

Luxembourg, 1st August 2019

To benchmark administrators and supervised
contributors

CIRCULAR CSSF 19/728

Re: ESMA Guidelines on non-significant benchmarks under the Benchmarks Regulation

Ladies and Gentlemen,

The purpose of this circular is to transpose the “Guidelines on non-significant benchmarks under the Benchmarks Regulation¹” (Ref. ESMA70-145-1209) (hereafter, the “Guidelines”), published on 19 June 2019 by the European Securities and Markets Authority (ESMA), into Luxembourg regulation.

The Guidelines apply in relation to the provision of non-significant benchmarks and the contribution to non-significant benchmarks and relate to: procedures and characteristics of the oversight function (Article 5 of the Benchmark Regulation); input data (Article 11 of the Benchmark Regulation); transparency of methodology (Article 13 of the Benchmark Regulation); and governance and control requirements for supervised contributors (Article 16 of the Benchmark Regulation).

¹ Regulation (EU) 2016/1011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

The Guidelines are annexed to this circular and are available on ESMA's website <http://www.esma.europa.eu>.

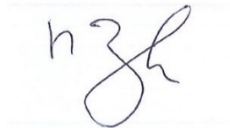
This circular enters into force on the day of its publication.

Yours faithfully,

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER



Claude WAMPACH
Director



Marco ZWICK
Director



Jean-Pierre FABER
Director



Françoise KAUTHEN
Director

Annex: Guidelines on non-significant benchmarks under the Benchmarks Regulation



European Securities and
Markets Authority

Guidelines

On non-significant benchmarks under the Benchmarks Regulation





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I. Scope

Who?

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

What?

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

When?

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

II. Legislative references, abbreviations and definitions

Legislative references

ESMA Regulation 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/EC¹

BMR Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

Abbreviations

NSBs Non-significant benchmarks

Definitions

¹ OJ L 331, 15.12.2010, p. 84.



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

Competent authority An authority designated under Article 40 of the Benchmarks Regulation.

III. Purpose

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

IV. Compliance and reporting obligations

Status of the guidelines

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

Reporting requirements

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

V. Guidelines on non-significant benchmarks

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

Scope

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

Composition of the oversight function

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

Characteristics and positioning of the oversight function

17. The oversight function should constitute a part of the organisational structure of the administrator, or of the parent company of the group to which it belongs, but be separate from the management body and other governance functions of the benchmark administrator.

18. The oversight function should assess and, where appropriate challenge, the decisions of the management body of the administrator with regards to the fulfilment of the requirements of BMR. Without prejudice to Article 5(3)(i) of BMR, the oversight function should address all recommendations on benchmark oversight to the management body.
19. Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations or decisions of the oversight function, it should record this fact clearly in the minutes of its next meeting, or in its record of decisions.

Procedures governing the oversight function

20. An oversight function of an administrator of NSBs should have procedures at least relating to the following areas:
 - a. the criteria to select its members;
 - b. the election, nomination or removal and replacement of its members;
 - c. the suspension of voting rights of external members for decisions that would have a direct business impact on the organisations they represent;
 - d. requiring members to disclose material conflict of interest before discussion of an agenda item during meetings of the oversight function;
 - e. the exclusion of members from specific discussions in respect of which they have a conflict of interest;
 - f. its access to the documentation necessary to carry out its duties;
 - g. measures to be taken in respect of breaches of the code of conduct;
 - h. the notification to the competent authority of any suspected market abuse by contributors or the administrator;
 - i. the prevention of improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function;
 - j. the public disclosure of the declaration of material conflicts of interest of members.
21. Where the oversight function is carried out by a natural person points (c) and (e) of the previous paragraph do not apply, and the administrator should appoint an alternate appropriate body or natural person to ensure that duties of the oversight function can be consistently carried out in case of the absence of the person responsible for the oversight function.

Non-exhaustive list of governance arrangements of the oversight function

22. The structure and composition of the oversight function should be determined, where appropriate, in accordance with one or more of the following non-exhaustive list:
- a. Unless the complexity or vulnerability of the NSBs indicate otherwise, one or more natural persons who are staff members of the administrator or any other natural persons whose services are placed at the administrator's disposal or under the control of the administrator, who are not directly involved in the provision of any relevant benchmark and are free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;
 - b. An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors to the benchmarks and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
 - c. Where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function, an oversight committee that includes members of staff representing parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities or, where such appropriate staff members are not available, independent members.
 - d. An oversight function consisting of multiple committees, each responsible for:
 - i. the oversight of a NSB, type of NSBs or family of NSBs, or
 - ii. a subset of the oversight responsibilities and tasks,provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.

