ Article ***4(1) of Directive 2014/65/EU but only with reference to data concerning financial instruments;***

***(b)*** ***an*** approved publication arrangement as defined in point (***52***) of ***Article 4(1)*** of ***Directive 2014/65/EU*** or ***a consolidated tape provider*** as defined in point (***53***) of ▌ Article ***4(1)*** of ***Directive 2014/65/EU,*** in accordance with mandatory ***post-trade transparency*** requirements***, but only with reference to data of transactions concerning financial instruments that are traded on a trading venue;***

***(c)*** an approved reporting ***mechanism*** as defined in point ***(54)*** of ***Article 4(1) of Directive 2014/65/EU, but 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;***

***(d)*** an electricity exchange as referred to in point (j) of paragraph 1 of Article 37 of Directive 2009/72/EC ***of the European Parliament and of the Council***[16]***;***

***(e)*** a natural gas exchange as referred to in point (j) of paragraph 1 of Article 41 of Directive 2009/73/EC ***of the European Parliament and of the Council***[17]***;***

***(f)*** an auction platform referred to in Article 26 or ▌ 30 of ***Commission*** Regulation (EU) No 1031/2010[18];

---

[16] ***Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (***OJ L 211, 14.8.2009, p. 55***)***.

[17] ***Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (***OJ L 9, 14.8.2009, p. 112***)***.

[18] ***Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2010, p. 1).***

***(g) data provided under Article 8(1) of Regulation (EU) No 1227/2011 and elaborated in Commission Implementing Regulation (EU) No 1348/2014[19]; or***

***(h) a third country trading venue, platform, exchange, publication arrangement or reporting mechanism equivalent to those specified in points (a) to (g) or any other entity such as a transactional data aggregator or a transactional data collector whose contribution of input data is already subject to appropriate supervision; and***

***(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[20].***

(12) 'transaction data' means observable prices, rates, indices 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 ***as defined in point (24) of Article 4(1) of Directive 2014/65/EU***;

(14) 'supervised entity' means the following :

(a) credit institutions as defined in point (1) of Article 3 of Directive 2013/36/EU;

(b) investment firms as defined in point (1) of paragraph 1 of ***Article 4(1) of Directive 2014/65/EU***;

---

**19** ***Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (OJ L 363, 18.12.2014, p. 121).***

**20** ***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) (OJ L 302, 17.11.2009, p. 32).***

(c) insurance undertakings as defined in point (1) of Article 13 Directive 2009/138/EC of the European Parliament and of the Council[21];

(d) reinsurance undertakings as defined in point (***4***) of Article 13 Directive 2009/138/EC;

(e) UCITS as defined in Article 1(2) of Directive 2009/65/EU[22];

(f) alternative investment fund managers (AIFMs) as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council[23];

(g) central counterparties ***or CCPs ,***as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council[24];

(h) trade repositories as defined in point (2) of Article 2 of Regulation (EU) No 648/2012;

(i) *administrators*;

(15) 'financial contract' means:

(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[25];

(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***[26];

---

21 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

22 OJ L 302, 17.11.2009, p. 32.

23 ***Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (***OJ L 174, 1.7.2011, p. 1***)***.

24 ***Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)***.

25 ***Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (***OJ L 133, 22.5.2008, p. 66***)***.

(16) ‘investment fund’ means AIFs as defined in point (a) of paragraph 1 of Article 4 of Directive 2011/61/EU, or UCITS falling within the scope of Directive 2009/65/EU;

(17) ‘management body‘ means the governing body, comprising the supervisory and the management function, which has ultimate decision-making authority and is empowered to set the entity’s strategy, objectives and overall direction;

(18) ‘consumer’ means a natural person who, in financial contracts covered by this Regulation is acting for purposes which are outside his ***or her*** trade, business or profession;

(19) 'interbank 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;

***(19a) 'foreign exchange rate benchmark' means a benchmark the value of which is determined in relation to the price, expressed in one currency, of one or a basket of currencies;***

(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 (2) of Article 2 of Commission Regulation (EC) No 1287/2006[27]***, excluding*** emission allowances as ***referred to*** in point (11) of Section C of Annex I of ***Directive 2014/65/EU***;

***(20a) ´basis risk´ means the risk related to the accuracy of the description by a benchmark of the underlying market or economic reality that the benchmark intends to measure;***

(21) ‘critical benchmark’ means***:***

---

[26] ***Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).***

[27] ***Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (***OJ L 241, 2.9.2006, p. 1***)***.

***(a)*** a benchmark ***that is not based on regulated data, the reference value of*** which ***exceeds EUR*** 500 billion euro ***as defined in Article 13(1)***; ***or***

***(b) a benchmark, the cessation of which would have a significant adverse impact on financial stability, on the orderly functioning of the markets and on the real economy in one or more Member States;***

***A critical benchmark is 'national' in nature where the adverse effects of it no longer being provided or it being provided using an unrepresentative set of contributors or data are restricted to one Member State. In such a case, the procedure laid down in Article 13(2a) to (2d) applies.***

***A critical benchmark is 'European' in nature where the adverse effects of it no longer being provided or it being provided using an unrepresentative set of contributors or data are not restricted to one Member State. In such a case, the procedure laid down in Article 13(2e), (2f) and (2g) applies.***

***(21a) 'non-critical benchmark'*** means a benchmark ***which does not meet the criteria for a critical benchmark provided for 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;

(***22a) 'public authority' means:***

***(a) any government or public administration;***

***(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 any government or public authority.***

2. The Commission shall be empowered to 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. ***In those delegated acts, the Commission shall ensure that***

***'published' or "made available' to the public' is understood as 'made available to the wider public of users or potential users'.***

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

***2a. The Commission shall adopt implementing acts in order to establish a list of public authorities in the Union as referred to in point (22a) of paragraph 1 of this Article and to review that list. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 38(2).***

Article 4

Exclusion of ***index providers*** unaware of the use of benchmarks provided by them ▌

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

▌

# TITLE II

# BENCHMARK INTEGRITY AND RELIABILITY

## Chapter 1

## Governance and Control of Administrators

### Article 5

### Governance ***and conflict 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 other natural person or third party whose services are placed at its disposal or under its***

***control, and the contributors or users and to ensure that, where any discretion or judgement in the benchmark process is required, it is exercised independently and fairly.***

▌

***2a.*** ***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. Where conflicts of interests may arise within the administrator due to its ownership structure, controlling*** interests ***or other activities conducted by any entity owning or controlling the administrator or by an entity that is owned or controlled by the administrator or any of its affiliates, the administrator shall establish an independent oversight function which shall include a balanced representation of a range of stakeholders, where the stakeholders are known, as well as subscribers and contributors. If such conflicts cannot be adequately managed, the administrator shall either cease any activities or relationships that create those conflicts or shall cease producing the benchmark.***

▌

***3a.*** ***An administrator shall publish or disclose all existing or potential conflicts of interest to users of the benchmark and the relevant competent authority and, where relevant, to contributors, including conflicts of interest arising from the ownership or control of the administrator.***

***3b.*** ***An administrator shall establish and operate adequate policies and procedures, as well as effective organisational arrangements, for the identification, disclosure, management, mitigation and avoidance of conflicts of interest in order to protect the integrity and independence of benchmark determinations. Such policies and procedures shall be regularly reviewed and updated. The policies and procedures shall take into account and address conflicts of interest, the degree of discretion exercised in the benchmark process and the risks that the benchmark poses, and shall:***

***(a)*** ***ensure the confidentiality of information contributed to or produced by the administrator, subject to the disclosure and transparency obligations under this Regulation; and***

***(b) 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.***

***3c. The administrator shall ensure that 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 to them 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 those persons do not create conflicts of interest or otherwise impinge on the integrity of the benchmark process;***

