



European Securities and
Markets Authority

Reply form for the Consultation 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_CP_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_CP_BMR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

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

ESMA_CP_BMR_XXXX_REPLYFORM or

ESMA_CP_BMR_XXXX_ANNEX1

Deadline

Responses must reach us by **30 June 2016**.

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



Publication of responses

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

Data protection

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



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_BMR_1>

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) is the leading energy exchange in Central Europe and a subsidiary of DBG. It develops, operates and connects markets for energy and related products including commodity benchmarks.

DBG's index activities are performed by Deutsche Börse AG (DBAG) providing DAX indices and its subsidiary STOXX Ltd. From 2010 to 2015, STOXX Ltd. (STOXX) was a subsidiary of DBAG and SIX Group. In August 2015, DBG fully acquired STOXX. For our customers this means one single point of contact for all index brands. STOXX and DBAG together 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 UCITS compliant indices to the market.

<ESMA_COMMENT_CP_BMR_1>



Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?

<ESMA_QUESTION_CP_BMR_1>

In our response to the Discussion Paper (DP) Deutsche Boerse Group (DBG) suggested that the definition of “made available to the public” should be as wide as possible. Therefore, we agree with the general conditions detailed in the consultation paper. DBG supports the reference made to the IOSCO principles mentioned in the introduction to this section, as we consider these globally relevant guidelines to provide a strong framework for the prevention of benchmark manipulation.

The overarching reason for introducing this legislation is to strengthen consumer and investor protection, and it is therefore crucial to prevent potential loopholes in the regulation. DBG supports ESMA’s approach in saying that an index would have to be (at least potentially) accessible to an indeterminate and open group of recipients (e.g. one or more). We would suggest that ESMA stresses in its final document that a benchmark provided in the EU - irrespective of where it is being administered - which is used as an underlying of any financial instrument issued in the EU should be seen as having been published (i.e. made available to the public).

DBG agrees with ESMA’s approach to “customized basket of securities” where they are used solely for asset allocation purposes, but would like to suggest that ESMA clarifies in the RTS that these baskets should be included in the definition of an index when using a more formal calculation methodology (rather than just holding a security). We otherwise see the risk of creating a loophole by having something that is essentially an index masquerading as basket of securities.

DBG agrees with ESMA’s suggestion that an index should be considered as being made available to the public regardless of how the data is provided to recipients through whatever medium, with or without a license agreement, for payment or for free. We agree that creating an exhaustive list of communication channels could stifle growth and would not be future-proof.

DBG also agrees with ESMA’s approach that the frequency of dissemination should ideally be in line with the frequency of calculation, but agrees that it could cause a loophole in the regulation. We would like to suggest ESMA to consider that the dissemination frequency should be in line with the published index methodology, which could go some way to remove the loophole mentioned.

<ESMA_QUESTION_CP_BMR_1>

Q2: Do you agree with the proposed specification of what constitutes *administering the arrangements for determining a benchmark*?

<ESMA_QUESTION_CP_BMR_2>

DBG supports ESMA’s specification of what constitutes administering arrangements for determining a benchmark and appreciates that it is broadly in line with the IOSCO principles.

We agree with ESMA that the creation or setting of a benchmark methodology is pivotally important for an administrator. DBG supports ESMA’s proposal that any activity in relation to the provision of a benchmark can be outsourced or carried out by a third-party, as long as the administrator remains in control of the performance of outsourced activities, and we agree as well that the governance arrangements would fall under control rather than provision of a benchmark.

In the context of administering the arrangements for determining a benchmark, ESMA is supposed to provide technical guidance on the details of the internal review and the approval of a given methodology, as well as the frequency of such review (cp. Art 13 (1)(b) and (3) BMR “Transparency of methodology”). We are well aware of the oversight function requirements in this context (Art 5 (3)(a) BMR), which require that the oversight of the administrator encompasses the reviewing of a benchmark’s definition and methodology at least on an annual basis. However, we would like to stress that a fully rules-based methodology does not necessarily require such a frequent review. In such cases, the requirement would be extremely costly while not providing any additional value to the market. There are Index Providers offering several

thousand indices, many of them rules-based and neither critical nor significant. In this context we would deem it most important that ESMA considers a proportionate approach as regards the frequency of reviews, in a way which is allowed under its mandate both for Art 5 and Art 13 BMR. Criteria to consider by ESMA could be the significance of a benchmark and if an index (family) is fully rules-based or not the relevance of the index in the market, the use of the index, scope or goal of the index and the market development.

