



European Securities and
Markets Authority

Reply form for the Discussion Paper on Benchmarks Regulation



15 February 2016

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the European Single Electronic Format (ESEF), published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type < ESMA_QUESTION_DP_BMR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_DP_BMR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_DP_BMR_XXXX_REPLYFORM or

ESMA_DP_BMR_XXXX_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach us by 31 March 2016.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_DP_BMR_1>

Europex, the Association of European Energy Exchanges, represents 26 European members who operate regulated markets for electricity, natural gas and other commodities. Energy exchanges act as administrators of a number of benchmarks. These are typically based on exchange transaction data and are subject to a transparent methodology. Financial instruments referencing these benchmarks are traded by physical players, e.g. power plant operators, as well as by market participants from the financial industry.

Europex explicitly welcomes ESMA's Discussion Paper on the Benchmark Regulation and the opportunity to share its views, particularly with regard to commodity-related issues.

<ESMA_COMMENT_DP_BMR_1>



Q1: Do you agree that an index’s characteristic of being “made available to the public” should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?

<ESMA_QUESTION_DP_BMR_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_1>

Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?

<ESMA_QUESTION_DP_BMR_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_2>

Q3: Do you agree with ESMA’s proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator? Which other characteristics/activities would you regard as covered by Article 3(1) point 3(a)?

<ESMA_QUESTION_DP_BMR_3>
Yes, the establishment of governance arrangements, including oversight and accountability, are the core of administering the arrangements for determining a benchmark.
<ESMA_QUESTION_DP_BMR_3>

Q4: Do you agree with ESMA’s proposal for a definition of issuance of a financial instrument? Are there additional aspects that this definition should cover?

<ESMA_QUESTION_DP_BMR_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_4>

Q5: Do you think that the business activities of market operators and CCPs in connection with possible creation of financial instruments for trading could fall under the specification of “issuance of a financial instrument which references an index or a combination of indices”? If not, which element of the “use of benchmark” definition could cover these business activities?

<ESMA_QUESTION_DP_BMR_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_5>

Q6: Do you agree with the proposed list of appropriate governance arrangements for the oversight function? Would you propose any additional structure or changes to the proposed structures?

<ESMA_QUESTION_DP_BMR_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_6>



Q7: Do you believe these proposals sufficiently address the needs of all types of benchmarks and administrators? If not, what characteristics do such benchmarks have that would need to be addressed in the proposals?

<ESMA_QUESTION_DP_BMR_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_7>

Q8: To the extent that you provide benchmarks, do you have in place a pre-existing committee, introduced through other EU legislation, or otherwise, which could satisfy the requirements of an oversight function under Article 5a? Please describe the structure of the committee and the reasons for establishing it.

<ESMA_QUESTION_DP_BMR_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_8>

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

<ESMA_QUESTION_DP_BMR_9>
Administrators should be able to determine how to organise the oversight function. (It is possible that one function will have the necessary competence to assess and supervise all benchmarks.) Regulatory requirements should be focused on how the oversight of a benchmark should be performed and what objectives it should attain, not on how it should be organised in a variety of administrators with different organisational structures and possibly different specificities.

Different methodologies do not necessarily require expertise in different fields or a different set of competences for the oversight function, so there is no rationale to require multiple oversight functions. All decisions in this respect should be made on a case by case basis, ideally by the administrator.

<ESMA_QUESTION_DP_BMR_9>

Q10: If an administrator provides more than one critical benchmark, do you support the approach of one oversight function exercising oversight over all the critical benchmarks? Do you think it is necessary for an oversight function to have sub-functions, to account for the different needs of different types of benchmarks?

<ESMA_QUESTION_DP_BMR_10>
Europex supports the approach of one oversight function exercising oversight over all critical benchmarks. As stated above, different types of benchmarks do not necessarily require a different set of competences for the oversight function, so there is no rationale to require multiple oversight functions. All decisions in this respect should be made on a case by case basis, ideally by the administrator.

<ESMA_QUESTION_DP_BMR_10>

Q11: Where an administrator provides critical benchmarks and significant or non-significant benchmarks, do you think it should establish different oversight functions depending on the nature, scale and complexity of the critical benchmarks versus the significant or non-significant benchmarks?

<ESMA_QUESTION_DP_BMR_11>



Different types of benchmarks do not necessarily require a different set of competences for the oversight function, so there is no rationale to require multiple oversight functions. All decisions in this respect should be made on a case by case basis, ideally by the administrator.

<ESMA_QUESTION_DP_BMR_11>

Q12: In which cases would you agree that contributors should be prevented from participating in oversight committees?

<ESMA_QUESTION_DP_BMR_12>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_12>

Q13: Do you foresee additional costs to your business or, if you are not an administrator, to the business of others resulting from the establishment of multiple oversight functions in connection with the different businesses performed and/or the different nature, scale and type of benchmarks provided? Please describe the nature, and where possible provide estimates, of these costs.