***(c) do not have any interests or business connections that compromise the administrator's functions;***

***(d) are 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; and***

***(e) are subject to effective procedures to control the exchange of information with other employees, and are not involved in activities that may create a risk of conflict of interest.***

***3d. The administrator shall establish specific control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, which could include an internal sign-off by management before the dissemination of a benchmark or an appropriate substitution, for example in the case of a benchmark that is updated intra-day or on a real-time basis.***

***3e. Any non-material change to the benchmark in respect of provisions covered in this Article shall not be considered to be a breach of any financial contract or financial instrument which references that benchmark. For a critical benchmark, the relevant competent authority shall have the power to deem a change to be material.***

*Article 5a*

*Oversight function requirements*

*1. The administrator shall establish and maintain a permanent and effective oversight function to ensure oversight of all aspects of the provision of its benchmarks.*

*2. An administrator shall develop and maintain robust procedures regarding its oversight function, which shall be made available to the relevant competent authorities.*

*The main features of the procedures shall include:*

*(a) the terms of reference of the oversight function;*

*(b) criteria to select members of the oversight function;*

*(c) the summary details of membership of any board or committee charged with the oversight function, along with any declarations of conflicts of interest and processes for election, nomination or removal and replacement of committee member.*

*3. The oversight function shall operate independently and shall include the following responsibilities, which shall be adjusted for the complexity, use and vulnerability of the benchmark:*

*(a) at least annually reviewing the benchmark's definition and methodology;*

*(b) overseeing any changes to the benchmark methodology and authorising the administrator to consult on such changes;*

*(c) overseeing the administrator's control framework, the management and operation of the benchmark, and, where a benchmark makes use of contributors, the code of conduct referred to in Article 9(1);*

*(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 remedial actions highlighted in the results of those audits;***

***(g) where the benchmark makes use of contributors, monitoring the input data and contributors and the actions of the administrator in challenging or validating contributions of input data;***

***(h) where the benchmark makes use of contributors, taking effective measures in respect of any breaches of the code of conduct; and***

***(i) where the benchmark makes use of contributors, reporting to the relevant competent authorities any misconduct by contributors or administrators of which the oversight function becomes aware, and any potentially anomalous or suspicious input data.***

***4. The oversight function shall be carried out by a separate committee or by another appropriate governance arrangement.***

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

***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.***

*5. The oversight function may exercise oversight of more than one benchmark provided by an administrator provided that it otherwise complies with the other requirements of Titles I and IV.*

*6. Any non-material change to the benchmark in respect of provisions covered in this Article shall not be considered to be a breach of any financial contract or financial instrument which references that benchmark. For a critical benchmark, the relevant competent authority shall have the power to deem a change to be material.*

*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 shall be proportionate to the level of conflicts of interest identified, the extent of discretion in the benchmark provision and the nature of benchmark input data and shall include:*

*(a) the management of operational risk;*

*(b) the contingency and recovery procedures that are in place in the event of a disruption to the benchmark provision.*

*3. Where input data is not transaction data, the administrator shall:*

*(a) establish measures to ensure, to the extent possible, that contributors comply with the code of conduct referred to in Article 9(1) and the applicable standards for the input data;*

*(b) establish measures to monitor input data, including monitoring the input data before publication of the benchmark and validating the input data after publication in order to identify errors and anomalies.*

*4. The control framework shall be documented, reviewed and updated as appropriate and made available to the relevant competent authority, and upon request, to the users.*

*5. Any non-material change to the benchmark in respect of provisions covered in this Article shall not be considered to be a breach of any financial contract or financial*

***instrument which references that benchmark. For a critical benchmark, the relevant competent authority shall have the power to deem a change to be material.***

***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 independent internal or external function, with the necessary capability to review and report on the administrator's compliance with the benchmark methodology and this Regulation.***

***3.*** ***For non-critical benchmarks, the administrator shall publish and maintain a compliance statement in which the administrator shall report on its compliance with this Regulation. The compliance statement shall at least cover the requirements laid down in Articles 5(1), (2a), (3b), (3c) and (3d), Articles 5a and 5b, Article 5d(b) to (g), Article 7(1)(aa), (b), (ba), (bb), (bc) and (c), Article 7(2a), (3a) and (3b), Article 7a, Article 8(1) and (2), Article 9(1) and 9(2), Article 11, and Article 17(1).***

***Where the administrator does not comply with the requirements laid down in Articles 5(1), (2a), (3b), (3c) and (3d), Articles 5a and 5b, Article 5d(b) to (g), Article 7(1)(aa), (b), (ba), (bb), (bc) and (c), Article 7(2a), (3a) and (3b), Article 7a, Article 8(1) and (2), Article 9(1) and (2), Article 11 and Article 17(1), the compliance statement shall clearly state why it is appropriate for that administrator not to comply with those provisions.***

***4.*** ***The administrator of a non-critical benchmark shall appoint an independent external auditor to review, and report on, the accuracy of the administrator´s compliance statement. Such an audit shall take place at least every two years and whenever material changes to the benchmark occur.***

***5.*** ***The administrator shall provide the audits under paragraph 4 to the relevant competent authority. The administrator shall provide or publish details of the audits under paragraph 4 to any user of the benchmark upon request. Upon the request of the relevant competent authority, or any user of the benchmark, the administrator shall provide or publish details of the reviews referred to in paragraph 4.***

*6.* ***The relevant competent authority may request additional information from the administrator in respect of their non-critical benchmarks in accordance with Article 30 and/or issue a recommendation to the administrator regarding the administrator´s compliance with the provisions covered by the compliance statement until the full satisfaction of the competent authority. The competent authority may publish the recommendation on its website.***

***Article 5d***

***Record keeping requirements***

*1.* ***The administrator shall keep records of:***

***(a) all input data;***

***(b) any exercise of judgement or discretion by the administrator and, where applicable, by assessors, in the benchmark determination;***

***(c) records of the disregard of any input data, in particular where it conformed to the requirements of the benchmark methodology, and the rationale for such disregard;***

***(d) other changes in or deviations from standard procedures and methodologies, including those made during periods of market stress or disruption;***

***(e) the identities of the submitters and of the natural persons employed by the administrators for determining the benchmarks;***

***(f) all documents relating to any complaint; and***

***(g) records of relevant communications between any person employed by the administrator and the contributors or submitters in respect of the benchmark.***

*2.* ***Where the benchmark is based on contributions from contributors, the contributor shall also keep records of any relevant communications, including with other contributors.***

*3.* ***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 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 5e***

***Complaint handling***

***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 a complaint mechanism shall ensure that:***

***(a)*** ***an administrator shall have in place a mechanism detailed in a written complaints handling policy, through 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)*** ***there is a process and target timetable for the 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 matter of the complaint;***

***(e)*** ***an administrator shall aim to complete its investigation promptly.***

***Article 5f***

***Regulatory technical standards on governance and control requirements***

***ESMA shall develop draft regulatory technical standards to specify further and calibrate the governance and control requirements under Articles 5(2a), 5(3a-3d), 5a(2), 5a(3), 5b(2), 5b(3), 5c(2), 5c(1) to (3). ESMA shall take account of the following:***

***(a)*** ***developments in benchmarks and financial markets in light of international convergence of supervisory practice in relation to governance requirements of benchmarks;***

***(b)*** ***specific features of different types of benchmarks and administrators including sectoral features and the types of input data used;***

***(c) distinction between critical and non-critical benchmarks;***

***(d) whether requirements are already partially or fully covered by other relevant regulatory requirements, particularly for benchmarks based on regulated data, and particularly but not limited to requirements under Directive 2014/65/EU or Regulation (EU) No 600/2014of the European Parliament and of the Council[28], so as to ensure that no duplication of requirements or other unnecessary burdens for administrators result.***

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

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

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.

