



European Securities and  
Markets Authority

## Reply form for the Discussion Paper on Benchmarks Regulation



## 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 29 March 2016.

All contributions should be submitted online at [www.esma.europa.eu](http://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](http://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>

### Introductory Remarks

Deutsche Börse Group (DBG) is one of the largest exchange organisations worldwide. It organises markets characterised by integrity, transparency and safety for investors who invest capital and for companies that raise capital – markets on which professional traders buy and sell equities, derivatives and other financial instruments according to clear rules and under strict supervision. DBG, with its services and systems, ensures the functioning of these markets and a level playing field for all participants – worldwide.

DBG has an integrated business model. Its product and service portfolio has a broader basis than other exchange organisations as it covers the entire process chain, from the monitored execution of trading orders, clearing, netting and transaction settlement through to post-trade custody of securities as well as the necessary electronic infrastructure and the provision of market information. DBG sets standards with its superior risk management and its innovative collateral management to enable customers to effectively use their capital.

European Energy Exchange (EEX) – the leading energy exchange in Central Europe. It develops, operates and connects markets for energy and related products including commodity benchmarks.

DBG's index activities are performed by the subsidiary STOXX Ltd. From 2010 to 2015, STOXX Ltd. was a subsidiary of DBG and SIX Group. In August 2015, DBG fully acquired STOXX. For our customers this means one single point of contact for all index brands. Together with STOXX Ltd., STOXX and DBG publish more than 10,850 global indices and benchmarks. STOXX and DAX indices are used as underlyings for financial products such as exchange-traded funds (ETFs), futures and options, and structured products, as well as for risk and performance measurement of investment activities. In addition STOXX develops and produces indices and benchmarks for other index owners, e.g. issuers of financial products, asset managers or other index providers.

The DAX and STOXX indices reflect DBG's core values of transparency, reliability and innovation. Since the introduction of the DAX index more than 25 years ago and the EURO STOXX 50 in 1998, we have continuously expanded our index family with objectivity and rules-based construction as guiding principles.

DBG supports the spirit of regulation of the index and benchmark industry. All DBG entities providing indices that are used as benchmarks have or will claim compliance with the principles laid down by the International Organization of Securities Commission's (IOSCO) Principles for Financial Benchmarks. STOXX and DBAG also adhere to the ESMA/EBA principles on Benchmark Setting in the EU and provide a high number of ESMA UCITS compliant indices to the market.

### Additional comments

#### **Definition of a regulated-data benchmark - "entirely and directly" [Article 3(1) (20a) BMR]<sup>1</sup>**

DBG considers that the provision requiring regulated-data to be sourced "entirely and directly" from trading venues etc. in the definition of a "regulated-data benchmark" should be further clarified in order not to disrupt established and well-functioning market practices. Benchmark administrators usually do not take direct feeds from exchanges, but use data vendors in order to access regulated markets data, both from trading venues in the EU as well as outside of the EU. Not subsuming this set up (regulated-data sourced in through market data vendors) under the definition of "directly" would create additional unnecessary burden for benchmark administrators. Regulated-data sourced from data vendors is usually used for trading decisions by investors and thus should be seen as a reliable source of data. DBG strongly sug-

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<sup>1</sup> All references to specific articles refer to the Level 1 text as agreed by the Council's COREPER on 9 December

gest to explicitly clarify that sourcing of raw data (meaning non-processed in a way generating derived data) from data vendors will not result in benchmarks falling outside of the scope of the definition for regulated-data benchmarks. In this context, the vendor should be considered as a technical means to source the data from trading venues, and not as separate entity acting in between units.

#### **Definition of a regulated-data benchmark - treatment of third country regulated-data**

DBG considers that the RTS should provide clarity, in line with the Level 1 text, as to when benchmarks based 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 of the Benchmark Regulation (BMR).

Input data from 3rd country regulated markets in general provides for the same assets as regards quality (transaction based or firm bid offer data generated under the rules and surveillance of a regulated market) and broad availability of the data. Benchmark administrators within and outside the EU offer regulated-data benchmarks based on data generated on 3rd country trading venues in order to provide global investable benchmarks. This ensures sufficient choice for investors within the EU and enables them to benefit from market developments in third countries in a reliable, efficient and cost effective way. In case benchmark administrators could not benefit from the proportionate treatment for regulated-data benchmarks as well for benchmarks based on data from 3rd country trading venues costs would most likely significantly increase or benchmarks would be discontinued in the EU to the detriment of European end-users in the current low interest rate environment.

#### **Calculation of Thresholds**

While ESMA in their Discussion Paper (DP) focusses on threshold determination in the context of critical benchmarks only, we wonder why threshold determination is not being mentioned by ESMA in the context of non-critical benchmarks as well. In general we consider the task of threshold determination to be a significant challenge as regards the availability and/or accessibility of data and the cumbersome process of patch-working across different sorts of data sources while some data might even not be available at all.

Data sources have to be identified not only for the identification of the instruments in question, but as well in order to generate the respective exposure of one benchmark across different instrument groups and use cases. Furthermore, those data sources will have to be accessible and easily be usable in order to obtain the necessary information. In any case we consider this to be a major and costly effort which will increase depending on the frequency in which mandatory updates of such thresholds are being required as well depending on the number of benchmarks affected by this requirement. As regards the nature of the potential data sources to be tapped further research might be necessary.

#### **Nature of structured products**

The BMR specifies, that the nominal amount of all financial instruments other than derivatives should be assessed for the calculation in case of derivatives the notional amount. In general the classification of structured products is often unclear due to the nature of those products. Here we would like to mention the current discussion with regulators as regards the classification of structured products as financial instrument other than derivatives or as a derivative which will finally have an impact on the data to be gathered for the determination of thresholds.

A proper classification assumed, there are further issues to be considered as regards this asset class. When it comes to structured products, the nominal value is a purely legal / theoretical value which does not reflect how much money is invested in the product. The assets actually invested are more relevant and are reflected by the notional value. To ensure an adequate interpretation of the data, we would advise considering the notional instead of the nominal value of structured products, if such data should be counted at all.

We hope our comments will be considered helpful in developing the final Level 2 measures. In case of any questions we kindly ask to contact us.

<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>

DBG recommends to keep the definition of “made available to the public” as wide as possible, in order to ensure as broad investor protection as possible. In case of only a very limited definition of “made available to the public”, there could be various possibilities for any index provider to conduct regulatory arbitrage, e.g. such as making information available to a closed user group only, which then could be interpreted as not having “made available to the public”. This could be to the detriment of investors within the EU as well as provide for a distortion of a level playing field amongst competing index providers. Therefore, the current existing channels and modalities of publishing existing benchmarks may be used as guidance. In this context please refer as well to our comment below.