<ESMA_QUESTION_DP_BMR_13>

Multiple oversight functions multiply the costs of establishing the oversight function, and, hence, should be limited to the specific, individual cases, in which one oversight function is actually unable to exercise effective oversight over all benchmarks. It should not be an automatic administrative requirement to provide a separate oversight function for each benchmark or each type of benchmarks. Multiple oversight functions should only be required when they are objectively justified by the different set of competences required to exercise the oversight over different types of benchmarks.

<ESMA_QUESTION_DP_BMR_13>

Q14: Do you agree that, in all cases, an oversight function should not be responsible for overseeing the business decisions of the management body?

<ESMA_QUESTION_DP_BMR_14>

Yes.

<ESMA_QUESTION_DP_BMR_14>

Q15: Do you support the proposed positioning of the oversight function of an administrator? If not, please explain your reasons why this positioning may not be appropriate.

<ESMA_QUESTION_DP_BMR_15>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_15>

Q16: Do you have any additional comments with regard to the procedures for the oversight function as well as the composition and positioning of the oversight function within an administrator's organisation?

<ESMA_QUESTION_DP_BMR_16>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_16>

Q17: Do you agree with the proposed list of elements of procedures required for all oversight functions? Should different procedures be employed for different types of benchmarks?

<ESMA_QUESTION_DP_BMR_17>



TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_17>

Q18: Do you agree with the proposed treatment of conflicts of interest arising from the composition of an oversight function? Have you identified any additional conflicts which ESMA should consider in drafting the RTS?

<ESMA_QUESTION_DP_BMR_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_18>

Q19: Do you agree with the list of records to be kept by the administrator for input data verification? If not, please specify which information is superfluous / which additional information is needed and why.

<ESMA_QUESTION_DP_BMR_19>

We consider the following information to be superfluous because the contributors to the benchmark should be responsible for maintaining such records and making the information available to the Administrator on request:

- a) the role of the individuals responsible for submissions and approval (It should be sufficient for the Administrator to record the identity of the individual responsible for submissions);
- b) relevant communication between submitters and approvers;
- c) relevant communication between staff in the panel entities units who deal in benchmark-referenced instruments or derivatives and internal or external third parties involved in the benchmark contribution process;
- d) substantial exposures of individual traders or trading desks to benchmark related instruments, as well as changes therein; and
- e) remedial actions taken in response to audit findings and progress in their implementation unless the actions have an impact (or potential impact) on the integrity of the benchmark.

While we acknowledge the argument that data storage is less expensive now than it has been in the past, we believe that an Administrator should at least be entitled to rely on the lines of defence of a supervised entity to store the requisite data safely and accurately. Also, it is important to highlight that some of the data is commercially extremely sensitive.

We consider that, in the case of material transactions or market data that is deliberately excluded by a contributor bank from its contribution, an Administrator should maintain a record of the reason for the omission, if the exclusion is not obvious through the application of the benchmark calculation methodology.

<ESMA_QUESTION_DP_BMR_19>

Q20: Do you agree that, for the information to be transmitted to the administrator in view of ensuring the verifiability of input data, weekly transmission is sufficient? Would you instead consider it appropriate to leave the frequency of transmission to be defined by the administrator (i.e. in the code of conduct)?

<ESMA_QUESTION_DP_BMR_20>



We consider it appropriate to leave the frequency of transmission to be defined by the Administrator in the code of conduct since a weekly transmission may be appropriate for some benchmarks but not for others.
<ESMA_QUESTION_DP_BMR_20>

Q21: Do you agree with the concept of appropriateness as elaborated in this section?

<ESMA_QUESTION_DP_BMR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_21>

Q22: Do you see any other checks an administrator could use to verify the appropriateness of input data?

<ESMA_QUESTION_DP_BMR_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_22>

Q23: Would you consider it useful that the administrator maintains records of the analyses performed to evaluate the appropriateness of input data?

<ESMA_QUESTION_DP_BMR_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_23>

Q24: Do you see other possible measures to ensure verifiability of input data?

<ESMA_QUESTION_DP_BMR_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_24>

Q25: Do you agree with the identification of the concepts and underpinning activities of evaluation, validation and verifiability, as used in this section?

<ESMA_QUESTION_DP_BMR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_25>

Q26: Do you agree that all staff involved in input data submission should undergo training, but that such training should be more elaborate / should be repeated more frequently where it concerns front office staff contributing to benchmarks?

<ESMA_QUESTION_DP_BMR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_26>

Q27: Do you agree to the three lines of defence-principle as an ideal type of internal oversight architecture?

<ESMA_QUESTION_DP_BMR_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_27>



Q28: Do you identify other elements that could improve oversight at contributor level?