▌

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;***

---

*28* ***Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).***

***(b) the administrator shall make available to the relevant competent authorities the identity and the tasks of the service provider who participates in the benchmark determination process;***

***(c) the administrator shall take appropriate action if it appears that the service provider may not be carrying out the outsourced functions effectively and in compliance with applicable law and regulatory requirements;***

***(d) the administrator shall retain the necessary expertise to supervise the outsourced functions effectively and to manage the risks associated with the outsourcing;***

***(e) 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 law and regulatory requirements;***

***(f) the service provider shall cooperate 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 those rights of access;***

***(g) the administrator shall be able to terminate the arrangements where necessary.***

***(h) the administrator shall take reasonable steps, including contingency plans, to avoid undue operational risk related to the participation of the service provider in the benchmark determination process.***

Chapter 2

Input data**,** methodology and reporting of ***infringements***

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 ***transaction data or, where more appropriate, non-transaction based data, including committed quotes and verifiable estimates,***

***provided that it*** accurately and reliably ***represents*** the market or economic reality that the benchmark is intended to measure ▌.

***(aa) The input data referred to in point (a) shall be verifiable.***

(b) The administrator shall obtain the input data from a reliable and representative panel or sample of contributors so as to ensure that the resulting benchmark is reliable and representative of the market or economic reality that the benchmark is intended to measure ▌.

***(ba) The administrator shall only use input data from contributors which comply with the code of conduct referred to in Article 9.***

***(bb) The administrator shall maintain a list of persons who may contribute input data to the administrator including procedures to evaluate the identity of a contributor and any submitters.***

***(bc) The administrator shall ensure contributors provide all relevant input data; and***

(c) Where the input data of a benchmark is not transaction data and a contributor is a party to more than 50% of ***the*** value of transactions in the market ▌that the benchmark intends to measure, the administrator shall verify ***where possible,*** that the input data represents a market subject to competitive supply and demand forces. Where the administrator finds 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 ▌.

▌

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

***(a) criteria that define 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 preventing the contributor from providing further input data or applying other sanctions 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. Where a benchmark meets the criteria laid down in Article 14a, this requirement shall only apply where compliance is possible within reason.***

***3a. Where the input data of a benchmark is contributed from a front office function, meaning any department, division, group, or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities, the administrator shall:***

***(a) obtain data from other sources that corroborates that input data;***

***(b) ensure that contributors have adequate internal oversight and verification procedures that allow for:***

***(i) validation of input data contributed, including procedures for multiple reviews by senior staff to check inputs and internal sign off procedures by management for submitting inputs;***

***(ii) the physical separation of employees in the front office function and reporting lines;***

***(iii) full consideration of conflict management measures to identify, disclose, manage, mitigate and avoid existing or potential incentives to manipulate or otherwise influence data inputs, including through remuneration policies and conflicts of interest between the contribution of input data activities and any other business of the contributor, its affiliates, or their respective clients or customers.***

***The provisions laid down in points (a) and (b) of the first subparagraph shall apply to benchmarks that meet the criteria laid down in Article 14a only where compliance with these provisions is possible within reason.***

*3b.* ***Any non-material change to the benchmark in respect of provisions covered in this Article shall not be considered to be a breach of any financial contract or financial instrument which references that benchmark. For a critical benchmark, the relevant competent authority shall have the power to deem a change to be material.***

*3c.* ***ESMA shall develop draft regulatory technical standards to specify further the internal oversight and verification procedures of a contributor that the administrator shall seek, in compliance with paragraph 2a and 3a, in order to ensure the integrity and accuracy of input data.***

***ESMA shall take into account the principle of proportionality with respect to non-critical and commodity benchmarks; the specificity of different types of benchmarks in particular those benchmarks based on contributions from entities that meet the criteria laid down in Article 14a; the nature of the input data , whether requirements are already partially or fully covered by other relevant regulatory requirements, particularly but not limited to requirements under Directive 2014/65/EU or Regulation (EU) No 600/2014, so as to ensure no duplication of requirements or other unnecessary burdens for administrators shall result, 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***
***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 back-testing;***

***(d) is resilient and ensures that the benchmark can be calculated in the widest set of possible circumstances;***

***(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 the circumstances in which 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.***

***4. Any non-material change to the benchmark in respect of provisions covered in this Article shall not be considered to be a breach of any financial contract or financial instrument which references that benchmark. For a critical benchmark, the relevant competent authority shall have the power to deem a change to be material.***

***Article 7b***

***Transparency of methodology***

***1. The administrator shall transparently develop, operate and administer the benchmark data and methodology.***

***The administrator shall publish, by means that ensure a fair and easy access:***

***(i) the methodology used for each of the benchmark or family of benchmarks; and***

***(ii) the procedure for consulting on, and the rationale for, any proposed material change in its methodology and the rationale for such a change, including a***

***definition of what constitutes a material change and when it will notify users of any changes.***

***2. Where a benchmark meets the criteria laid down in Article 14a, the administrator of that benchmark shall describe and publish with each calculation, to the extent reasonable and 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 price, and indicative percentages of each type of input 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"; and***

***(b) a concise explanation of the extent to which, and the basis upon which, any judgement was exercised including any decision to exclude input data which otherwise conformed to the requirements of the relevant methodology for that calculation; base prices on spreads or interpolation, extrapolation, or weighting bids or offers higher than concluded transactions in any calculation.***

***3. Where such a publication would not be compatible with applicable intellectual property law, the methodology shall be made available to the relevant competent authority.***

***4. Where a material change is made to the methodology of a critical benchmark, the administrator shall notify the relevant competent authority of the change. The competent authority shall have 30 days to approve the change.***

***Article 7c***

***Regulatory technical standards on input data and methodology***

***ESMA shall develop regulatory technical standards to specify the controls in respect of input data, the circumstances under which transaction data may not be sufficient and how this can be demonstrated to the relevant competent authorities and the requirements for developing methodologies, distinguishing for different types of benchmarks and sectors as set out in this Regulation. ESMA shall take account of the following:***

***(a)*** ***developments in benchmarks and financial markets in light of international convergence of supervisory practice in relation to benchmarks;***

***(b)*** ***specific features of different benchmarks and types of benchmarks;***

***(c)*** ***the principle of proportionality with respect to non-critical benchmarks;***

***(d)*** ***the vulnerability of benchmarks to manipulation in light of the methodologies and input data used;***

***(e)*** ***that sufficient detail should be available to users to allow them to understand how a benchmark is provided in order to assess its relevance and appropriateness as a reference;***

***(f)*** ***whether requirements are already partially or fully covered by other relevant regulatory requirements, particularly for benchmarks based on regulated data, and particularly but not limited to requirements under Directive 2014/65/EU or Regulation (EU) No 600/2014, so as to ensure no duplication of requirements or other unnecessary burdens for administrators shall result.***

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

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

Article 8

Reporting of ***infringements***

1. The administrator shall ***have procedures in place for its managers, employees, and any other natural persons whose services are placed at its disposal or under its control, to report internally infringements of this Regulation and other relevant applicable law***.