<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>

The initial goals of the BMR are investor protection and secure EU financial markets. In this context it seems natural that any issued financial instrument within the EU which refers to an index provided within the EU, irrespective of where it is administered, should be seen as having been published (i.e. made available to the public) alone by its inclusion as an underlying in a financial instrument or as a benchmark for performance evaluation impacting users as well as end investors. Even in case an index is not one of the broadly marketed indices within the EU, it might nevertheless have significant impact on a subset of EU investors depending on their exposure to it.

Therefore, in order to positively verify the scope of the definition in question, there could be a set of variables against which ESMA could evaluate if an index has been made available to the public, such as:

- a) the technical means indices and information about those indices are made available - examples might include: a data feed accessible to single or multiple parties, a market data vendor, the internet, a selected group of parties (members or customers) of a trading platform or SI, information provided per e-mail or mail internally or externally, etc.
- b) the commercial means indices and information about those indices are made available, be it for free or at a fee, indices made available at discriminatory or non-discriminatory means, made available at a closed user group or at an open user group, etc.

Due to constantly changing markets, this list / set of variables should not be considered to be exhaustive.

<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>

DBG agrees with ESMA to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator.

<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>

In general, we are supportive of ESMA's intention to clarify the definition of 'use of a benchmark' by capturing all different types of users of benchmarks. Nevertheless, DBG takes the view that regulated markets are not, and should not be considered to be issuers under the BMR. As regards derivatives, it should be noted that exchanges create contracts but do not issue instruments. The broadening of the issuance principle for the purpose of creating a more comprehensive definition of 'use of a benchmark' should therefore be unmistakably confined to the BMR only.

<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>

The activity of regulated markets acting as benchmark administrators should not be caught within the scope of the definition for 'use of a benchmark'. The act of "using" a benchmark should explicitly be linked to whether a financial contract has been "issued on own account" or the firm has an explicit market position on the performance of that benchmark.

Generally, exchanges and clearinghouses are not "users" as they do not carry any inherent conflict of interest. The definition of index "users" refers to persons who "issue" a financial instrument. It is a logical consequence from the incidents in calculating interest rate benchmarks like LIBOR that the affiliation of an index administrator to a "user" or a "contributor" leads to a higher level of oversight as their economic interests lead to conflict of interest. However, the current definition requires further clarification explicitly addressing this conflict: The appropriate clarification could be that "users of a benchmark" hold active positions in or trade a financial instrument or issue financial instruments on their own account.

As a consequence, it would be made explicitly clear that infrastructure providers like exchanges or clearinghouses do not belong to the "use of a benchmark" definition in the proposal, due to their neutral positioned services towards market participants. Infrastructure providers are already highly regulated and supervised, and even more importantly, they do not benefit economically from changes of the value (price) of an index, having therefore no inherent conflict of interest.

<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>

#### **General comments**

DBG supports most of ESMA's proposals. However, we do not agree with ESMA's interpretation that the function of benchmark oversight is to challenge the board or management of the benchmark administrator in all respects. In line with the initial goal of the BMR, benchmark governance should ensure the reliability and quality of benchmarks in EU financial markets, i.e. that benchmarks are being determined and calculated in a proper and reliable way. The challenge of business decisions should not be the task of any benchmark oversight.

As regards the set-up of the oversight, DBG especially agrees with the comment made in paragraph 32 of the DP, allowing the oversight function to take the form of a separate committee within the organisational structure of the administrator. We would strongly welcome ESMA including this set-up in their list of appropriate governance arrangements. In this respect DBG also agrees with ESMA that different oversight functions could be implemented depending on the nature of the benchmark and the expert knowledge of the actual committees set up by the benchmark administrator. We agree as well that there could be sub-committees to one overall committee instead of multiple committees as discussed above. However, we would advise ESMA not to be overly prescriptive and to keep some flexibility for benchmark providers to



decide on the structure themselves. DBG very much appreciates ESMA's confirmation that proportionality shall be applied within the RTS on oversight.

### **Composition of the oversight function**

The first two examples by ESMA are both referring to Article 5(2a) BMR, which addresses the ownership structure of a benchmark provider. ESMA provides for two potential compositions in this respect.

In this context DBG would like to point out that the composition of the oversight function should also take note of the susceptibility for manipulation of the benchmarks provided by a specific administrator, with a view to preventing undue regulatory burden. As reflected in the proportionate regime of the Level 1 text, this susceptibility for manipulation is not only a result of ownership structure, but in fact depends more on the nature of the benchmark. Under a proportionate regime, benchmarks which are not prone to manipulation due to the fact that they are based on regulated-data and provided by a neutral administrator not trading or holding positions in instruments referenced to their benchmarks should not be required to establish the stricter oversight function requirements, regardless of their ownership structure. In any case it should always be duly verified upfront if indeed a potential conflict of interest exists and if it cannot be mitigated as stated in Article 5(2a) BMR.

The introduction of an external oversight function including users of those indices risks diluting the requirements of the BMR by introducing conflicts of interest of its own into the oversight committee. There is a significant risk that users may want to represent their own interests rather than the interests of the wider market jeopardising the independence of the benchmark. This is particularly true for widely used benchmarks. Stakeholders include those parties who have issued financial products on the index and are exactly the parties that could benefit from particular index changes. If those parties would get access to price sensitive information (such as planned index changes) before the rest of the market, this could lead to insider trading.

As regards the annual review as required within Article 5a(3)(a) of the Level 1 text, DBG would like to suggest to ESMA to specify that in the light of proportionate regulation, the reviews may take place as per benchmark family rather than per individual benchmark.

Furthermore, the BMR Level 1 does not require external parties to be included in the oversight. Introducing such a requirement at Level 2 would most likely not be in the sense of the Level 1 while certainly not providing for a proportionate regime.

<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>

### **Oversight Committee(s)**

DBG appreciates ESMA's considerate thoughts on the set-up of oversight in an appropriate way as regards the nature and risk of a benchmark (types of benchmarks) and its vulnerabilities especially in context with ownership structure. We agree strongly as well that those oversight committees should be free of any unmanageable conflicts of interest.

Furthermore, we agree with ESMA's consideration that a different oversight might be sensible for critical compared to non-critical benchmarks, even in case both types of benchmarks are being administered by the same benchmark administrator. This consideration is based on different reasons:

- the oversight committee of a critical benchmark may be composed in a different way than the oversight committee of a non-critical benchmark (family), due to different requirements as regards the knowledge of the members.
- it would be uneconomical and result in undue regulatory burden to have the same (strict) oversight to both non-critical and critical benchmarks.



However, we would deem it sensible that the administrator should be able to decide for himself if a set-up with multiple oversight committees (or sub-groups under a single oversight committee) might be right or if one overall oversight committee would be best suited.

### **Conflict of interests**

DBG deems it most sensible that before an oversight committee is being installed, or a decision over the structure is being taken, it is clarified upfront if there may be any potential conflict of interest that cannot be mitigated, be it at the administrator itself, or be it in the planned oversight committee. Any conflict of interest which could lead to an incentive of manipulation of input data especially should be addressed accordingly in order to avoid any LIBOR like events in the future.