<ESMA_QUESTION_DP_BMR_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_28>

Q29: Do you agree with the list of elements contained in a conflict of interest policy? If not, please state which elements should be added / which elements you consider superfluous and why.

<ESMA_QUESTION_DP_BMR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_29>

Q30: Do you agree that where expert judgement is relied on and/or discretion is used additional appropriate measures to ensure verifiability of input data should be imposed? If not, please specify examples and reasons why you disagree.

<ESMA_QUESTION_DP_BMR_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_30>

Q31: Do you agree to the list of criteria that can justify differentiation? If not, please specify why you disagree.

<ESMA_QUESTION_DP_BMR_31>

The starting point in considering the differentiation between the supervised and non-supervised contributors should be the regulatory obligations to which the supervised contributors are subject in order to avoid regulatory duplication where possible.

We recognise that the size of contributors may constitute a practical impediment to broadening the application of the oversight measures imposed on front office contributions to all contributors. However, the impact on a benchmark of contributors having insufficient controls is not a function of size, if the calculation methodology of the benchmark is to give equal weighting to all contributions. In this context, a risk-based approach would seem appropriate, based on the quality and effectiveness of the controls.

<ESMA_QUESTION_DP_BMR_31>

Q32: Do you agree to the list of elements that are amenable to proportional implementation? If not, please specify why you disagree.

<ESMA_QUESTION_DP_BMR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_32>

Q33: Do you agree to the list of elements that are not amenable to proportional implementation? If not, please specify why you disagree.

<ESMA_QUESTION_DP_BMR_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_33>



Q34: Do you consider the proposed list of key elements sufficiently granular “to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts”?

<ESMA_QUESTION_DP_BMR_34>
Yes.

We recommend that the verification procedures for input data should only be described in general terms in order to avoid attempts to undermine the checks and controls.

<ESMA_QUESTION_DP_BMR_34>

Q35: Beyond the list of key elements, could you identify other elements of benchmark methodology that should be disclosed? If yes, please explain the reason why these elements should be disclosed.

<ESMA_QUESTION_DP_BMR_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_35>

Q36: Do you agree that the proposed key elements must be disclosed to the public (linked to Article 3, para 1, subpara 1, point (a))? If not, please specify why not.

<ESMA_QUESTION_DP_BMR_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_36>

Q37: Do you agree with ESMA’s proposal about the information to be made public concerning the internal review of the methodology? Please suggest any other information you consider useful to disclose on the topic.

<ESMA_QUESTION_DP_BMR_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_37>

Q38: Do you agree with the above proposals to specify the information to be provided to benchmark users and, more in general, stakeholders regarding material changes in benchmark methodology?

<ESMA_QUESTION_DP_BMR_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_38>

Q39: Do you agree, in particular, on the opportunity that also the replies received in response to the consultation are made available to the public, where allowed by respondents?

<ESMA_QUESTION_DP_BMR_39>
It is important (in accordance with IOSCO Principle 12) that all stakeholders’ comments, as well as the administrator’s summary response to those comments, are made publically available after any given consultation period, except where the respondent has requested confidentiality. We regard this as fully sufficient and do not consider it necessary to publish all stakeholder comments in detail.

The consultation procedure for material changes in the benchmark methodology, the summary of the received comments as well as the actual material changes themselves should be published on the admin-



istrator's website. However, we do not see the need to make hard copies available upon request, at least not without an additional charge.

<ESMA_QUESTION_DP_BMR_39>

Q40: Do you agree that the publication requirements for key elements of methodology apply regardless of benchmark type? If not, please state which type of benchmark would be exempt / which elements of methodology would be exempt and why.

<ESMA_QUESTION_DP_BMR_40>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_40>

Q41: Do you agree that the publication requirements for the internal review of methodology apply regardless of benchmark type? If not, please state which information regarding the internal review could be differentiated and according to which characteristic of the benchmark or of its input data or of its methodology.

<ESMA_QUESTION_DP_BMR_41>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_41>

Q42: Do you agree that, in the requirements regarding the procedure for material change, the proportionality built into the Level 1 text covers all needs for proportional application?

<ESMA_QUESTION_DP_BMR_42>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_42>

Q43: Do you agree that a benchmark administrator could have a standard code for all types of benchmarks? If not, should there be separate codes depending on whether a benchmark is critical, significant or non-significant? Please take into account your answer to this question when responding to all subsequent questions.

<ESMA_QUESTION_DP_BMR_43>

We agree that an administrator could employ a standard code of conduct for all its benchmarks. Such a code should be tailored based on the degree of use (critical, significant, non-significant), on the underlying, the applied methodology, the supervised nature of the contributors as well as potentially on the geographic location of the benchmark.

We suggest that it should be on each administrator to decide whether or not to employ a standard code of conduct for its benchmarks.