2. The administrator shall ***have procedures in place to report infringements of this Regulation and other relevant applicable law to the appropriate authorities.***

Chapter 3

Code of conduct and requirements for contributors

Article 9

Code of conduct

1. ***Where a benchmark is based on input data from contributors,*** the administrator shall ***draw up, where possible in collaboration with the contributors,*** a code of conduct for each benchmark clearly specifying the ▌ contributors' responsibilities ▌ with respect to the ***contribution of input data and shall ensure submitters confirm their compliance with the code of conduct and reconfirm compliance in the event of any changes to 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;***

***(b) policies to ensure contributors provide all relevant input data; and***

***(c) the systems and controls that the contributor is required to establish, including:***

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

***(ii) policies on the use of discretion in providing input data;***

***(iii) any requirement for the validation of input data before it is provided to the administrator;***

***(iv) record keeping policies;***

***(v) suspicious input data reporting requirements;***

***(vi) conflict management requirements.***

***2a. The administrator may develop a single code of conduct for each family of benchmarks it provides.***

***2b. Within 20 days from the date of application of the decision to include a critical benchmark in the list referred to in Article 13(1), 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 this Regulation.***

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

***ESMA, while developing those draft regulatory technical standards,*** shall take into account the ***principle of proportionality with respect to*** different characteristics of benchmarks and ***of*** contributors, notably in terms of differences in input data and methodologies, the risks of input data being manipulated***,*** and the international convergence of supervisory practices in relation to benchmarks. ***ESMA shall consult with ACER, with regard to applicability of codes of conduct in particular with regard to relevant 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 paragraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.***

▌

Article 11

***Requirements for supervised contributors***

1. The ▌ governance and control requirements ***set out in paragraphs 2a and 3*** shall apply to a supervised contributor ***contributing input data to a critical benchmark.***

2. A supervised contributor shall ***have effective systems and controls in place 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 Regulation (EU) No 596/2014;***

***(c) conflict management measures, including organisational separation of employees where appropriate and a consideration of how to remove incentives to manipulate any benchmark created by remuneration polices;***

***(d) record keeping of communications in relation to provision of input data for an appropriate period of time;***

***(e) record keeping of exposures of individual traders and trader desks to instruments referencing a benchmark in order to facilitate audits, investigations and for purposes of managing conflicts of interest;***

***(f) record keeping of internal and external audits.***

***2a. Where input data is not transaction data or committed quotes, supervised contributors shall, in addition to the systems and controls referred to in paragraph 2, establish policies guiding any use of judgement 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***, including for the purposes set out in Article 5c(3),*** and make available the information and records kept in accordance with ***paragraphs 2 and 2a***.

4. ***ESMA*** shall ***develop draft regulatory technical standards to specify further*** the requirements concerning systems and controls set out in ***paragraphs 2, 2a and 3*** for different types 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.***

TITLE III

REQUIREMENTS ***FOR*** CRITICAL BENCHMARKS

Chapter 1

***Regulated data***

***Article 12a***

***Regulated data***

***Where benchmarks are determined by the application of a formula to data set out in point 11(i) or point 11(ii) of Article 3(1), Articles 7(1)(b), 7(1)(ba), 7(1)(c), 7(2a), 7(3a), 8(1), 8(2), 9, 11 and 13a shall not apply to the provision of and the contribution to such benchmarks. Article 5d(1)(a) shall not apply to the provision of such benchmarks with reference to input data that are contributed entirely as specified in point 11 of Article 3(1). These requirements shall also not apply for purposes of Article 5c(3).***

Chapter 2

Critical benchmarks

Article 13

Critical benchmarks

1. ***A benchmark that is not based on regulated data shall be deemed to be a critical benchmark in the following circumstances:***

***(a) the benchmark is used as a reference for financial instruments and financial contracts having an average value of at least EUR 500 000 000 000, as measured over an appropriate period of time;***

***(b) the benchmark is recognised as critical in accordance with the procedure laid down in paragraphs 2a, 2c and 2e-2g.***

***ESMA shall develop draft regulatory technical standards to:***

***– specify how the market value of financial instruments is calculated;***

– ***specify how the gross notional value of derivatives is calculated;***

– ***specify the length of time to be used to measure appropriately the value of the benchmark;***

– ***review the EUR 500 000 000 000 threshold, at least every [three] years after the date of the entry into force of 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.***

▌

***2a. A competent authority of a Member State may deem a benchmark administered within its jurisdiction to be critical where it has an average notional value totalling less than the amount set in point (a) of the first subparagraph of paragraph 1 if it considers that the cessation of that benchmark would have a significant adverse impact on the integrity of markets, financial stability, consumers, the real economy, or the financing of households and corporations within its jurisdiction. In such a case, it shall notify ESMA of its decision within five days.***

***2b. Within 10 days following receipt of the notification provided for in paragraph 2a of this Article, ESMA shall publish the notification on its website and update the register referred to Article 25a.***

***2c. Where a national competent authority considers that a decision taken pursuant to paragraph 2a by another competent authority in the Union will have a significant adverse impact on financial market stability, the real economy, or supervised contributors to the relevant benchmark in its jurisdiction, it shall issue a request to that national competent authority to reconsider its decision. The competent authority that took the decision pursuant to paragraph 2a shall inform the requesting competent authority of its response within 30 days of the receipt of the request.***

*2d.* ***In the absence of an agreement between the competent authorities, the requesting competent authority may refer the matter to ESMA. Within 60 days of receiving such a referral request, ESMA shall act in accordance with Article 19 of Regulation (EU) No 1095/2010.***

*2e.* ***Where a competent authority of a Member State or ESMA considers that a benchmark administered in another Member State with an average notional value totalling less than the amount set in point (a) of the first subparagraph of paragraph 1 should nevertheless be deemed to be critical, as the cessation of that benchmark would have a significant adverse impact on the integrity of markets, financial stability, consumers, the real economy, or the financing of households and corporations within its jurisdiction, it shall issue a request to the national competent authority of the relevant benchmark administrator to categorise the benchmark as critical. The competent authority of the relevant benchmark administrator shall inform the requesting competent authority of its response within 30 days of the receipt of the request.***

*2f.* ***Following the procedure laid down in paragraph 2e, and in the absence of an agreement between the competent authorities, the requesting competent authority may refer the matter to ESMA. It shall transmit a documented assessment of the impact of the cessation of the benchmark in its jurisdiction, which shall include at least the following:***

***(a) the variety of use in terms of market participants, as well as use in retail markets;***

***(b) the availability of a feasible market-led substitute for the benchmark;***

***(c) 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;***

***(d) the concentration in use and, where applicable, of contribution to the benchmark among Member States;***

***(e) any other indicator to assess the potential impact of the discontinuity or unreliability of the benchmark on the integrity of markets, financial stability, or the financing of households and corporations of the Member State.***

***Where ESMA is the requesting competent authority, it shall review its request and issue a binding opinion.***

***2g.*** ***Within [10] weeks of receiving the notification referred to in paragraph 2d, and after consulting the ESRB and other relevant national competent authorities, ESMA shall issue a binding opinion on the criticality of the benchmark. ESMA shall transmit its opinion to the Commission, the national competent authorities and the administrator, together with the results of the consultations. ESMA shall base its opinion on the criteria listed in paragraph 2f and other relevant criteria.***

***2h.*** ***Once a benchmark has been defined as critical, the college of competent authorities shall be formed pursuant to Article 34.***

***The college of competent authorities shall request the information needed in order to grant the authorisation enabling this benchmark to be provided under the additional conditions imposed by this Regulation on account of the benchmark being critical, as provided for in Article 23.***

***2i.*** ***The college of competent authorities shall review at least once every two years benchmarks previously classed as critical.***

***2j.*** ***Member States may, in exceptional circumstances, impose additional requirements on any benchmark administrator in respect of the matters covered by this Article.***

***Article 13a***

***Mandatory administration of a critical benchmark***

***1.*** ***If an administrator of a critical benchmark intends to cease producing its critical benchmark, it shall:***

***(a)*** ***immediately notify its competent authority; and***

***(b)*** ***within four weeks of such notification submit an assessment of how the benchmark is to be transitioned to a new administrator; or***

***(c)*** ***within four weeks of such notification submit an assessment of how the benchmark is to be ceased to be produced, taking into account the procedure established in Article 17(1).***

***During that period, the administrator shall not cease production of the benchmark.***

***2. Upon receipt of the assessment of the administrator referred to in paragraph 1, the competent authority shall within four weeks:***

***(a) inform ESMA; and***

***(b) make its own assessment of how the benchmark shall be transitioned to a new administrator or be ceased to be produced, taking into account the administrator's procedure for cessation of its benchmark established in accordance with Article 17(1).***