<ESMA_QUESTION_CP_BMR_2>

Q3: Do you agree that the ‘use of a benchmark’ in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, ...)?

<ESMA_QUESTION_CP_BMR_3>

DBG explicitly welcomes ESMA's consideration that the definition of “issuance” does not encompass derivatives and therefore trading venues should not be considered as issuers. While we fully agree with ESMA on this point, we would like to challenge ESMA's reasoning regarding the “value determination”, due to the fact that there is no inherent conflict involved at the trading venue as explained below.

When determining the contract values or final settlement prices for financial instruments (which could be seen as the amount payable under a financial instrument), exchanges and/ or clearing houses do not benefit at all economically from changes of the value (price) of an index, having therefore no inherent conflict of interest.

Recital 19 states:

“Reference prices or settlement prices produced by central counterparties (CCPs) should not be considered to be benchmarks because they are used to determine settlement, margins and risk management and thus do not determine the amount payable under a financial instrument or the value of a financial instrument.”

Exchanges also determine settlement prices, which are clearly mentioned in the recital not to be an amount payable. We therefore question whether exchanges in the context of this regulation can be placed under the scope of this second bullet as the term “amount payable” has not been defined.

As a consequence, it should be made explicitly clear that infrastructure providers like exchanges or clearinghouses do not classify as “users” under the BMR, due to their neutral positioned services towards market participants and given that they are already highly regulated and supervised.

<ESMA_QUESTION_CP_BMR_3>

Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?

<ESMA_QUESTION_CP_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. However, regulated markets are not, and should not be considered to be issuers under the BMR.

Especially as regards derivatives, it should be noted that exchanges create contracts but do not issue instruments.

<ESMA_QUESTION_CP_BMR_4>

Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in the case where the regulatory data is not available or sufficient?



<ESMA_QUESTION_CP_BMR_5>

General remarks

As not only critical benchmarks are affected by threshold calculations, DBG appreciates that ESMA recognizes both the shortcomings of the planned data gathering process as well as its flawed results. We continue to point out that the threshold determination process is overly burdensome especially for those who provide large numbers of benchmarks and is thus not proportionate. Even once the new regime would be established, the cost would most likely still outweigh the benefits of that regulatory requirement.

The current proposal – due to the nature of the topic – still foresees multiple databases to be tapped, all most likely differing both as to form/format and content. This would result in significant work and high processing cost for the EU Commission, ESMA or any affected NCA as well as the respective index providers.

While we are still sceptical as regards the data gathering process, we nevertheless support ESMA's practical approach as regards the counting of composite benchmarks, which will weigh the value (nominal, notional) when weightings are available, and in case no weightings are available to use an equal weightings approach.

We would like to reiterate that any double counting should strictly be avoided and that for this purpose the value of UCITS to be counted under net asset values of investment funds.

We further would like to reiterate our strong suggestion as already lined out in our comments to the Discussion Paper, that for the generation of threshold data a best practice should be set by ESMA ensuring that administrators generating such data and acting supposedly according to the rules will not be penalised in case of the data would be unintentionally erroneous.

Bonds and other forms of securitised debt (data source: FIRDS)

DBG appreciates that ESMA is looking into different regulations for potential solutions and in order to not add on to further additional regulatory requirements. We appreciate as well that ESMA takes into consideration the significant complexities which occur in case of data mining across different databases such as the FIRDS database to be operated by ESMA. In this context may we expect that ESMA plans for easy usability of its FIRDS database for benchmark data inquiries? Especially small index providers would otherwise not be in a position to mine data unless the ESMA database would be very easy to use and very service oriented.