<ESMA_QUESTION_DP_BMR_43>

Q44: Do you believe that an administrator should be mandated to tailor a code of conduct, depending on the market or economic reality it seeks to measure and/or the methodology applied for the determination of the benchmark? Please explain your answer using examples of different categories or sectors of benchmarks, where applicable.

<ESMA_QUESTION_DP_BMR_44>



As stated in paragraph 138, the purpose of the code is to specify the responsibilities for contributors with respect to input data, record keeping, suspicious input data reporting and conflict management requirements.

We suggest that it should be on each administrator to decide whether or not it is desirable to tailor a code of conduct, depending on the market or economic reality the benchmark seeks to measure and/or the methodology applied for the determination of the benchmark. We do not think that it should be mandatory.
<ESMA_QUESTION_DP_BMR_44>

Q45: Do you agree with the above requirements for a contributor's contribution process? Is there anything else that should be included?

<ESMA_QUESTION_DP_BMR_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_45>

Q46: Do you agree that the details of the code of conduct to be specified by ESMA may still allow administrators to tailor the details of their codes of conduct with respect to the specific benchmarks provided?

<ESMA_QUESTION_DP_BMR_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_46>

Q47: Do you agree that such information should be required from contributors under the code of conduct? Should any additional information be requested?

<ESMA_QUESTION_DP_BMR_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_47>

Q48: Are their ways in which contributors may manage possible conflicts of interest at the level of the submitters? Should those conflicts, where managed, be disclosed to the administrator?

<ESMA_QUESTION_DP_BMR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_48>

Q49: Do you foresee any obstacles to the administrator's ability to evaluate the authorisation of any submitters to contribute input data on behalf of a contributor?

<ESMA_QUESTION_DP_BMR_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_49>

Q50: Do you agree that a contributor's contribution process should foresee clear rules for the exclusion of data sources? Should any other information be supplied to administrators to allow them to ensure contributors have provided all relevant input data?

<ESMA_QUESTION_DP_BMR_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_50>



Q51: Do you think that the listed procedures for submitting input data are comprehensive? If not, what is missing?

<ESMA_QUESTION_DP_BMR_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_51>

Q52: Do you agree that rules are necessary to provide consistency of contributors' behaviour over the time? Should this be set out in the code of conduct or in the benchmark methodology, or both?

<ESMA_QUESTION_DP_BMR_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_52>

Q53: Should policies, in addition to those set out in the methodology, be in place at the level of the contributors, regarding the use of discretion in providing input data?

<ESMA_QUESTION_DP_BMR_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_53>

Q54: Do you agree with the list of checks for validation purposes? What other methods could be included?

<ESMA_QUESTION_DP_BMR_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_54>

Q55: Do you agree with the minimum information requirement for record keeping? If not would you propose additional/alternative information?

<ESMA_QUESTION_DP_BMR_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_55>

Q56: Do you support the recording of the use of expert judgement and of discretion? Should administrators require the same records for all types of benchmarks?

<ESMA_QUESTION_DP_BMR_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_56>

Q57: Do you agree that an administrator could require contributors to have in place a documented escalation process to report suspicious transactions?

<ESMA_QUESTION_DP_BMR_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_57>



Q58: Do you agree with the list of policies, procedures and controls that would allow the identification and management of conflicts of interest? Should other requirements be included?

<ESMA_QUESTION_DP_BMR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_58>

Q59: Do you have any additional comments with regard to the contents of a code of conduct in accordance with Article 9(2)?

<ESMA_QUESTION_DP_BMR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_59>

Q60: Do you agree with the above list of requirements? Do you think that those requirements are appropriate for all benchmarks? If not what do you think should be the criteria we should use?

<ESMA_QUESTION_DP_BMR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_60>

Q61: Do you agree that information regarding breaches to the BMR or to Code of Conduct should also be made available to the Benchmark Administrator?

<ESMA_QUESTION_DP_BMR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_61>

Q62: Do you think that the external audit covering benchmark activities, where available, should also be made available, on request, to the Benchmark Administrator?

<ESMA_QUESTION_DP_BMR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_62>

Q63: Do you agree with the proposed criteria for the specific elements of systems and controls as listed in Article 11(2)(a) to (c)? If not, what should be alternative criteria to substantiate these elements?

<ESMA_QUESTION_DP_BMR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_63>

Q64: Do you agree that the submitters should not be remunerated for the level of their contribution but could be remunerated for the quality of input and their ability to manage the conflicts of interest instead?

<ESMA_QUESTION_DP_BMR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_64>

Q65: What would be a reasonable delay for signing-off on the contribution? What are the reasons that would justify a delay in the sign off?

<ESMA_QUESTION_DP_BMR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_65>

Q66: Is the mentioned delay an element that may be established by the administrator in line with the applicable methodology and in consideration of the underlying, of the type of input data and of supervised contributors?