Only once the analysis conducted upfront has confirmed that there will not be a conflict of interest which may not be mitigated, the next step to set up the committee should be taken. The introduction of external parties to an oversight committee as suggested by ESMA may create potential conflicts of interest as well. The inclusion of benchmarks users and stakeholders could dilute the requirements of the Regulation by introducing conflicts of interest into the oversight committee itself. There is a risk that users (deliberately or unintentionally) represent their own personal interests rather than the interests of the wider market which could jeopardize the independence of the index.

Especially in the case of a neutral benchmark provider it is questionable if the inclusion of external stakeholders would provide for a benefit or rather the opposite.

Please refer to the response to Q6 regarding further details.

<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>

STOXX and DBAG have an established governance function, consisting of various hierarchical committees, that supports the administration of its indices through challenge and decision making as regards the benchmark determination, calculation and dissemination. All discretionary decisions in relation to the administration of its indices are taken by the respective committee. The committee structure is being tailored to the business set-up of STOXX and DBAG. In this set up, DBAG administers the DAX Benchmark family while determination has been sourced out to STOXX Ltd., which is wholly owned by DBG since last year. The committees are all in line with the requirements introduced by IOSCO and ESMA / EBA, therefore we feel that our current setup would be able to satisfy the proportional requirements laid down in Article 5a BMR. Both STOXX and DBAG have had their governance structures assessed through a third-party audit engagement and an external audit reports exist. Further details on each of STOXX and DBAG governance structure are available on the respective websites.

<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>

DBG would strongly advise not to introduce a “one-size-fits-all solution”. It can be most proportionate only to have one oversight function in specific cases, e.g. when a benchmark administrator administers regulated-data benchmarks only. However, the administrator should have a choice at least in case there is a mixed portfolio of benchmarks including critical and non-critical benchmarks.



<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>

DBG is of the opinion that this could vary as regards the nature of the index, and the covered market(s). However, we would deem it sensible to leave a certain flexibility to the index administrator to take this decision.

<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>

Unless a portfolio of benchmarks provided by one administrator is rather homogeneous (e.g. only benchmarks which are based on regulated-data compared to benchmarks based on data generated via a panel) it might be sensible to operate different oversight committees as different knowledge amongst members might be required in order to be efficient.

Please see as well our comments to Q 7 above, which are as follows:

DBG agrees with ESMA's consideration that a different oversight might be sensible for critical benchmarks compared to non-critical even in case both types of benchmarks are being administered by the same benchmark administrator. This consideration is based on different reasons:

- the oversight committee of a critical benchmark may be composed in a different way than the oversight committee of a non-critical benchmark (family) due to different requirements as regards the knowledge of the members.
- it could be uneconomical to have the same (strict) oversight to both non-critical and critical benchmarks.

However, we would as well deem it sensible that the administrator should be able to decide for himself if a set-up with multiple oversight committees (or sub-groups under a single oversight committee) might be right or if one overall oversight committee would be best suited.

<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>

DBG would deem it not adequate to include contributors when the oversight function assumes a control function over the contributed data. While contributors may function as guests for explanatory purposes, they should not be in the position to make a decision.

<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>

DBG likes to point out that regulatory requirements and compliance with such regulations usually and naturally provide for additional cost factors within the industry. However, as long as the underlying regulation is being defined and applied in a proportionate way, usually its overall benefits should outweigh its overall cost.

In order for the BMR not to increase cost along the value chain without benefits outweighing them, the Regulation needs to provide for sufficient flexibility and proportionality, for those not creating significant unnecessary cost for the industry.

In this respect, we deem it sensible that the administrator should be able to decide for himself if a set-up with multiple oversight committees (or sub-groups under a single oversight committee) might be right or if one overall oversight committee would be best suited.

<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>

DBG is of the strong opinion that the function of benchmark oversight is not to challenge the board or management of the benchmark administrator in all respects including business decisions. Especially not in case the benchmark administrator is active in business areas and lines as well other than benchmark administration.

In line with the initial goal of the BMR, benchmark oversight should ensure the reliability and quality of benchmarks in EU financial markets, in a way that benchmarks are being determined and calculated in a proper and reliable way. Its purpose is to advise, provide an escalation point and consistent application of policy as well as identify and address risk and changes. The BMR was not intended to regulate the management of benchmark administrator businesses.

<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>

DBG fully agrees with ESMA's suggestion that the oversight committee could be embedded within an administrator's organisational structure in order to operate efficiently, and that this would even comply with the requirement by an NCA for an independent oversight. In order to keep the oversight free of potential conflicts of interest, members from compliance or legal departments may form part of the committee as well, which should not include any person being overseen by the committee as a voting member.

We do not, however, agree with ESMA that stakeholders or any external members should be part of an oversight committee. First, as we pointed out in our answer to Q7, we would only consider this an option – if at all – in case the benchmark administrator would experience any conflict of interest which cannot be mitigated. And even then, it should be taken into consideration that including external members can newly introduce conflicts of interest, which should not be underestimated.

<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>

DBG considers the terminology of "management body" in this context to be unclear and misleading. Governance is about benchmark quality and reliability, not about management of the business or challenging

the management of the business. Furthermore, as lined out above introducing external members to an oversight function likely causes more problems than it solves and should not be regarded as an automatic default. Caution should be exercised when suggesting or even mandating that parties which gain to benefit from benchmark changes (such as contributors, users and stakeholders) be included in governance committees.

<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>

DBG considers the elements of the procedures detailed to be sufficient for all types of benchmarks.

<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>

DBG agrees with the proposed treatment of conflict of interests. However, we would again like to call attention to the fact that including external stakeholders like market participants and benchmark users into an oversight function would most likely introduce their own conflicts of interest in the oversight committee. We would certainly not consider it adequate if contributors could be included, especially not as voting members.

<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>

The list of records required to be kept by administrators needs to be aligned with the type of input data used for a particular benchmark and the specific risk profile of the category of input data. The list of records may make sense for input data sourced from contributors, provided a contribution is appropriately defined. However, we would like to highlight that independent administrators do not have access to books and records of contributors and have no means to know if data is excluded or not.

DBG supports the exemptions for storage of input data for regulated-data benchmarks as lined out in the Level 1 text. Trading venues need to keep records already in line with regulatory requirements, e.g. under MiFID II. There is no need to additionally store this data at the level of the index provider.

Input data sourced from data vendors which “is readily available to an administrator” should not be considered as contribution in line with paragraph 139. Our view is that “readily available” means “input data not created for the sole purpose of calculating a benchmark.” This is a view expressed by various members of ESMA. In this context, readily available data should be treated similarly to regulated-data since the benchmark administrator does not have access to the details of the price formation. As discussed in paragraph 68 of the DP, administrators do not have to keep records of input data for regulated-data benchmarks, but verifiability “in this case must be understood as checking the provenance and transmission of the input data used” which can be done through appropriate quality assurance practices.