***During that period of time, the administrator shall not cease production of the benchmark.***

***3. Following completion of the assessment under paragraph 2, the competent authority shall have the power to compel the administrator to continue publishing the benchmark until such time:***

***(a) as the provision of the benchmark has been transferred to a new administrator; or***

***(b) as the benchmark can be ceased in an orderly fashion; or***

***(c) as the benchmark is no longer critical.***

***The competent authority may compel the administrator to continue to publish the benchmark for a limited period of time not exceeding six months, which the competent authority may extend where necessary by up to a further six months.***

***Article 13b***

***Mitigation of market power of critical benchmark administrators***

***1. The administrator, in controlling the provision of the critical benchmark, shall have due regard to the principles of market integrity and benchmark continuity including the need for legal certainty for contracts which reference the benchmark.***

***2. When providing the critical benchmark for use in a financial contract or a financial instrument, the administrator shall ensure that licences of, and information relating to,***

***the benchmark are provided to all users on a fair, reasonable and non-discriminatory basis, as outlined in Article 37 of Regulation (EU) No 600/2014.***

Article 14

Mandatory contribution ***to a critical benchmark***

1. ***The administrator of one or more*** critical ***benchmarks based on submissions by*** contributors ***the majority of which*** are ***supervised entities shall, every two years, submit 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 to that critical benchmark, they shall promptly notify in writing the administrator of the critical benchmark and the relevant competent authority. Within 14 days of receipt of such notification, the administrator shall inform*** the competent authority ***and provide an assessment*** of the ***implications of the cessation*** on the ***capability of the benchmark to measure the underlying market or economic reality. The administrator shall also inform the remaining supervised contributors to the critical benchmark of the notice to cease contributions and seek to determine whether others intend to cease contributing.***

   ***The competent authority shall promptly inform the college of competent authorities and shall complete its own assessment of the implications of the cessation within a reasonable period of time. The competent authority shall have the power to require the contributors which made the notification intending to cease contributing input data to a critical benchmark to continue to contribute such input data until the competent authority has completed its assessment.***

3. ***In the event that*** the competent authority ***considers that the representativeness of a critical*** benchmark ***is put at risk, it shall have the power to:***

   ***(a) require supervised entities in accordance with paragraph 4, including entities that 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. Such a requirement shall be in place for an appropriate transition period dependent upon the average length of contract referencing the relevant***

***benchmark, but not exceeding 12 months from the date when the initial decision to mandate contribution was taken;***

***(b) following a review as laid down in paragraph 5b of the transitional period referred to in point (a) of this paragraph, extend the period of mandatory contribution by a period of time not exceeding 12 months;***

***(c) determine the time by which input data shall be contributed, without obliging supervised entities to trade or commit to trade;***

***(d) require the administrator to make changes to the code of conduct, methodology or other rules of the critical benchmark to increase the benchmark's representativeness and robustness, after discussion with the administrator;***

***(e) request administrator to provide and make available to users of the benchmark a written report on measures that the administrator intends to adopt, to increase the representativeness and robustness of the benchmark.***

4. ***The supervised entities referred to in point (a) of paragraph 3 shall be determined by*** the competent authority of the administrator***, with the assistance of the competent authority of the supervised entities, on the basis of the size of the supervised entity's participation in the market that the benchmark seeks to measure, as well as the contributor's expertise and ability to provide input data of the necessary quality. Due consideration shall be given to the existence of appropriate alternative benchmarks to which the financial contracts and financial instruments referencing the critical benchmark could transition.***

5. ***Where a benchmark is deemed to be critical in accordance with the procedure laid down in paragraphs 2a to 2d of Article 13, the competent authority of the administrator shall have the power to require the contribution of input data in accordance with points (a), (b) and (c) of paragraph 3 of this Article only from supervised contributors located in its Member State***.

***5a. The competent authority of a supervised entity referred to in paragraph 3 shall assist the competent authority of the administrator in enforcing measures pursuant to paragraph 3.***

***5b.*** ***By the end of the transitional period referred to in point (a) of paragraph 3, the competent authority of the administrator in cooperation with the college of competent authorities shall review the continued necessity of the measures laid down in point (a) of paragraph 3 and submit its conclusions in a written report. The competent authority of the administrator shall revoke the measures if it judges:***

***(a)*** ***that the benchmark can continue once the contributors mandated to contribute input data have ceased contributing;***

***(b)*** ***that the contributors are likely to continue contributing input data for at least one year if the power were revoked;***

***(c)*** ***following consultation with contributors and users, that an acceptable substitute benchmark is available and users of the critical benchmark are able to switch to that substitute at acceptable costs. Such a switch shall not be deemed to constitute a breach of an existing contract; or***

***(d)*** ***that no appropriate alternative contributors can be identified and the cessation of contributions from the relevant supervised entities would weaken the benchmark sufficiently to require the winding down of the benchmark.***

***In the case of points (a) and (b) of the first subparagraph, the supervised entities intending to cease contributing shall do so on the same date to be determined by the competent authority of the administrator, not exceeding the periods laid down in point (b) of paragraph 3.***

***5c.*** ***In the event that a critical benchmark is to be wound down, each supervised contributor to the critical benchmark shall continue to contribute input data for an additional appropriate period of time determined by the competent authority, but not exceeding the periods laid down in point (b) of paragraph 3. Any changes or switches to another benchmark shall not be deemed to constitute a breach of an existing contract.***

***5d.*** ***The administrator shall, as soon as is practically possible, notify the relevant competent authority in the event that a contributor infringes the requirements of paragraph 2.***

***Article 14a***

***Commodity benchmarks based on contributions from non-supervised entities***

***Where a commodity benchmark is based on submissions from contributors the majority of which are not supervised entities whose main business is the provision of investment services within the meaning of Directive 2014/65/EU or banking activities under Directive 2013/36/EU, Articles 5a, 5b, 5c(1), 5c(2), 5d(2), 7(1)(ba), 7(1)(bc) and 9 shall not apply.***

# TITLE IV

# TRANSPARENCY AND CONSUMER PROTECTION

## Article 15

## Benchmark statement

1. ***Within two weeks of inclusion in the register referred to in Article 25a, an*** administrator shall publish a benchmark statement for each benchmark ***or, where applicable, for each family of benchmarks produced and published in order to obtain authorisation or registration, or in order to be endorsed under Article 21b, or recognised under Article 21a. The administrator shall update the benchmark statement for each benchmark or a family of benchmarks at least every two years. The statement shall***:

   (a) clearly and unambiguously defines the market or economic reality measured by the benchmark and the circumstances in which such measurement may become unreliable;

   ▌

   (c) ▌ clearly and unambiguously identify the elements of the ***benchmark*** to which discretion may be exercised ***and*** the criteria applicable to the exercise of such discretion▌ ;

   (d) ***provide*** 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) ***advise*** that any financial contracts 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. ***The benchmark statement shall contain at least:***

***(a) the definitions for all key terms relating to the benchmark;***

***(b) the rationale for adopting the benchmark 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, minimum data needed to determine a benchmark, 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 judgment 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;***

***(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; and***

***(g) the identification of potential limitations of a benchmark, including its operation in illiquid or fragmented markets and the possible concentration of inputs.***

Article 17

Cessation of a benchmark

1. An administrator shall publish***, together with the benchmark statement referred to in 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 the cessation of the recognition of a benchmark pursuant to Article 21a or the endorsement pursuant to Article 21b. The procedure shall also be integrated into the code of conduct referred to in Article 9(1). The procedure may be drafted, where applicable, for families of benchmarks and shall be updated and published whenever a material change occurs***.

2. Supervised entities that ***use*** a benchmark 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, indicating why such benchmarks would be suitable alternatives.*** The supervised entities shall provide the relevant competent authority with these plans ***upon*** request ***and where possible reflect them in the contractual relationship with clients***.