<ESMA_QUESTION_DP_BMR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_66>

Q67: In case of a contribution made through an automated process what should be the adequate level of seniority for signing-off?

<ESMA_QUESTION_DP_BMR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_67>

Q68: Do you agree with the above policies? Are there any other policies that should be in place at contributor's level when expert judgement is used?

<ESMA_QUESTION_DP_BMR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_68>

Q69: Do you agree with this approach? If so, what do you think are the main distinctions – amid the identified detailed measures that a supervised contributor will be required to put in place - that it is possible to introduce to cater for the different types, characteristics of benchmarks and of supervised contributors?

<ESMA_QUESTION_DP_BMR_69>
Yes.

We would nevertheless highlight the comment in paragraph 188 that, “[...] less strict rules could apply to those submitters that may take a position on financial instruments as part of their core business (e.g. insurance, reinsurance, pension funds) and those for which this could only occur occasionally (e.g. market operators, central counterparties, trade repositories)”. We consider that market operators, central counterparties and trade repositories would only become party to an unmatched trading position in exceptional circumstances (e.g. in case of the default of a participant) and with the purpose of off-setting a position (or at least minimising it) rather than creating one.

<ESMA_QUESTION_DP_BMR_69>

Q70: Do you foresee additional costs to your business or, if you are not a supervised contributor, to the business of others resulting from the implementation of any of the listed requirements? Please describe the nature, and where possible provide estimates, of these costs.

<ESMA_QUESTION_DP_BMR_70>



TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_70>

Q71: Could the approach proposed, i.e. the use of the field total issued nominal amount in the context of MiFIR / MAR reference data, be used for the assessment of the “nominal amount” under BMR Article 13(1)(i) for bonds, other forms of securitised debt and money-market instruments? If not, please suggest alternative approaches

<ESMA_QUESTION_DP_BMR_71>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_71>

Q72: Are you aware of any shares in companies, other securities equivalent to shares in companies, partnerships or other entities, depositary receipts in respect of shares, emission allowances for which a benchmark is used as a reference?

<ESMA_QUESTION_DP_BMR_72>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_72>

Q73: Do you have any suggestion for defining the assessment of the nominal amount of these financial instruments when they refer to a benchmark?

<ESMA_QUESTION_DP_BMR_73>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_73>

Q74: Do you agree with ESMA proposal in relation to the value of units in collective investment undertakings? If not, please explain why

<ESMA_QUESTION_DP_BMR_74>

It is important to avoid double-counting when calculating the total value of assets referencing a benchmark.

<ESMA_QUESTION_DP_BMR_74>

Q75: Do you agree with the approach of using the notional amount, as used and defined in the EMIR reporting regime, for the assessment of notional amount of derivatives under BMR Article 13(1)(i)? If not, please suggest alternative approaches.

<ESMA_QUESTION_DP_BMR_75>

Europex generally supports the proposal put forward by ESMA to use the notional amount of derivatives for the calculation of the total value of a benchmark. However, we would encourage ESMA to consider different sources of data for the assessment of different benchmarks.

In this context, we would like to highlight that some benchmarks are used on a daily basis provided that each day a given derivative contract is being priced against this benchmark. Other benchmarks, however, are only used on the expiry day of a given derivative contract.

ESMA should therefore specify whether the notional amount should be calculated at a certain point in time or as an average over a specified time period. The notional amount of derivatives can vary significantly over time and the transaction data held by Trade Repositories does not accurately reflect the contracts' value.

This is of particular importance for commodity benchmarks. Many commodity prices, in particular energy commodities, follow a strong seasonal pattern. As an example, natural gas prices tend to be high in the winter and lower in the summer. Against this background, calculating the notional amount at a certain point in time would easily lead to an over- or undervaluation of prices. To eliminate the seasonality of many commodity markets, we suggest considering an average price over a year. This might well be an average price of the most liquid derivative contract.

Many commodity markets differ from classical financial markets as many commodity benchmark administrators do not licence their benchmarks. And where they do so, they often have little or no knowledge about the volume referencing this benchmark as fees tend to not be independent from the actual volume. Hence, in many commodity markets, the availability of data is often very poor and most administrators dispose of no exclusive knowledge.

With regard to European electricity and natural gas wholesale markets, the Agency for the Cooperation of Energy Regulators (ACER) is collecting and storing almost the entire trading data in these markets. However, while the underlying benchmarks *can* be reported, this is not done in a consistent manner. Moreover, the data is not available to benchmark administrators in these markets.

This uncertainty in relation to commodity markets clearly needs to be taken into consideration, as it is mostly exclusively exchanges providing reliable data on the nominal amount referencing a benchmark.