<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>

DBG considers that the administrator should be able to determine the frequency of transmission through contractual agreements or through the relevant code of conduct. The transmission frequency should be based on the frequency that the data is available and/or used by the benchmark provider.

<ESMA\_QUESTION\_DP\_BMR\_20>

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

<ESMA\_QUESTION\_DP\_BMR\_21>

DBG agrees with ESMA on the concept of appropriateness as defined by ESMA and especially as regards the close links between methodology and data chosen by the benchmark provider.

We agree with ESMA that there is no need to verify the appropriateness of input data on a daily basis as this would be disproportionate. For a proportionate application of the BMR, further verification of appropriateness through the benchmark provider other than through regular methodological reviews should not be required for regulated-data benchmarks.

The appropriateness of input data for DBG and STOXX indices is both verified on a daily basis through broad use in the market as well as during regular methodology reviews. Our indices are fully rules based and the prices are generally obtained from regulated-data markets; this means that stakeholders can typically also obtain real-time/intra-day data from the established information service providers. Additionally the headline indices of STOXX and DBAG are replicated and monitored by a large range of market participants, ensuring the correctness of the indices instantaneously.

<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>

DBG has no further comments.

<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>

DBG agrees with ESMA's view that the appropriateness of input data is closely interlinked with the methodology of a benchmark.

For benchmarks based on regulated-data, there is a straight forward process of choosing the respective data source according to methodology of the benchmark and then using that data accordingly. DBG would like to point out that keeping records on the analysis of appropriateness of input data in such a scenario should not be necessary. Regular reviews of the methodology by the benchmark provider as well as reliable input data already provide for all information necessary. Data sourced from a regulated market within as well as outside of the EU provides for the most reliable input data and as such should not be due to unnecessary and disproportionate regulatory burden.

For benchmarks based on other data than regulated-data, DBG generally agrees with the concept of appropriateness as elaborated in this section.

<ESMA\_QUESTION\_DP\_BMR\_23>

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

<ESMA\_QUESTION\_DP\_BMR\_24>

DBG strongly supports the proportionate approach as regards verifiability requirements lined out by ESMA in the DP. In this context we explicitly support as well ESMA's view that the verifiability of regulated-data should be limited to checking the provenance and as well as the transmission of the data.

DBG considers this to be both sufficient as well as proportionate taking into consideration the differences as regards the significant amount of data processed (which then would have to be stored) as well as the nature of the data. The accuracy of data generated by regulated trading venues is already ensured by the respective trading venues themselves which are on top being regulated under MAR and MiFID II as well. In more detail ESMA's proposal on the verifiability of regulated-data could be substantiated as follows:

- **Checking the provenance of the input data** should be achieved by the initial selection of the regulated trading venue (including a 3rd country venue) as the relevant data source for the benchmark in question, and the continuous use of this data source for input data.
- **Checking the transmission of the input data** should encompass checking the technical availability of the data during the calculation process (e.g. checking for heartbeats during the transmission process). In general, in order to ensure the feasibility of the verification requirement in the face of huge amounts of processed data (e.g. millions of data per second over a complete day compared to panel based input data which potentially contains 100 data points at one point per day at max), it should in principle be sufficient to verify randomly selected data points instead of requiring the verification of each respective input data which is being used.

This is equally true for 3rd country trading venues, in case they are regulated equivalent to EU trading venues.

A requirement to additionally verify data would be disproportionate and result in over-regulation.

<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>

DBG agrees with the level of scrutiny determined in this section.

<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>

DBG, as an independent index provider, does not deal with the potential conflicts of interest that arise from a front office contributor scenario.

However, we agree that staff working in function related to benchmark contribution should have the appropriate knowledge to undertake the tasks to which they have been assigned as well as their responsibility as regards the overall market.

<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>



DBG generally agrees with the concept of having three lines of defence. However, the prescriptive nature of having an internal audit function could cause unnecessary burden to smaller benchmark providers or contributors. We would like therefore to suggest that the third level support could also be provided by the compliance function (e.g. on a higher seniority than for the second line of defence) or by a third party audit service.

<ESMA\_QUESTION\_DP\_BMR\_27>

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

<ESMA\_QUESTION\_DP\_BMR\_28>

DBG has no further comments.

<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>

DBG considers the elements listed are sufficient.

<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>

DBG strongly supports the proportionate approach as regards verifiability requirements lined out by ESMA in the DP. In this context we explicitly support as well ESMA's view that the verifiability of regulated-data should be limited to checking the provenance and as well as the transmission of the data.

<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 list of criteria to justify differentiation appears appropriate with the exception of the "size of contributors" referenced in paragraphs 108 and 109. Whether a contributor is large, small or somewhere in between, the integrity of the contribution and benchmark determination processes need to be protected. An appropriate oversight measure should be implemented by any entity involved in the process. Any differentiation in assessing the appropriateness of the oversight function for a contributor should depend on the type of input data it provides and any potential conflicts of interest posed. The appropriateness of the number of contributors should also be taken into account and the proportionality of the contribution to the benchmark. If 5 of 100 contributors are not participating, it entails a different risk as if 5 of 7 contributors are not participating.

<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>

DBG has no further comments.

<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>  
DBG has no further comments.  
<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>  
DBG appreciates ESMA’s suggestions as regards the content of the methodology to be made public. We agree that the definition including the objective of the benchmark should be an integral part of the methodology, including its objective and the currency in which it is being determined.

Furthermore, DBG agrees that the definition of a benchmark should be as precise as possible in order to avoid subjective interpretations as much as possible. The more rule-based an index is, the less vulnerable to manipulation it should be.

DBG agrees with ESMA’s view in line with the BMR that IP rights of benchmark producers should be protected, especially when input data is broadly available as in the case for regulated-data benchmarks. In this context and for the avoidance of doubt, we would strongly appreciate if ESMA could clearly reiterate Recital 24 of the BMR within the future RTS. DBG fully supports ESMA’s view that it should be sufficient that interested parties are allowed to understand the suitability of the benchmark for their purposes including any limitations or risks which should be stated in the methodology as well.

In total DBG considers the list of elements as suggested by ESMA as sufficiently granular and we agree that the elements should only be included in the methodology, where applicable. However, we would like to highlight that there might be indices where not all key elements would have to be included, e.g. there would be no contributor in the case of regulated-data benchmarks.

<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>  
DBG has no further comments.  
<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>  
DBG agrees that index methodologies should be transparent and made available to the public, with the caveats around Recital 24 taken into account and as well strongly linked to the definition of “public” in line with Article 3(1)(1)(a).  
<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>

DBG agrees generally with the proposal of ESMA as regards the information to be made public within a methodology.

DBG explicitly agrees with ESMA's view that it should be the administrator's responsibility to determine the frequency of any internal review.