***Article 17a***

***Appropriateness of a benchmark***

***The administrator shall ensure the accuracy of the benchmark in relation to the description of the market or economic reality that the benchmark intends to measure in accordance with the benchmark statement requirements laid down in Article 15.***

***ESMA shall publish guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 six months after the entry into force of this Regulation setting out the definition of appropriateness in terms of acceptable levels of basis risk.***

***By December 2015, the Commission shall publish a report analysing existing practices with regard to managing basis risk in financial contracts, in relation to the use of benchmarks such as a interbank interest rate and a foreign exchange benchmark, and assessing if the conduct of business provisions laid down in Directive 2008/48/EC and Directive 2014/17/EU are sufficient to mitigate basis risk associated with benchmarks used in financial contracts.***

TITLE V

USE OF BENCHMARKS PROVIDED BY AUTHORISED ***OR REGISTERED*** ADMINISTRATORS OR BY ADMINISTRATORS FROM THIRD COUNTRIES

Article 19

Use of ***a benchmark***

***1.*** A supervised entity may use a benchmark ***or a combination of benchmarks*** in the Union as a reference in a financial instrument or financial contract ***if they are*** provided by an administrator authorised ***or registered*** in accordance with Article 23 ***or 23a, respectively***, or an administrator located in a third country ***pursuant to Article 20, 21a or 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 that reference a benchmark, the issuer, offeror, or person asking for admission to trade on a regulated market shall ensure that the prospectus also includes clear and prominent information stating whether the benchmark has been registered or is provided by an administrator registered in the public register referred in Article 25a of this Regulation.***

***3.*** ***ESMA shall withdraw, or bring into line with paragraph 1 of this Article, paragraphs 49 to 62 of ESMA's Guidelines for competent authorities and UCITS management companies, Guidelines on ETFs and other UCITS issues[29].***

Article 20

Equivalence

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 ***met, unless Article 21a or Article 21b applies***:

   (a) the Commission has adopted an equivalence decision in accordance with paragraph 2 ***or 2a***;

   (b) the administrator is authorised or registered in, and is subject to supervision in, that third country;

[29] ***01.08.2014, ESMA/2014/937.***

(c) the administrator has notified ESMA of its consent that its actual or prospective benchmarks may be used by supervised entities 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 with the IOSCO Principles for Oil Price Reporting Agencies, published on 5 October 2012***; and

(b) the binding requirements are subject to effective supervision and enforcement on an on-going basis in that third country.

***(ba) – there is effective exchange of information with foreign tax authorities;***

***– there is no lack of transparency in legislative, judicial or administrative provisions;***

***– there is a requirement for a substantive local presence;***

***– the third country does not act as an offshore financial centre;***

***– the third country does not provide for tax measures which entail no or nominal taxes or that no advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages;***

***– the third country is not listed as a Non-Cooperative Country and Territory by FATF;***

– ***the third country fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.***

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

***2a. Alternatively, the Commission may adopt a decision stating that specific rules or requirements in a third country with respect to individual and specific administrators or individual and specific benchmarks or families of benchmarks are equivalent to those of this Regulation and that those individual and specific administrators or individual and specific benchmarks or families of benchmarks may therefore be used by supervised entities in the Union.***

***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 ***frameworks*** and supervisory ***practices*** have been recognised as equivalent in accordance with paragraph 2 ***or 2a***. 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 ***relevant*** 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 ***domestic*** legislation;

(c) the procedures concerning the coordination of supervisory activities ▌.

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 third country administrators***

▌

2. ESMA shall withdraw the registration of an administrator referred to in ***point (d) of Article 20(1) where ESMA has well-founded reasons, based on documented evidence, that the administrator***:

(a) ▌ is acting in a manner which is clearly prejudicial to the interests of ***the*** users of its benchmarks or the orderly functioning of markets; or

(b) ▌ has seriously infringed the national ***domestic*** legislation or other provisions applicable to it in the third country and on the basis of which the Commission has adopted the decision in concordance with Article 20(2) ***or (2a)***.

3. ESMA shall take a decision under paragraph 2 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 registration of the administrator, at least 30 days before the withdrawal.

4. ESMA shall inform the other competent authorities of any measure adopted in accordance with paragraph 2 without delay and shall publish its decision on its website.

***Article 21a***

***Recognition of an administrator 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 ESMA 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 but shall be exempt from Articles 11, 13a and 14. Where an administrator is able to demonstrate that a benchmark it provides is based on regulated data or is a commodity benchmark that is not based on submissions by contributors the majority of which are not supervised entities where the main business of the group is the provision of investment services within the meaning of Directive 2014/65/EC or banking activities under Directive 2013/36/EC, the exemptions for such benchmarks, as provided for in Articles 12a and 14a respectively, shall apply to the administrator.***

***3. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall also be able to do so by complying in full with all requirements established in the IOSCO principles for financial benchmarks, or where the administrator complies with the criteria laid down in Article 14a(1), the IOSCO principles for oil price reporting agencies . Such compliance shall be reviewed and certified by an independent external auditor at least every two years, and whenever a material change to the benchmark is made, and the audit reports shall be sent to ESMA and, upon request, made available to users.***

***4. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall have a representative established in the Union. The representative shall be a natural person domiciled in the Union or a legal person with its registered office in the Union. The representative shall be expressly designated by the administrator located in a third country to act on its behalf concerning all communication with the authorities including ESMA and relevant competent authorities***

***and any other relevant person in the Union with regard to the administrator's obligations under this Regulation.***

***5. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with ESMA. The applicant administrator shall provide all information, as set out in Article 23 or 23a, necessary to satisfy ESMA that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 or 2a and shall indicate the list of its actual or prospective benchmarks which may be used in the Union and, where the administrator is supervised by a third-country authority, the competent authority responsible for its supervision in the third country.***

***Within [90] days of receiving the application referred to in the first subparagraph, ESMA, after consulting relevant competent authorities, shall verify that the conditions laid down in paragraphs 2 or 2a, 3 and 4 are fulfilled. ESMA may delegate this task to a relevant national competent authority.***

***If ESMA 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) where the administrator located in a third country is supervised by a third country authority, an appropriate cooperation arrangement is in place between the relevant competent authority or ESMA and the third country authority of the administrator in order to ensure at least an efficient exchange of information;***

***(ii) the effective exercise by the competent authority or ESMA of its supervisory functions under this Regulation is not prevented by the laws, regulations or administrative provisions of the third country where the administrator is located.***

***6. Where an administrator located in a third country intends to obtain prior recognition through compliance with this Regulation as laid down in paragraph 2 of this Article, and where the administrator considers that a benchmark it provides may be entitled to the exemptions in Article 12a and 14a, it shall, without undue delay, notify ESMA thereof. It shall provide documentary evidence to support its assertion.***

*7. Where an administrator located in a third country considers that the cessation of a benchmark it provides would have a significant adverse impact on the integrity of markets, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States, it may apply to ESMA for an exemption from one or more of the applicable requirements of this Regulation or of the relevant IOSCO principles, for a specific and limited period of time not exceeding 12 months. It shall provide documentary evidence to support its application.*

*ESMA shall consider the application within 30 days and inform the third country administrator whether it is exempt from one or more of the requirements as specified in its application and the length of time of the exemption.*

*ESMA may extend the exemption period upon its expiry by up to a further 12 months where there is good reason to do so*

*8. ESMA shall develop draft regulatory technical standards to specify further the recognition process, the form and content of the application referred to in paragraph 4, the presentation of the information required in paragraph 5 and any delegation of tasks and responsibilities to national competent authorities with respect to those paragraphs.*

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

*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 21b*

*Endorsement*

*1. An administrator located in the Union and authorised in accordance with Article 23 or registered in accordance with Article 23a may apply to its competent authority to endorse a benchmark or a family of benchmarks provided in a third country for their use in the Union, provided that the following conditions are met:*