Nevertheless, even in case of an easy to use FIRDS database, it leaves the question open how the administrator is supposed to identify all the instruments (ISINs) in question, taking into consideration that the administrator is not always aware of who uses a particular benchmark and in which context (in this context please revert as well to our answer to Q7).

Derivatives (data source: Trade Repositories)

We understand that ESMA is aiming for Trade Repositories to provide for much more granular data. Please note that those additional provisions will most likely increase the cost base of Trade Repositories as well. Currently, such detailed reports are not produced. We understand the processed data should then be made available to regulators as well as benchmark administrators.

Comments as regards the proposed regulatory text (3.7 Draft Technical Advice on the measurement of the reference value of a benchmark)

Proposed text adaption 1:

- a) Nominal amount of financial instruments other than derivatives

“For bonds, money market instruments and other forms of securitized debt including structured finance products **other than derivatives**”

Rationale:

We of course fully appreciate ESMA's reference to the regulation as regards the classification of structured financial products. However, we still need to reiterate that there are currently unsolved discussions between NCAs and markets participants as regards the nature of structured financial products we cannot neglect either in this context. Within these discussions it has become clear that at least some structured financial products are to be classified as derivatives rather than securities.

Proposed text adaptations 2:

b) Notional amount of Derivatives - Futures

“For Exchange Traded Derivatives (ETDs) the formula should read: “number traded contracts * contract size * underlying price”

Rationale

ESMA has not defined the variable “number of units of future” which could lead to misinterpretations. It is therefore that we would like to suggest using “contract size” instead, defined as “the deliverable quantity of commodities or financial instruments underlying futures and option contracts that are traded on an exchange”.

Further, ESMA suggests using the “settlement price” – we would like to point out that this data could be difficult to be obtained and would like to suggest replacing this by the “underlying price” of the future.

Again it is important to clearly state that any double reporting should be avoided, and therefore number of trades should be counted single sided only.

b) Notional Amount of Derivatives - Options

“For Exchange Traded Derivatives (ETDs) the formula should read: “number of traded contracts * contract size * strike price”.

Rationale

In alignment with the comments above as regards the calculation of futures notional we would like to suggest as well to replace the “number of contracts” defined as “the quantity of the underlying security that the holder of an option possesses the right to buy or sell” in the suggested formula for options with “contract size” instead. Again it is important to clearly state that any double reporting should be avoided, and therefore number of trades should be counted single sided only.

Transitional Regime

DBG does not fully agree with the transitional regime as suggested by ESMA. First of all the Level 1 text requires the use of notional data. In case data provided by trading venues should be used as a proxy during the transitional phase until the new regime might be working, we at least would recommend using notional data as required by Level 1. In case a trading venue makes available such data as open interest – which is currently not legally required – such publication usually includes notional data as well.

<ESMA_QUESTION_CP_BMR_5>

Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?

<ESMA_QUESTION_CP_BMR_6>

With the following we would like to comment on Statement 79 and 80 within the consultation document.

- DBG agrees that only a very small number of commodity benchmarks will fall into the category of critical benchmarks.
- However, when it comes to the seasonal pattern of some commodity prices or consumption volume it is not a matter of size, liquidity of the market or usage of a Benchmarks but of the characteristics of the underlying commodity. Commodities that follow seasonal patterns because of physical characteristics (e.g. non-storability, weather-dependency or season-driven consumption) do so even in relatively liquid markets.

For these commodity benchmarks a six-month average is not adequate from our view as the seasonality tends to be spread over the whole year. As a result, we still propose to choose a yearly average as seasonal patterns should to be levelled out then.

<ESMA_QUESTION_CP_BMR_6>

Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?

<ESMA_QUESTION_CP_BMR_7>

DBG cannot support ESMA's suggestion to use license agreements to generate data for the calculation of thresholds due to the following reasons:

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. While initially it might look like an easy solution to a significant challenge of gathering requested data in fact it is not. The width of index license arrangements varies significantly across the market and for many products (varying across administrators) no license agreements are even necessary, resulting in a lack of complete knowledge for those administrators as regards the use of respective benchmarks in the market and products in terms of overall value or number of instruments.