Furthermore, DBG agrees as regards the close link between methodology and governance. For the avoidance of doubt we would like to point out, that members of the governance board should not be directly involved in the day to day work of reviewing and adapting benchmark methodologies but should rather be responsible for ensuring a signing-off of the respective methodology reviews and adaptations. This should also include constellations where an administrator outsources the benchmark administration to another benchmark administrator, while retaining the governance and responsibility via an administrator oversight committee.

As regards the publication of persons either as part of the governance or as contributors, due to data protection reasons, we would recommend to publicly display held positions within firms rather than the personal name of those members within those functions. Names could be disclosed on inquiry in case a justified reason is being provided.

<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>

DBG agrees in most points with ESMA especially in regards to the information to be provided to affected stakeholders in relation to material changes and the practical aspects of consultation outlined in paragraph 131 of the DP. We agree that it would be most useful that the consultation process is being defined by the administrator on a case by case basis, in order for it to be most effective.

In the context of Article 7b(1)(iii) and Article 7b(2)(a) of the Level 1 text, DBG would like to point out that there may be (black swan) events which might require swift action of the benchmark administrator as regards their methodology adaptation which might make a deviation from usual processes necessary, also as regards the timing of upfront information. DBG fully agrees that this would be extraordinary circumstances only, however, they should be considered by ESMA as well. Here ESMA should ideally clarify that in those exceptional circumstances, the usual timeline of consulting customers / stakeholders may be reduced if required.

Furthermore, DBG agrees with ESMA that the oversight of a benchmark should effectively challenge the qualification of a change in methodology including its classification as material or non-material.

The information specified in paragraph 132 of the DP could be difficult to be provided, depending on the expected granularity pursued by ESMA. The benchmark administrator is not always aware about the way in which its benchmark is being used. Therefore, if ESMA would intend to include such a requirement, it should be both proportionate as well as a recommendation only.

As regards ESMA's comments on the mandatory availability of hard copies, we would like to suggest to keep that at the discretion of the benchmark administrator.

<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>



DBG would kindly ask for ESMA's view on the question if a consultation may as well be conducted within an external stakeholder/consultative working group, in which case the replies would initially only be shared within this Advisory Group before being communicated to the broader market.

Furthermore, regardless of which sort of consultation would be considered as adequate by ESMA, we would deem it sensible for the benchmark administrator to provide for a summary of the received feedback to the public, since a listing of all feedback received could increase costs across the line, given that DBG administers approximately 11,000 indices.

In case ESMA would decide for the latter, we would deem it sensible only in the case of "critical benchmarks".

<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>

DBG agrees that the requirements should be universal irrespective of the benchmark type, as long as potential IP rights of the benchmark administrator are being protected in line with BMR Recital 24.

<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>

DBG agrees that the requirements should be universal, irrespective of the benchmark type.

<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>

DBG agrees that the proportionality is sufficient.

<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>

DBG has no further comments.

<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>  
DBG has no further comments.  
<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>  
TYPE YOUR TEXT HERE  
<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>

### **General comments**

DBG would like to point out that the definition of quantitative thresholds is important not only for critical benchmark administrators but as well for any other benchmark administrator as it provides for one determinant of the “benchmark class” the respective benchmark will belong to and thus the cost of compliance

accompanying the respective classification. Therefore, we would like to raise some points in this context within the section of critical benchmarks, while not referring to critical benchmarks alone.

Already at Level 1 it was most obvious that the determination of thresholds provides for a major task and that there is no existing solution available. Necessary data is either not available or scattered across different data sources requiring significant investments for anybody who will be generating those threshold data. DBG has provided its comments to the political debate at Level 1 discussion without any impact.

Going forward it is most questionable if it is possible to define a set-up which is in the position to efficiently and effectively provide the required threshold numbers in a reliable way while keeping regulation at a proportionate level of regulation. By all means over-regulation should be avoided and proportionality should be strictly adhered to while transposing the requirements into law in order to not overly burdening EU Capital Markets.

In our opinion, for the determination of threshold data general the following steps would need to be applied in general:

- a) identification of the adequate data sources, in order to perform the following tasks
- b) identification of the respective instruments in question,
- c) identification of the respective instruments exposures (nominal / notional / other),
- d) aggregation of the respective instruments exposures, and
- e) potentially verification of such data.

Furthermore, in case benchmark administrators are being required to monitor respective threshold data, it is necessary to include two caveats: first, a best practice standard/process should be set by ESMA so that administrators using such threshold data are not penalised where the prescribed process was applied by the data aggregator but the results and therewith the thresholds were unintentionally erroneous; and, second, absent a mandate by the competent authorities or ESMA, the license agreements of benchmark administrators should not be constrained by a demand of the licensor for these data, which are protected as proprietary and confidential information by many financial institutions.

## **Gathering information as regards “nominal amounts”**

### **a) Identification of adequate data sources**

Data sources have to be identified not only for the identification of the instruments in question, but as well to generate the respective exposure of one benchmark across different instrument groups and use cases. Furthermore, those data sources will have to be accessible and easily be usable in order to obtain the vast amount of necessary information. In any case we consider this to be a major and costly effort which will increase depending on the frequency in which mandatory updates are being required as well depending on the number of benchmarks affected by this requirement. As regards the potential data sources to be tapped further research might be necessary.

DBG agrees with ESMA that the initial step for defining thresholds for a particular benchmark is the identification of those instruments referencing the benchmark in question. Already the identification of all instruments referencing a particular benchmark will be a significant task due to the general lack of information in this space, especially on an aggregated level.

### **b) Identification of the financial instruments referencing a benchmark**

Theoretically, the index provider might identify those instruments if the use of their benchmarks in every instrument which references the index would be reported to them by the licensees of the benchmark in question. This is, however, in many cases not the fact and / or possible, due to the following reasons: different license terms depending on the use of benchmarks which do not require the reporting of instrument exposure (*which would be a significant additional burden on benchmark users especially in the case of structured products referencing a benchmark and could add to cost on end users*), some benchmarks are not being licensed at all but are used without knowledge of the benchmark provider (*no data would be available in such cases*). For certain benchmarks there might be no data or very low data, which would

underestimate their use compared to more transparent use of benchmarks. This may be to the detriment of the benchmark provider for whose indices more data is available.

Another approach would be the one identified by ESMA to use the ESMA data base to screen for potential instruments using a particular benchmark for reference. While we deem this to be another theoretical solution, it has its short-comings as well. The application of the BMR might be earlier than the ESMA database will be available which forms part of MiFID II which is significantly delayed. Even if the ESMA database will be available in time, it is not yet clear which data will be available to the public and at which cost. As regards the number of instruments ESMA pointed out itself there could be a double digit number of instruments within that data base.

Screening this data for respective instruments will require significant additional IT and human resources, so it is questionable who would be in the position to shoulder those cost and efforts. Furthermore, we deem it questionable how the instruments should be identified in a database which most likely uses an ISIN as the key ID and not the underlying benchmark. There is most likely no direct link to a / some benchmarks referenced to.