*(a) the endorsing administrator has verified and is able to demonstrate to its competent authority that the provision of the benchmark or family of benchmarks to be endorsed fulfils requirements which:*

***(i) are at least as stringent as the requirements set out in this Regulation;***

***(ii) ensure full compliance with the IOSCO Principles for Financial Benchmarks as reviewed and certified by an independent external auditor at least every two years or when a material change to the benchmark occurs; or***

***(iii) ensure full compliance with the IOSCO Principles for Oil Price Reporting Agencies, as reviewed and certified by an independent external auditor at least every two years or when a material change to the benchmark occurs, where the benchmark to be endorsed meets the criteria laid down in Article 14a(1);***

***(b) the endorsing administrator has the necessary expertise to monitor the provision of benchmark activities performed in a third country effectively and to manage the risks associated.***

***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, including the audit reports required under points (a) (ii) and (iii) of that paragraph.***

***3. Within 90 days of receipt of the application, the relevant competent authority shall examine the application for an endorsement and adopt a decision to approve or refuse it. The relevant competent authority shall notify ESMA of any benchmarks or families of benchmarks that have been approved for endorsement and the endorsing administrator.***

***4. A benchmark or family of benchmarks endorsed shall be considered to be a benchmark or family of benchmarks provided by the endorsing administrator.***

***5. The administrator that has endorsed a benchmark or family of benchmarks provided in a third country shall remain responsible for ensuring the endorsed benchmark or family of benchmarks fulfil the conditions set out in paragraph 1.***

***6. Where 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 withdraw its approval of the endorsement and shall inform ESMA. Article 17 shall apply in the event of a cessation of the endorsement.***

TITLE VI

AUTHORISATION AND SUPERVISION OF ADMINISTRATORS

Chapter 1

Authorisation

▌

Article 23

***Authorisation procedure for a critical benchmark***

1. ***A natural or legal person located in the Union that intends to act as an*** administrator ***of at least one critical benchmark*** shall ***apply*** to the competent authority ***designated under Article 29 for*** the Member State in which ***that person*** is located.

2. The application for authorisation in accordance with paragraph 1 shall be made▌ within 30 ▌ days of any agreement entered into by a supervised entity to use an index provided by that administrator as a reference to a financial instrument or financial contract ▌ .

***2a. Once a benchmark has been defined as critical, be this ´national´ or ´European´ in nature, the relevant competent authority shall be responsible for granting authorisation for the provision of that benchmark in line with its new legal status, after verifying that all the requirements have been fulfilled.***

3. The applicant administrator shall provide all information necessary to satisfy the competent authority that ***it*** has established, at the time of authorisation, all the necessary arrangements to meet the requirements laid down in this Regulation. ***It shall also provide the necessary data to calculate the value referred to in Article 13(1) or estimate thereof, where available, for each benchmark.***

4. Within ***20*** 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 examine the application ***for an authorisation*** and adopt a decision to authorise or refuse ***within 60 days of receipt of a complete application***.

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

***5a.*** ***If the relevant competent authority decides to refuse to grant authorisation for the provision of a critical benchmark which was already being provided without that status, the relevant competent authority may issue a temporary permit for a period of time not exceeding six months, during which the benchmark may continue to be provided on the basis of the previous model pending fulfilment of the relevant requirements for its authorisation as a critical benchmark.***

***The relevant competent authority may extend the permit for an additional period of time not exceeding six months.***

***5b.*** ***Should the administrator and/or the contributors fail to fulfil the requirements for continuing to provide a benchmark defined as critical by the end of that period, the provision of the benchmark will cease in accordance with Article 17.***

6. The competent authority shall notify ESMA of any decision to authorise an applicant administrator ▌ within ***10 days***.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article ***37*** concerning measures 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 and the costs to the ***applicants*** and competent authorities.

***Article 23a***

***Registration process for a non-critical benchmark***

***1.*** ***A natural or legal person located in the Union that intends to act exclusively as an administrator of non-critical benchmarks shall apply for registration to the competent authority designated under Article 29 for the Member State in which that person is located.***

***2.*** ***A 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.***

***3. An application in accordance with paragraph 1 shall be made within 30 days of any agreement entered into by a supervised entity to use an index provided by the person as a reference to a financial instrument or financial contract or to measure the performance of an investment fund.***

***4. The applicant administrator shall provide:***

***(a) documentation to satisfy the competent authority that it meets the requirements laid down in Articles 5(3a), 5c, 6, where applicable, 7b and 15; and***

***(b) the total reference value, or estimate thereof, where available, of each benchmark.***

***5. Within 15 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, the applicant shall submit the additional information required by the relevant competent authority.***

***6. The relevant competent authority shall register the applicant within 15 days of receipt of a complete application for registration.***

***7. Where the relevant competent authority believes a benchmark should be categorised as critical pursuant Article 13(1), it shall notify ESMA and the administrator within 30 days of receipt of the complete application.***

***8. Where the registering competent authority believes a benchmark should be categorised as critical pursuant Article 13(2a) or 13(2c), it shall notify ESMA and the administrator within 30 days after receipt of the complete application, and submit to ESMA its assessment pursuant to Article 13(2a) or 13(2c).***

***9. Where a registered administrator´s benchmark is categorised as critical, the administrator shall apply for authorisation pursuant to Article 23 within 90 days following the receipt of the notification laid down in Article 13(2b) or the opinion laid down Article 13(2g).***

Article 24

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

1. The competent authority shall withdraw or suspend the authorisation ***or registration*** of an administrator where the administrator:

(a) expressly renounces the authorisation or has provided no benchmarks for the preceding twelve months;

(b) has obtained the authorisation ***or registration*** 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 ***seven*** days.

***2a. Following the adoption of a decision to suspend the authorisation or registration of an administrator, and where cessation of the benchmark would result in a force majeure event, or frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark, 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 been withdrawn. During such period of time, the use of such benchmark by supervised entities shall be permitted only for financial instruments and financial contracts that already reference the benchmark. No new financial contracts or financial instruments shall reference the benchmark.***

***2b. Following the adoption of a decision to withdraw the authorisation or registration of an administrator, Article 17(2) shall apply.***

Chapter 2

Notification of benchmarks

***Article 25a***

***Administrators´ register and initial use of a benchmark***

***1. ESMA shall establish and maintain a public register that contains the following information:***

***(a) the identities of the administrators authorised or registered under the provisions of Articles 23 and 23a, as well as the competent authority responsible for the supervision thereof;***

***(b) 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 thereof;***

***(c) the identities of the administrators that acquired recognition in accordance with Article 21a and the third country competent authority responsible for the supervision thereof;***

***(d) the benchmarks that are endorsed in accordance with the procedure laid down in Article 21b and the identities of the endorsing administrators.***

***2. Before an index is used by a supervised entity as a benchmark in the Union, the entity shall verify that the provider of the relevant index is referenced on the website of ESMA as an authorised, registered or recognised administrator in accordance with this Regulation.***

Chapter 3

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 ***with its prior written consent.*** The competent authorities shall notify ESMA of any proposed delegation 60 days prior to such delegation taking effect.

2. A competent authority may delegate ▌ its tasks under this Regulation to ESMA subject to the agreement of ESMA. ▌

3. ESMA shall notify the Member States of a proposed delegation within seven days. ESMA shall publish details of any agreed delegation within ***seven*** days of notification.

***Article 26a***

***Breach of Union law by national competent authorities***

***1. Where a national competent authority has not applied this Regulation or has applied it in a way which appears to be a breach of Union law, ESMA may use its powers under Article 17 of Regulation (EU) No 1095/2010 in accordance with the procedures laid down in that Article and may, for the purposes of Article 17(6) of Regulation (EU) No 1095/2010, adopt individual decisions addressed to benchmark administrators supervised by that national competent authority and to contributors to a benchmark supervised by that national competent authority where those contributors are supervised entities.***

***2. Where the relevant benchmark is a critical benchmark, ESMA shall ensure cooperation with the college of competent authorities in accordance with the procedure laid down Article 34.***

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) ▌ such disclosure is necessary for legal proceedings.