How reports work today depends on the use of the benchmark in question. While for ETFs usually AUMs are being reported to the administrator, for other use cases only the number of referenced products may be reported or even none of them. This set-up of contractual arrangements has been chosen to avoid over-administration of benchmark users. Increasing the burden on users across benchmarks and across the EU would increase overall costs and potentially reduce choice of products for investors.

<ESMA_QUESTION_CP_BMR_7>

Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?

<ESMA_QUESTION_CP_BMR_8>

General remarks

DBG is generally supportive of ESMA's suggestions as regards the development of a consistent approach which requires both NCAs as well as the EU Commission to take ESMA's proposed values into consideration when establishing a list of critical benchmarks.

We also support the relative impact approach which takes into consideration the size of an affected country and that the list of criteria shall be non-exhaustive. We further agree with ESMA that the defined criteria should be considered jointly and may be calibrated on a case by case depending on the nature of the benchmark in question as well as the respective (economic) environment. While we generally are supportive of ESMA's approach we would like to submit some additional comments as regards issues where we disagree.

Market Integrity

Under section 4(a) of 4.3 of the Draft Technical Advice on the criteria referred to in Article 20(1)(c) subpara. (iii), ESMA refers to "significant" in the context of a relative share but without any definition of "signifi-

cant". We understand that ESMA is considering a flexible approach with discretion for NCAs as well as the Commission; however, we are concerned that an un-level playing field could develop within the EU in case flexibility would be applied without any limits. We therefore would like to suggest that there should at least be some references to a certain value when talking about significance.

Under section 4(f)(3), ESMA refers to criteria whether the benchmark is used for tax purposes. We would like to better understand how ESMA would consider this to be explored, decided or evaluated. We do not expect benchmark providers to create benchmarks for this purpose outright, but there should not be the risk of false positives due to a lack of definition or criteria how such a benchmark use should be identified. We would thus like to suggest to cancel section 4(f)(3) outright due to the difficulty in clearly defining it.

Consumers

ESMA often refers to the number of consumers. While we appreciate the consideration in this respect we would like to alert ESMA to the significant data gathering work which will most likely be triggered by the inclusion of such a request within the RTS.

Real economy

DBG cannot see the direct relevance of the GDP compared to the outstanding volume of assets referenced to any benchmark, regardless of its nature. Therefore, we deem ESMA's suggestion to be too generic and of little value to the insight generating process and suggest deleting section 4(k) of 4.3 of the Draft Technical Advice.

The criteria as defined under section 4(l): "*Criteria related to the financing of households and businesses*" is the most important information referring as well to the real economy as loans to households and corporations provide for the motor of the economy and thus as an enabler of GDP growth.

<ESMA_QUESTION_CP_BMR_8>

Q9: Do you think that the concept of "significant share of" should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?

<ESMA_QUESTION_CP_BMR_9>

While we support ESMA in a mostly flexible approach which allows for certain discretion at various points in the evaluation process, we deem it sensible to have at least some defined minimum standards which should be adhered to in order to maintain a level playing field within the EU. In this context (and as already pointed out in our answer to Q 8), DBG considers a certain definition of the terminology "significant share" as sensible.

<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?

<ESMA_QUESTION_CP_BMR_10>

DBG appreciates ESMA's considerate approach as regards endorsement of third country benchmarks and that it should be the exception. While we understand and share the regulator's view that any misuse of endorsement must be prevented, DBG would like to point out that global markets require global indices. In this respect, DBG appreciates an approach which allows for diversity of indices within the EU while protecting EU investors and market participants.

The model of endorsement provides for a sensible solution especially in such cases where certain globally established benchmarks with a larger subscriber base outside the EU are being made available in the EU market and to EU investors. Third country administrators of such benchmarks would most likely not con-

sider relocating, neither would they consider submitting their IP rights to any EU located administrator. In such cases, endorsement is of significant value to the EU market and should be supported as much as possible.