#### **c) Identification of the instruments exposure / nominal amounts / notional amounts**

Once the respective instruments in questions may have been identified, the respective exposure (volumes) per benchmark has to be identified next before data aggregation across all asset classes and uses can be conducted per benchmark. Again, multiple data sources most likely will need to be tapped in order to obtain the necessary data.

#### **Bonds and other securitized debts**

In this context we agree with ESMA that as regards bonds and other securitized debt the ESMA reference data base may be used for the extraction of the “total issued nominal amount” under the constraints lined out above.

#### **Structured products**

However, as regards structured products, which might reference interest benchmarks as well in combination with other benchmarks, we need to point out that while a nominal amount might be issued usually only a smaller amount is being sold into the market, depending on demand. The difference between nominal and notional amount may be significant and due to the already low thresholds chosen by the regulators only the actual exposure – in this case the notional amount and not the nominal amount – should be counted.

Additionally, we need to point out that the instrument class structured products needs special attention as it is currently being debated as well with regulators if they have to be categorized as derivative or security. It is our understanding that this debate is still ongoing. Furthermore, in case one benchmark just forms part of multiple benchmarks within a structured product we would also suggest to only count an adequate percentage of the respective notional.

#### **Derivatives**

The empowerment specifies that the notional amount of derivatives shall be used. When assessing the notional amount of ETDs, it should be calculated as average daily notional value per month in EUR in order to smooth out potential volatilities.

Please see as well our further comments to Q 77 below.

#### **d) Aggregation of such data**

DBG needs to point out the risk that using multiple different data sources requires at least a best practice if not clear guidelines how to aggregate and calculate including a clear idea as regards the data sources to be tapped for the respective information to be sourced. Not having this increases the risk of wrong data points, wrong aggregation and / other potential mistakes which might be misleading when determining the thresholds thus introducing an un-level playing field for benchmark administrators.



We would therefore suggest to ESMA to set out clear (best practice) rules to adhere to when checking thresholds as well according to Article 14b(4) BMR. Furthermore, adhering to those rules, administrators should not be penalised where the prescribed process was applied but the results were unintentionally erroneous.

Referring to Article 14b(4) BMR further we need to point out that we consider it disproportionate in case a constant monitoring of such data would be required. Therefore, we propose a set interval to be defined by ESMA during which such monitoring will have to apply at least once.

**e) Verification of such data**

DBG would like to raise the point of neutral verification of the calculated thresholds. Does ESMA foresee to define a process 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>

DBG is not aware of any such instruments.

<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>

DBG agrees that the net asset value should be used in relation to the value of units in collective investment undertakings to avoid double counting.

<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>

With the following we refer to paragraph 204, i.e. to the definition of nominal amount c).

We agree that the notional amount of commodity derivatives shall be determined by the amount and the relevant price. We understand that the idea is to multiply a derivatives amount by the commodity's spot price. However, both components have their difficulties in many commodity markets.

- Price related issues:

Many commodity prices, in particular energy commodities but also agricultural commodities, follow a strong seasonal pattern. For the sake of an example, natural gas prices tend to be high in winter and lower in summer. An extreme case in this respect is power as it is not storable. Spot prices in power market strongly change from day to day (dependent on power demand, availability of renewable energy sources etc.). Considering this, we strongly advise not to understand the calcula-

tion of the notional amount on an appointed day as this would surely lead to distortions. In an extreme case it could lead to a situation where a benchmark is being overvalued if the valuation takes place on a day where prices tend to be high, or being undervalued if valuation takes place on a day where prices tend to be high.

To avoid this, we suggest considering an average price over a year. In particular where commodity derivatives reference commodities that face a limited storability or where timing is of importance, e.g. natural gas, power or freight, ESMA should also consider not taking the spot market price but rather a derivative price as a component for determining the notional value. This might well be an average price of the most liquid derivative contract.

- Volume-related issues

Many commodity markets differ to classical financial markets in the respect that benchmark administrators do not licence their benchmarks, or where they do so, many of them do not have any knowledge on the volume referencing that benchmark as fees tend not to be determined by the volume. Hence, availability of representative data is rather scarce in many commodity markets; most administrators do not have any exclusive knowledge.

In European electricity and natural gas trading markets, the Agency for the Cooperation of Energy Regulators (ACER) possess of almost the entire trading data in these markets. However, underlying benchmarks can be reported but it is not done consistently. In addition, the data is not available to benchmark administrators in these sectors.

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

<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>

DBG considers that the second option to use the most recently available net asset value is the most reasonable one to provide accuracy and completeness; having gaps between the reporting periods for AIFMD and UCITS could distort the value at point of assessment.

<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>

DBG supports ESMA's first option, which states that assets referencing a combination of benchmarks, only the portion of the value which refers to single benchmark should be taken into account.

The market for instruments referencing a combination of various benchmarks is extremely broad and diverse. In order to account for the relevant risk exposure per instrument, it could even be necessary to check the respective prospectus per instrument. The effort would be massive and absolutely disproportionate. Therefore, we suggest the application of a practical approach by using a rule of thumb or any other approximation but other than the full volume of the composite instrument.

The empowerment specifies that the nominal amount of all financial instruments other than derivatives should be assessed for the calculation. In general the classification of structured products is often unclear due to the nature of the products. Here we would like to mention the open discussion with regulators as regards the classification of structured products, affecting the classification of a structured product as financial instrument other than derivatives or as derivative.

A proper classification assumed, there are further issues to be considered as regards this asset class. When it comes to structured products, the nominal value is a purely legal / theoretical value which does not reflect how much money is invested in the product. The assets actually invested are more relevant and are reflected by the notional value. To ensure an adequate interpretation of the data, we would advise considering the notional instead of the nominal value of structured products, if such data should be counted at all.

Furthermore, the empowerment specifies that the notional amount of derivatives shall be used. When assessing the notional amount of ETDs, it should be calculated as average daily notional value per month in EUR in order to smooth out potential anomalies.

As regards non-critical benchmarks especially a practicable solution is necessary as in Germany alone approximately 1.5 mn structured products being traded. This might require the definition of a method or process for the calculation of thresholds taking into account certain vagueness or approximations.

<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>

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<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>

DBG generally agrees with the approach to clarify and define the criteria of the assessment by national competent authorities (NCA). ESMA should develop clear guidance in relation to the acceptance and rejection under Article 14c(2) BMR.

### **General comments**

DBG agrees with ESMA’s statements that most of the relevant Articles referred to in this section (Article 5(2), 5(3c) (c) (d) (e), 7(3a) (b) and 9(2)) would not apply anyways for most benchmark providers which purely base their indices on regulated-data. However, there is no explicit statement of this in the legal text. In this context DBG would like to encourage ESMA to install wording in its RTS referring to a clear guidance / criteria on which basis the NCA should decide in order to limit different interpretations on national levels across the EU.