Article 28

Cooperation ***on*** investigations

1. The relevant competent authority may request the assistance of another competent authority with regard to on-site inspections or investigations. ***The competent authority receiving the request shall cooperate to the extent possible and appropriate.***

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 ***support or*** carry out the on-site inspection or investigation.

Chapter 4

Role of Competent Authorities

Article 29

Competent authorities

1. For administrators and supervised contributors, each Member State shall designate the relevant 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 ***of this Article and pursuant to point (a) of Article 25a(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 ***relevant*** 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 ***provision of, and contribution to, a benchmark, including any service provider pursuant to Article 6(3a),*** as well as their principals, and if necessary, ▌ summon and question any such person with a view to ***obtaining*** 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 natural and 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;

▌

(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 a person who has published or disseminated the benchmark to publish a corrective statement about past contributions to or figures of the benchmark***;***

***(ka) review and require modifications of the compliance statement.***

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. A person 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 2.

Article 31

Administrative measures and sanctions

1. Without prejudice to the supervisory powers of competent authorities in accordance with Article 34, 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, 14, 15, 17, ▌ 19, ▌ 23 ***and 23a*** of this Regulation where they are apply; and

(b) failure to cooperate or comply in an investigation or with an inspection or request covered by Article 30.

2. In ***the event*** 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 contributors;

(f) the imposition of maximum administrative pecuniary sanctions of at least three times 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 ***into*** force of this Regulation; or

(ii) for ***infringements*** of point (b)▌ of ***Article*** 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 ***into*** 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, 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 according to 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 points (b) and (c) of ***Article 7***(1), whichever is the higher of EUR 250 000 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 according to 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 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 ***and obligation to cooperate***

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

(a) the gravity and duration of the ***infringement***;

***(aa) the criticality of the benchmark to financial stability and the real economy;***

(b) the degree of responsibility of the responsible person;

(c) ▌the total 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 breaches by the person concerned;

(g) measures taken, after the breach, by a responsible person to prevent the repetition of the breach.

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.

***2a. 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.***

***2b. Competent authorities shall provide assistance to competent authorities of 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.***

Article 33

Publication of decisions

1. A decision imposing an administrative sanction or measure for ***infringements*** 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:

*(i)* that the stability of financial markets would not be put in jeopardy; or

*(ii)* 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.

***4a.*** ***Member States shall annually provide ESMA 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 annually provide ESMA 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

***College*** of competent authorities

1. Within 30 ▌ days from the ***inclusion of*** a benchmark ***in the list of*** critical ***benchmarks pursuant to Article 25a, with the exception of critical benchmarks that are national in nature as laid down in point 21 of Article 3(1)***, the ***relevant*** 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 the ***major*** contributors.

3. Competent authorities of other Member States shall have the right to be member of the college where, if that ▌ 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 ***30*** 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. ***ESMA*** shall chair the meetings of the college, coordinate the actions of the college and ensure efficient exchange of information among members of the college.

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 between the competent authorities;

   (c) cases in which the competent authorities must consult each other;

   (d) the assistance to be provided under Article ***14(5a)*** in the enforcement of the measures referred to in Article ***14(3)***.

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

7. In the absence of agreement concerning the arrangements under paragraph 6, any members of the college, other than ESMA, may refer the matter to ESMA. 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*** Article ▌ 24 and ▌ ***, where applicable, Articles 14 and 23,*** 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***. ***A mediation mechanism shall be established to assist in finding a common view among the competent authorities in the event of any disagreement.***

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 taken in accordance with Articles ▌ 23 ***and*** 24▌ .

***Where, 20 days after the referral to ESMA provided for in the first subparagraph, the issue is not settled, the competent authority of the administrator shall take the final decision and provide a detailed explanation in writing of its decision to the authorities referred to in the first subparagraph and to ESMA.***

***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.***

***9a. Any of the competent authorities within a college that fails to agree on any of the measures to be taken under Article 13a or 14 may refer the matter to ESMA. Without prejudice to Article 258 TFEU, ESMA may act in accordance Article 19 of Regulation (EU) No 1095/2010.***

***9b. Any measure taken under Article 13a or 14 shall remain in force at least until there is agreement by the college, pursuant to paragraphs 8 and 9a.***

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.

***2a. Performing its role in the implementation and monitoring of Regulation (EU) No 1227/2011, the Agency for the Cooperation of Energy Regulators (ACER) and other relevant supervisors shall cooperate with ESMA for the purposes of this Regulation and shall be consulted during the drafting of all regulatory technical standards and delegated acts and, without delay, shall supply all information necessary to fulfil its obligations.***

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 (EU) No 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) ▌ and 23(7) 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) ▌ and 23(7) 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) ▌ and 23(7) 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. An administrator providing a benchmark on [the date of entry into force of this Regulation] shall apply for authorisation ***or registration*** under Article 23 ***or 23a*** within [***12*** months after the date of application].

***1a. The competent national authorities shall decide which of the registered benchmarks are to be considered 'critical'. Those benchmarks shall be authorised in accordance with the provisions of Article 23.***

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 is refused.

3. Where an existing benchmark does not meet the requirements of this Regulation, but changing that benchmark to ***comply*** 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 continued use of the benchmark in existing financial contracts and financial instruments may be permitted by the relevant competent authority of the Member State where the natural or legal person providing the benchmark is located until such time as the competent authority considers it possible for the benchmark to cease being used or be substituted by another benchmark without causing detriment to either party to the contract***.

***3a.*** ***New financial instruments or financial contracts shall not reference an existing benchmark that does not meet the requirements of this Regulation after [the entry into application of this Regulation]***.

***3b.*** ***By way of derogation from paragraph 3a, new financial instruments may reference an existing benchmark that does not meet the requirements of this Regulation for a period of one year after [the date of application of this Regulation], provided that the financial instrument is necessary for hedging purposes in order to manage the risk of an existing financial instrument that references that benchmark.***

4. ***Unless the Commission has adopted an equivalence decision as referred to in Article 20(2) or (2a), supervised entities in the Union shall only use a benchmark provided by an administrator located in a third country, where it is used as a reference in existing*** financial instruments and financial contracts ▌ at the time of entry into force of this Regulation ▌ or ***where it is used in new financial instruments and*** financial contracts ***for three years from the date of*** application of this Regulation.

***Article 39a***

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

***Article 19(2) is without prejudice to existing prospectuses approved under Directive 2003/71/EC prior to [the entry into force of this Regulation]. For prospectuses approved prior to [the entry into force of this Regulation] under Directive 2009/65/EC the underlying documents shall be updated at the first opportunity and in any event by …* [[twelve] months after the entry into force of this Regulation].***

Article 40

Review

***1.*** By 1 ***January*** 2018, the Commission shall review and ***submit a*** report to the European Parliament and ***to*** 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; ***and***

(b) the effectiveness of the supervisory regime in Title VI and the colleges under Article 34 and the appropriateness of supervision of certain benchmarks by a Union body.

▌

***1a. The Commission shall review the evolution of international principles, particularly those applicable to PRA commodity benchmarks, as well as the evolution of legal frameworks and supervisory practices in third countries concerning the provision of benchmarks, and shall submit a report to the European Parliament and to the Council by …* [four years after the date of the entry into force of this Regulation] and every four years thereafter. Those reports shall be accompanied by a legislative proposal, if appropriate.***

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 ***6*** months after ... [***the*** entry into force ***of the delegated acts adopted by the Commission under this Regulation]***.

However, Article 13(1) ***and Articles 14*** and 34 shall apply from ...[6 months after entry into force].

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* |