We furthermore believe that the endorsement provisions in the BMR were drafted with the specific aim to prevent regulatory arbitrage, i.e. preventing benchmarks currently provided in the EU from moving to third countries in order to benefit from a lighter regulatory regime. However, administrators of benchmarks historically provided from third countries (i.e. prior to the development of the BMR) by definition have not based their decisions on the existence of the BMR. The addition of the criteria “historical presence in a third country” to the list of objective reasons would therefore be useful to allow benchmarks historically provided from third countries directly to qualify for endorsement. ESMA’s current proposal on the cumulative use of a) objective reasons for the provision of a benchmark or family of benchmarks and b) objective reasons for the use of a third country benchmark or family of benchmarks, however, would currently not allow for such a scenario. Therefore, DBG would like to strongly recommend adding to the current wording (especially in case a cumulative approach should be applied) as follows:

5.5 Draft Technical Advice on Article 33 (Endorsement)

1. Objective reason for the provision of a benchmark or family of benchmarks within a third country
“d.[new] A globally used index administered by a third country benchmark provider with historical presence in a third country”
2. Objective reason for the use of a benchmark or family of benchmarks within a third country
“(iii)[new] The use of the benchmark within the EU would allow to participate in a globally traded instrument to the advantage of the EU investor and market place”

DBG deems it important that not only existing benchmarks are being considered for endorsement, but also new ones in order to not exclude potential options for the EU market from the beginning.

<ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?

<ESMA_QUESTION_CP_BMR_11>

DBG generally welcomes ESMA’s proposal regarding the transitional provisions. However, we would like to recommend an adapted wording in the case of transition to another benchmark, which currently seems to be too generic thus leaving unintended room for interpretation.

DBG explicitly welcomes ESMA’s approach leaving certain discretion to NCAs when reviewing a non-compliant benchmark. Benchmarks may differ in nature as well as in use and thus discretion might be necessary. However, while discretion shall be applied by NCAs, transparency about the decisions as well as the reasoning shall be provided to the public, thus limiting any potential un-level playing field.

We also explicitly welcome ESMA’s intension to apply a non-exhaustive list of criteria on which the assessment of a non-compliant benchmark should be based on, as well as the case-by-case-approach per benchmark. We would like to add to the latter that in this context it could make sense to refer to benchmarks as well as families of benchmark, as often enough benchmarks come in families.

We appreciate that ESMA will liaise with the benchmark provider in order to use his experience within the process and would like to encourage that this might not be only for certain selected tasks. A close co-operation between NCAs and the affected benchmark provider would be beneficial for all affected parties including the market in general.

However, the current wording applied by ESMA as regards transitioning of a benchmark - most likely referring to a similar benchmark provided by another benchmark provider - risks unfortunately to give rise

to inconsistent interpretation. The wording currently suggested by ESMA may be interpreted in a way that the benchmark administrator who failed to become compliant with the requirements as lined out in the BMR within the set time frame (for whatever reasons) would have to submit its IP rights to another benchmark provider, which would constitute a de facto disappropriation. In fact even in case a benchmark might not suffice all EU BMR requirements, it could still hold a significant value outside of Europe.

We are not convinced that this is what ESMA had in mind when formulating the Draft Technical Advice and assume that ESMA was referring to “substitutes of benchmarks” which are referenced to in various parts of the BMR. In this case another Benchmark Administrator (or even the same) operates a benchmark which is a close substitute of the benchmark in question. We would therefore like to propose a different wording:

6.4 Draft Technical Advice on transitional provisions

2. (bullet 5)

- “whether the transitioning of **assets referencing the benchmark in question to an adequate substitute provided by another benchmark provider** would lead to a substantial change in the benchmark”.

Again, when reviewing this, we would recommend including the benchmark provider of the non-compliant benchmark within the process as well.

Finally, we would like to raise the question, if ESMA foresees any time limit for the decision making process of the NCA.

<ESMA_QUESTION_CP_BMR_11>