#### **(a) Vulnerability of a benchmark**

DBG reiterates that in the case of regulated-data – be it transaction data or in very few circumstances firm bids/offers – the input data used is not able to be manipulated by the benchmark provider or any other stakeholder. We would like to point out that firm bid/offers of a regulated market have a similar quality as the transactions concluded on those markets. Benchmarks based on regulated-data thus should be considered to be nearly riskless in this regard including firm bids and offers. This should be the case for EU as well as Non-EU regulated markets.

Even in case a benchmark provider is not only providing benchmarks but as well other services, this is not necessarily an indication of a potential vulnerability of the benchmark. Unlike in the case of LIBOR, where the contributors to a panel were able to manipulate the benchmark value (through contribution of false input data) in order to achieve a (positive) impact on their existing positions in financial instruments tied to the LIBOR, this is not the case in a scenario where a neutral benchmark provider is owned by an exchange, as the exchange does not hold own positions referenced by such benchmark.

Therefore, ESMA should not only consider different functions of a firm providing benchmarks and other services, but instead should consider the interest (e.g. holding positions). Please note in this context the neutral benchmark providers' foremost interest is to provide attractive and reliable benchmarks. Therefore, it is in the own interest of by the provider that manipulation does not occur.

DBG would abstain to consider the nature of a benchmark only when looking for potential historical cases of manipulation. In any case the nature of the benchmark should be complemented with the nature of the provider (e.g. being neutral in contrast to holding positions referencing the benchmark in question). We agree, however, that the absence of any evidence as regards the nature of the benchmark in question in general should be considered as a positive sign for the decision making process.

#### **(b) Nature of the input data**

DBG agrees with ESMA as regards their comments made in paragraph 231 of the DP and strongly supports ESMA in their view.

DBG would like to point out that we agree with ESMA's paragraph 232 as well, as long as the wording “the administrator is itself engaged in the market the benchmark is intended to represent” is clarified as “is holding positions in financial instruments referencing the benchmark in question..”. The term being “engaged” risks being too vague to provide for clear guidance.

#### **(c) Level of conflict of interest**

DBG would like to encourage ESMA to provide the necessary rewording clarifying what “participates in the market” means. As pointed out above, DBG considers this as “holding positions in financial instruments referencing the benchmark in question”.

#### **(d) Degree of discretion of the administrator**

DBG agrees with ESMA on their analysis that depending on the quality of input data the discretion of the benchmark provider is reduced, as there is no need and no incentive to calculate or augment the input data. In this context again we would like to point out that besides transaction data, also firm bids/offers from regulated markets should be considered as reliable input data in the sense of regulated-data. We would expect that when using regulated-data, the NCA would not require additional application of the Articles mentioned in the first paragraph.

**(e) Impact of the benchmarks on markets**

We would like to point out that the calculation of thresholds as defined in the Level 1 text provides for significant challenges as lined out in the answer to Q71. We deem those thresholds to provide for a critical part of the BMR as it is not yet clear on which data basis, according to which rules and in line with which verification measures those thresholds will be generated. Furthermore, we deem the thresholds to be comparably low when looking at BIS estimates provided for some selected benchmarks. DBG always reiterated that qualitative criteria should be therefore in the focus of the regulator and any quantitative criteria only be valid in combination with strong qualitative criteria.

**(f) Nature, scale and complexity of the provision of the benchmark**

DBG appreciates ESMA's list of criteria when it comes to the complexity of the provision of a benchmark. In this respect we would like to add that complexity should be considered being relative depending on the experience a provider may have. The same applies for the digestion of vast amounts of data. In case a provider is an expert regarding the activities in question, this should be counted as a positive signal he is able to conduct complex processes. So we strongly agree that the complexity of a service should as well take into consideration the nature of the provider.

**(g) Importance of the benchmark to financial stability**

We would like to point out that the calculation of thresholds as defined in the Level 1 text provides for significant challenges as lined out in the answer to Q71. We deem those thresholds to provide for a critical part of the BMR as it is not yet clear on which data basis, according to which rules and in line with which verification measures those thresholds will be generated. Furthermore, we deem the thresholds to be comparably low when looking at BIS estimates provided for some selected benchmarks.

DBG always pointed out that qualitative criteria should be therefore in the focus of the regulator and any quantitative criteria only be valid in combination with strong qualitative criteria.

**(h) Value of financial instruments and financial contracts that reference the benchmark**

DBG agrees with ESMA on the close link with point (e).

**(i) Administrators size, organizational form and/or structure**

DBG agrees with most of ESMA's comments made in paragraphs 246 and 247 of the DP. However, we still deem it necessary that where an index becomes a benchmark against which investor's money is being referenced or validated, there needs to be a high level of reliability once front office submissions / panels are being used for data generation. Therefore, and especially in case of a large firm providing the front office data, Article 7(3a)(b) should be applied.

<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>

According to Article 14c(6) and 14d(2) BMR, administrators of significant and non-significant benchmarks respectively may decide not to comply with a number of governance requirements following a "comply or explain approach", i.e. the administrators need to explain why non-compliance is appropriate in a compliance statement, for which ESMA is empowered to develop a template. For efficiency purposes DBG would like to suggest that ESMA should allow for discretion in order to enable administrators to use as much as possible from their IOSCO compliance statements when making a statement for the BMR.



For reasons of proportionate regulation, we urge ESMA to consider also allowing a single statement, rather than numerous statements, for benchmarks that have substantially the same makeup even if they are not part of the same “family”. E.g. STOXX and DBAG equity indices have many of the same characteristics and therefore maintaining statements for in total approximately 11.000 indices or a double digit number of benchmark families will become extremely cumbersome while not providing any additional value to the NCA or a user of those indices – and thus result in disproportionate regulation. As of today, DBAG and STOXX issue independently verified compliance statements based on the IOSCO principles for all its indices, including those not used or tracked by financial instruments. However, we do not state each single index but apply compliance across the board.

Furthermore, we would like to encourage ESMA to have clear rules guiding the administrator how to complete the statements and how to offer enough information to the NCA if it has chosen to “explain” rather than “comply”; it should also be clear what additional information can be requested by the NCA to ensure compliance of the BMR.

In this context we would like to point out that in contrast to the suggestion by ESMA in paragraph 253, we would rather like to propose to submit the information as lined out under paragraph 252 once and then attach the respective BMR Article with which the Administrator does not comply.

DBG would strongly appreciate that the administrative burden as regards the compliance statement is kept as lean and sensible as possible.

<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>

The principle that benchmarks should define a market or economic reality is fair and the description of that benchmark’s target market or economic reality should be made readily and publicly available.

The estimation of market size (transaction volume or other trading related metrics) should not be a requirement for the benchmark provider though. The benchmark provider creates a value to accurately reflect the reality of the market or economic segment regardless of trading characteristics.

A benchmark provider should generally take into consideration observable market liquidity and/or size and number of participants within a certain market segment while constructing a benchmark to reflect that market or economic reality. Those considerations should be implemented through the benchmark methodology documentation and made easily available. Guidelines cannot be easily established to govern each and every market segment or to create a reasonableness test.