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

Scope

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

Ensuring appropriate and verifiable input data

25. For the purpose of Article 11(3)(a) and (b) of BMR, the administrator of a NSB should ensure that it has available to it all information necessary to enable it to check the following matters in relation to any input data that it uses for the benchmark, where applicable:
- a. whether the submitter is authorised to contribute the input data on behalf of the contributor in accordance with any requirement for authorisation under Article 15(2)(b) of BMR;
 - b. whether the input data is provided by the contributor, or selected from a source specified by the administrator, within a time-period prescribed by the administrator;
 - c. whether the input data meets the requirements set out in the methodology of the benchmark.

Internal oversight and verification procedures of a contributor to a NSBs

26. The internal oversight and verification procedures of a contributor that the administrator of a NSB should ensure are in place in compliance with Article 11(3)(b) of BMR should include at least the following:
- a. procedures governing:
 - i. communication of information to the administrator, upon its request;
 - ii. regular reporting to the senior management of the contributor on the duties carried out by the three levels of control functions;
 - iii. the means of cooperation and flow of information between the three levels of control functions.
 - b. establishment and maintenance of an internal function to serve as the first level of control for the contribution of input data and to be responsible for carrying out the following duties:
 - i. undertaking effective checking of input data prior to its contribution;
 - ii. checking that the submitter is authorised to contribute input data on behalf of the contributor in accordance with any requirement imposed under Article 15(2)(b) of BMR;
 - iii. ensuring that access to contributions of input data is restricted to persons involved in the contribution process, except where access is necessary for audit purposes, investigation purposes or purposes required by law.

- c. establishment and maintenance of an internal function to serve as the second level of control for the contribution of input data and to be responsible for carrying out the following duties:
 - i. establishing and maintaining a whistle-blowing procedure that includes appropriate safeguards for whistle-blowers;
 - ii. establishing and maintaining procedures for the internal reporting of any attempted or actual manipulation of the input data, for any failure to comply with the contributor's own benchmark-related policies and for the investigation of such events as soon as they become apparent;
 - iii. oversight of relevant communications between front office function staff directly involved in contributing input data and also of relevant communications between such staff and other internal functions or external bodies when the controls performed by this second level function give rise to concerns;
 - iv. establishing, maintaining and operating a conflict of interest policy regarding the actual or potential material conflicts of interest that ensures:
 - 1. the identification and disclosure to the administrator of actual or potential material conflicts of interest concerning any of the contributor's front office function staff who are involved in the contribution process;
 - 2. the absence of any direct or indirect link between the remuneration of a submitter and the value of the benchmark, the value of specific submissions made or the performance of any activity carried on by the contributor that might give rise to a conflict of interest related to the contribution of input data to the benchmark;
 - 3. a clear segregation of duties between front office staff involved in contributing input data and other front office function staff, where appropriate, taking into account: the level of discretion involved in the process of contribution; the nature, scale and complexity of the contributor's activities; whether conflicts of interest may rise between the contribution of input data to the benchmark and trading or other activities performed by the contributor.
- d. establishment and maintenance of an internal function, independent from the first and second level of controls functions, to serve as the third level of control for the contribution of input data and to be responsible for performing checks, on a regular basis, on the controls exercised by the other two control functions.

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

Key elements of the methodology used to determine a NSB

27. The information to be provided by an administrator of a NSB or family of NSBs in compliance with the requirement laid down in Article 13(1)(a) of BMR, should include at least the following elements, where applicable:

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

Details of the internal review and approval of the methodology

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

Material changes to the methodology

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

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

Scope

30. Notwithstanding the requirement of Article 26(4) of BMR, paragraphs 33, 34, 35 and 36 are not applicable to the contribution to NSBs for which the administrators chose not to apply Article 16(2) of BMR.
31. Notwithstanding the requirement of Article 26(4) of BMR, paragraph 37 is not applicable to the contribution to NSBs for which the administrators chose not to apply Article 16(3) of BMR.

Control framework of supervised contributors to NSBs

32. The control framework that a supervised contributor to NSBs is required to have in place pursuant to Article 16(1) of BMR should include the establishment and maintenance of at least the following controls:
 - a. an effective oversight mechanism for overseeing the process for contributing input data that includes a risk management system, the identification of senior personnel who are responsible for the data contribution process and the involvement of any compliance and internal audit functions within the contributor's organisation;
 - b. a policy on whistle-blowing, including appropriate safeguards for whistle-blowers;
 - c. a procedure for detecting and managing breaches of BMR. The procedure for managing breaches should include reviewing any detected breach or error and recording the actions taken as a consequence.

Controls on submitters of supervised contributors to NSBs

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

- b. procedures and systems for monitoring the data used for the contributions, and the contributions themselves, that are capable of producing alerts in line with parameters predefined by the contributor.

Management of conflicts of interest of supervised contributors to NSBs

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

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

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

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

Record-keeping requirements for supervised contributors to NSBs

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

Policies on expert judgement of supervised contributors to NSBs

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

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