Furthermore, we recommend that the 'net notional value', which better captures the co-dependency of value, is used (rather than the gross value) to calculate the materiality and scale of benchmarks. This also applies to any consideration of the 'use of benchmarks in a combination of benchmarks', as referenced in 8.2.5, section 214 of the present Discussion Paper:

The crude 'gross notional value' approach, via the multiplication of a position size or supposed deliverable supply quantity by the price in outright terms, can give rise to highly divergent and potentially economically inappropriate valuations of certain asset types or instruments falling under a 'significant' or 'critical' benchmark classification, especially in systems where the pricing is done in relative rather than absolute terms.

This means that when primary benchmarks do much of the heavy lifting in the price discovery process, (and although less significant or subsidiary prices may quite frequently be expressed in outright or 'flat' price terms), their actual value may in practice be determined by relative value trading. The correlation between those instruments also shows the degree to which they are co-determined by economic fundamentals.

<ESMA_QUESTION_DP_BMR_75>

Q76: Which are your views on the two options proposed to assess the net asset value of investment funds? Should you have a preference for an alternative option, please provide details and explain the reasons for your preference.

<ESMA_QUESTION_DP_BMR_76>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_76>

Q77: Which are your views on the two approaches proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of an investment fund referencing a benchmark within a combination of benchmarks? Please provide details and explain the reasons for your preference. Do you think there are other possible approaches? If yes, please explain.

<ESMA_QUESTION_DP_BMR_77>



For assets referencing a combination of benchmarks, only the portion of the value which refers to the single benchmark should be taken into account.

Furthermore, for the calculation of the notional value of contracts which are priced against the difference between the values of two benchmarks, we expect that only the relevant net price exposure of the differential is taken into account, rather than the outright prices of the two benchmarks.

<ESMA_QUESTION_DP_BMR_77>

Q78: Do you agree with the ‘relative impact’ approach, i.e. define one or more value and “ratios” for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

<ESMA_QUESTION_DP_BMR_78>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_78>

Q79: What kind of other objective grounds could be used to assess the potential impact of the discontinuity or unreliability of the benchmark besides the ones mentioned above (e.g. GDP, consumer credit agreement etc.)?

<ESMA_QUESTION_DP_BMR_79>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_79>

Q80: Do you agree with ESMA’s approach to further define the above criteria? Particularly, do you think that ESMA should develop more concrete guidance for the possible rejection of the NCA under Article 14c para 2? Do you believe that NCAs should take into consideration additional elements in their assessment?

<ESMA_QUESTION_DP_BMR_80>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_80>

Q81: Do you think that the fields identified for the template are sufficient for the competent authority and the stakeholders to form an opinion on the representativeness, reliability and integrity of a benchmark, notwithstanding the non-application of some material requirements? Could you suggest additional fields?

<ESMA_QUESTION_DP_BMR_81>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_81>

Q82: Do you agree with the suggested minimum aspects for defining the market or economic reality measured by the benchmark?

<ESMA_QUESTION_DP_BMR_82>

Again, we would like to point out that for many commodity benchmarks – even in case of regulated data commodity benchmarks - there is a low level of transparency with regard to the actual market size, also applying to many administrators. Many market players in various commodity markets tend to be trading exclusively for hedging purposes and do not per se publish the traded volumes in financial instruments.



<ESMA_QUESTION_DP_BMR_82>

Q83: Do you think the circumstances under which a benchmark determination may become unreliable can be sufficiently described by the suggested aspects?

<ESMA_QUESTION_DP_BMR_83>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_83>

Q84: Do you agree with the minimum information on the exercise of discretion to be included in the benchmark statement?

<ESMA_QUESTION_DP_BMR_84>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_84>

Q85: Are there any further precise minimum contents for a benchmark statement that should apply to each benchmark beyond those stated in Art. 15(2) points (a) to (g) BMR?

<ESMA_QUESTION_DP_BMR_85>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_85>

Q86: Do you agree that a concise description of the additional requirements including references, if any, would be sufficient for the information purposes of the benchmark statement for interest rate benchmarks?

<ESMA_QUESTION_DP_BMR_86>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_86>

Q87: Do you agree that the statement for commodity benchmarks should be delimited as described? Otherwise, what other information would be essential in your opinion?

<ESMA_QUESTION_DP_BMR_87>

The list of key elements that need to be included in each benchmark publication shall not be too burdensome in order to avoid a major delay of the publication. Where the benchmark determination follows the same pattern every time a benchmark is determined, it shall also be possible to refer to former publications as there is no added value in renewing the statement every time. We would additionally like to make very clear that it should not be necessary to mention more than the profession of the contributors. Mentioning more details could lead to a situation where some of them will cease their contributions, making some of the rather illiquid commodity markets even more opaque.

We would also like to highlight that IOSCO has spent a considerable amount of time and effort together with the Price Reporting Agencies to establish a workable standard for Benchmark Statements for Commodity Benchmarks. Hence, we encourage ESMA to follow the example of the IOSCO-Compliance Statements of Price Reporting Agencies.