DBG believes there may be difficulties in measuring this for all benchmarks. We would also encourage avoiding duplicating reporting requirements and would prefer to produce benchmark statements per family rather than per individual benchmark.

As regards commodity markets, we would like to point out that in many commodity markets there is a low level of transparency on the market size. Many market players in commodity markets do not publish transaction volumes as they tend to be active on the markets exclusively for hedging purposes.

<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>

Each market segment or economic reality may generally be dynamic in nature and thus there may be unplanned circumstances which benchmark determination may be impacted (please refer as well to our answer to Q38). The nature of unexpected events means that it's likely not possible to describe all situations where a benchmark determination may potentially become unreliable, and this should not be required either. Using data from regulated markets, however, potential risks even under stress are usually being softened and thus should not have a major impact.

<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>

DBG agrees with the minimum requirements suggested by ESMA in order to provide for a proportionate compliance. In case an index provider uses discretion (e.g. expert judgement) it should be stated in the benchmark statement. In this context, STOXX and DBG produce transparent strictly rules-based indices therefore the level of discretion is extremely low if at all. In cases where the rules may be not sufficient enough (e.g. black swan event, extraordinary situation which could not have foreseen) any discretionary decisions have to be taken through the index governance structure and/or including external consultation.

<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>

DBG has no further comments.

<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>

DBG has no further comments.

<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 publication of key elements that shall be done for each benchmark shall not be too burdensome in order not to unduly delay the benchmark's time to market. 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 further strongly advise that it should not be necessary to mention more than the profession of the contributors. Mentioning more details could result in some of them ceasing their contributions, risking to make some of rather illiquid commodity markets even more opaque.



We also believe that IOSCO has already gone a long way together with Price Reporting Agencies to establish a standard for benchmark statements for commodity benchmarks. 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>

DBG appreciates and welcomes ESMA's proportionate approach as regards the benchmark statement for regulated-data benchmarks, and we fully agree with ESMA that there should not be any further material requirements to be included for the benchmark statement of regulated-data benchmark provider.

We appreciate this especially due to the fact that such benchmark providers usually provide a large amount of indices (e.g. in the case of STOXX and DBG approximately 11.000 indices) and thus the administrative burden may be cumbersome the more information is being required by the regulator, especially if this applies for every single index.

DBG would therefore like to reiterate that at least benchmark families instead of single benchmarks should be covered in a benchmark statement. As most of this information is already part of the methodologies of such indices (apart from the regulator of the data source in question) it would be ideal if the benchmark statement would be allowed to be part of the methodology. This would be the most efficient practical application of the requirement.

<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>

DBG has no further comments.

<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>

Referring to paragraph 277, we consider Option 1 as being proportionate as Option 2 and 3 do not deliver additional information and content but pose more burdens to the administrators of significant Benchmarks.

<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>

Referring to paragraph 279, we consider Option 1 as being proportionate as Option 2 and 3 do not deliver additional information and content but pose more burdens to the administrators of non-significant Benchmarks.

<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>  
DBG has no further comments.  
<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>

As regards the information to be provided, DBG would like to make the following comments as a provider of regulated-data benchmarks:

- the disclosure of non-public financial information seems not to be justified by the BMR, as the solvency of an administration is not a subject matter of this regulation. A disclosure of financial information could only be justified in single cases if the NCA has a reason to believe that there is a conflict of interest and if it requests only the respective specific information,
- description of benchmarks provided should not refer to single benchmarks, but rather to family of benchmarks instead. Alternatively, a more general approach could be taken as regards an overview on the nature and risk of the benchmarks provided,
- as regards input data and methodology, again we would appreciate if this could be a general overview rather than a single-benchmark focused approach.

DBG would like to make the above comments in the light of a proportionate application of the BMR.

<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>  
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<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>

Referring particularly to paragraph 296 and 299, we would like to highlight that market liquidity in some commodity markets is rather scarce. This would need to be considered by the authorities when evaluating applications from administrators from the commodity sector – regardless of the Benchmarks being regulated-data benchmarks or falling under Annex II.

With a reference to paragraph 299 it is our view that it needs to be deemed necessary to mention contributors' profession, but it shall not be necessary to name single contributors by name. In some cases contributors are well established associations that are not focused on providing market data, but do so as a service for their members or contributors may well 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>  
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<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>  
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<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>  
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<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>  
DBG considers that the RTS should provide clarity, in line with the Level 1 text, as to under which circumstances benchmarks based 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 BMR. To prevent market disruption and a decline of transparent investment vehicles allowing investors to benefit from the development of growth markets beyond the EU, data sourced from 3rd country trading venues subject to an equivalent regulation to MiFID should be considered regulated-data.

As to the form and the content of the application for recognition, clear guidance is needed on issues which are critical for market access, like the involvement of “legal representative” in the oversight function, the content of audit reports, etc. It should be acknowledged that the involvement of the representative in the oversight function can be achieved by different means, i.e. that the level of involvement of the representative in the oversight function may depend on the circumstance of the case at hand.

In order to ensure legal certainty, clear guidance is needed as regards the information 3rd country administrators need to submit to their Member State of reference in order to claim the exemptions subsequent to the classification to a specific benchmark category.

<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>  
DBG generally agrees with ESMA that the presentation of the information as required in Article 21a(6) BMR should be, to the extent possible, aligned with the compliance statement for significant and non-significant benchmarks.

We would even deem it most sensible if ESMA could provide a standard template for the registration which could be used by the 3rd country competent authority. This would be generally easier for all parties and would reduce potential misunderstanding outright from the beginning.



<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>

DBG considers the list provided by ESMA as much too short. In order to reflect established market practices and ensure the competitiveness of benchmark administrators in a global industry, cost related reasons as well as joint ventures with strategic partners in markets outside the EU should also be acknowledged as objective reasons for an endorsement. Likewise, any established company situated outside of the EU should be able to be endorsed by an affiliated company within the EU as otherwise unjustified cost might be created for existing business locations. In case the list would be kept too narrow, EU Investors will not be in the position to profit from the same choice of benchmarks as non-EU Investors.

<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>

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<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 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>

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<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>

Open-ended funds which track a benchmark that would have to undergo substantial changes to follow the BMR could greatly change the financial contract the benchmark user (fund company) and client (investor) have engaged in for that particular investment vehicle. As that situation is open ended, it is not easily resolved within the ESMA guidelines and must be further studied to understand investor impact.

<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>

The definition proposed could be subjective to the individual benchmark provider. What is extraordinary or unforeseeable for STOXX and DBAG may be very different to that of another index provider. DBG would like to request some guidance on the level of subjectiveness an index provider has and what quantification would need to be shown to be classes as “force majeure”.

<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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**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>  
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<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>  
TYPE YOUR TEXT HERE  
<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>  
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<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>  
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<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>  
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<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>  
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