<ESMA_QUESTION_DP_BMR_87>

Q88: Do you agree with ESMA's approach not to include further material requirements for the content of benchmark statements regarding regulated-data benchmarks?



<ESMA_QUESTION_DP_BMR_88>

We fully agree with ESMA’s approach regarding the Benchmark Statement for Regulated Data Benchmarks. In this context, it is important to highlight that exchanges are already very closely supervised by the respective competent authorities.

<ESMA_QUESTION_DP_BMR_88>

Q89: Do you agree with the suggested additional content required for statements regarding critical benchmarks? If not, please precise why and indicate what alternative or additional information you consider appropriate in case a benchmark qualifies as critical.

<ESMA_QUESTION_DP_BMR_89>

We have some reservations about including an unqualified reference to “Information about the degree of utilisation of the benchmark in general and also with regard to different Member States”.

The reason for this concern is the lack of comprehensive information about the degree of utilisation of the benchmark in general and with regard to the use in different Member States in particular. For this, any statement concerning the utilisation of a benchmark would need to be expressed in general terms and would need to include explicit caveats (e.g. in relation to data availability).

<ESMA_QUESTION_DP_BMR_89>

Q90: Do you agree with the suggested additional requirements for significant benchmarks? Which of the three options proposed you prefer, and why?

<ESMA_QUESTION_DP_BMR_90>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_90>

Q91: Do you agree with the suggested additional requirements for non-significant benchmarks? If not, please explain why and indicate what alternative or additional information you consider appropriate in case a benchmark is non-significant.

<ESMA_QUESTION_DP_BMR_91>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_91>

Q92: Are there any further contents for a benchmark statement that should apply to the various classes of benchmarks identified in this chapter?

<ESMA_QUESTION_DP_BMR_92>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_92>

Q93: Do you agree with the approach outlined above regarding information of a general nature and financial information? Do you see any particular cases, such as certain types of providers, for which these requirements need to be adapted?

<ESMA_QUESTION_DP_BMR_93>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_93>



Q94: Do you agree with ESMA’s approach to the above points? Do you believe that any specific cases exist, related either to the type of provider or the type of conflict of interest, that require specific information to be provided in addition to what initially identified by ESMA?

<ESMA_QUESTION_DP_BMR_94>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_94>

Q95: Do you agree with the proposals outlined for the above points? Do you see any areas requiring particular attention or adaptation?

<ESMA_QUESTION_DP_BMR_95>

We refer mainly to 296. and 299.. In most cases, there is not a definitive source of comprehensive information about the degree of utilisation of a benchmark in general. This applies in particular to its usage in different Member States.

As indicated in our answer to Q75, in many commodity markets the availability of reliable data is very poor. This clearly needs to be considered by the Authorities when evaluating applications from administrators from the commodity sector – regardless if the benchmarks are regulated data-benchmarks or are falling under Annex II.

With reference to 299, we deem it necessary to mention the contributors’ profession, but it shall not be necessary to name individual contributors. In some cases, contributors are well established associations that are not focused on providing market data and that deliver a service to their members. In other cases, the contributors may be companies that are active on the markets for hedging purposes but do not wish to be named.

<ESMA_QUESTION_DP_BMR_95>

Q96: Can you suggest other specific situations for which it is important to identify the information elements to be provided in the authorisation application?

<ESMA_QUESTION_DP_BMR_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_96>

Q97: Do you agree with the proposed approach towards registration? How should the information requirements for registration deviate from the requirements for authorisation?

<ESMA_QUESTION_DP_BMR_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_97>

Q98: Do you believe there are any specific types of supervised entities which would require special treatment within the registration regime? If yes, which ones and why?

<ESMA_QUESTION_DP_BMR_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_98>

Q99: Do you have any suggestions on which information should be included in the application for the recognition of a third country administrator?



<ESMA_QUESTION_DP_BMR_99>

Since a third country administrator may fulfil the BMR condition by applying the relevant IOSCO Principles for Financial Benchmarks, we suggest that assessments should be based on one of the following:

- The IOSCO summary in Chapter 2 of the IOSCO Principles for Financial Benchmarks Final Report of 2013¹, or
- the Key Indicia associated with the Principles, as set out in the IOSCO Assessment Methodology.

Whichever level of granularity is chosen, it should be applied consistently, at least across all applicants of a particular type. Moreover, all national competent authorities should coordinate the assessment of the applications consistently among themselves.

Europex considers that the RTS should provide clarity, in line with the Level 1 text, as to under which circumstances benchmarks based fully or partially on exchange data from outside the EU would be considered regulated data benchmarks, enabling the administrator to subsequently benefit from the exemptions specified in Article 12a. In our view, data sourced from third country trading venues subject to an equivalent regulation to MiFID should be considered regulated data. Incentivising benchmark administrators not to source data from equivalently regulated and supervised third country trading venues could ultimately negatively impact the representativeness and reliability of benchmarks in Europe and is contrary to the aims of the regulation.

<ESMA_QUESTION_DP_BMR_99>

Q100: Do you agree with the general approach proposed by ESMA for the presentation of the information required in Article 21a(6) of the BMR?

<ESMA_QUESTION_DP_BMR_100>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_100>

Q101: For each of the three above mentioned elements, please provide your views on what should be the measures to determine the conditions whether there is an ‘objective reason’ for the endorsement of a third country benchmark.

<ESMA_QUESTION_DP_BMR_101>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_101>

Q102: Do you consider that there are any other elements that could be taken into consideration to substantiate the ‘objective reason’ for the provision and endorsement for use in the Union of a third country benchmark or family of benchmarks?

<ESMA_QUESTION_DP_BMR_102>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_102>

Q103: Do you agree that in the situations identified above by ESMA the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in

¹ See <https://www.iosco.org/library/pubdocs/pdf/IOSCOFD415.pdf>



a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references a benchmark? If not, please explain the reasons why.

<ESMA_QUESTION_DP_BMR_103>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_103>

Q104: Which other circumstances could cause the consequences mentioned in Article 39(3) in case existing benchmarks are due to be adapted to the Regulation or to be ceased?

<ESMA_QUESTION_DP_BMR_104>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_104>

Q105: Do you agree with the proposed definition of “force majeure event”? If not, please explain the reasons and propose an alternative.

<ESMA_QUESTION_DP_BMR_105>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_105>

Q106: Are the two envisaged options (with respect to the term until which a non-compliant benchmark may be used) adequate: i.e. either (i) fix a time limit until when a non-compliant benchmark may be used or (ii) fix a minimum threshold which will trigger the prohibition to further use a non-compliant benchmark in existing financial instruments/financial contracts?

<ESMA_QUESTION_DP_BMR_106>
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<ESMA_QUESTION_DP_BMR_106>

Q107: Which thresholds would be appropriate to foresee and how might a time limit be fixed? Please detail the reasons behind any suggestion.

<ESMA_QUESTION_DP_BMR_107>
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<ESMA_QUESTION_DP_BMR_107>

Q108: Is the envisaged identification process of non-compliant benchmarks adequate? Do you have other suggestions?

<ESMA_QUESTION_DP_BMR_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_108>

Q109: Is the envisaged procedure enabling the competent authority to perform the assessment required by Article 39(3) correct in your view? Please advise what shall be considered in addition.

<ESMA_QUESTION_DP_BMR_109>
In paragraph 355, ESMA proposes two way of identifying benchmarks, in summary:



- national benchmark providers might be required to declare to their competent authority the benchmarks of which they are aware are being used in financial contracts/financial instruments, and
- supervised entities might be required to transmit such information to the competent authority of the administrator.

In the first case, it is not clear why national benchmark providers might be required to declare the use of benchmarks which they do not administer themselves. In the second case, competent authorities would surely receive many multiples of reports about some benchmarks. Yet, there would be no certainty that all benchmarks in use are reported. It would be generally less burdensome, if ESMA and/or each national competent authority published a list of benchmarks and asked for a notification of any omissions.

<ESMA_QUESTION_DP_BMR_109>

Q110: Which information it would be opportune to receive by benchmark providers on the one side and benchmark users that are supervised entities on the other side?

<ESMA_QUESTION_DP_BMR_110>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_110>

Q111: Do you agree that the different users of a benchmark that are supervised entities should liaise directly with the competent authority of the administrator and not with the respective competent authorities (if different)?

<ESMA_QUESTION_DP_BMR_111>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_111>

Q112: Would it be possible for relevant benchmark providers/users that are supervised entities to provide to the competent authority an estimate of the number and value of financial instruments/contracts referencing to a non-compliant benchmark being affected by the cessation/adaptation of such benchmark?

<ESMA_QUESTION_DP_BMR_112>

There is little likelihood that benchmark providers could estimate the number and value of financial instruments/contracts referencing to a non-compliant benchmark – please see our response to Q89.

The ability of supervised entities to provide the competent authority with an estimate of the number and value of financial instruments/contracts referencing a non-compliant benchmark is likely to vary depending on the type of supervised entity – some should find it a simple matter whereas for others it would be a burdensome and potentially imprecise task.

<ESMA_QUESTION_DP_BMR_112>

Q113: Would it be possible to evaluate how many out of these financial contracts or financial instruments are affected in a manner that the cessation/adaptation of the non-compliant benchmark would result in a force majeure event or frustration of contracts?

<ESMA_QUESTION_DP_BMR_113>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_113>