esma European Securities and Markets Authority

Reply form for the Consultation Paper on Benchmarks Regulation

29 September 2016

European Securities and Markets Authority

Date: 29 September 2016

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the Benchmarks Regulation, 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

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 **02 December 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>

I. General

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 subsidy 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) which is providing DAX indices, as well as 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 the 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.

II. Specific issues

1. Clear Date for Registration is needed

It is of utmost importance for DBG and its affiliated companies to actively participate in the global and EU Index Market. We are hence concerned about any insecurities as regards a clearly specified timeline for authorisation and registration and the transitioning rules. Due to the differing views on the interpretation of the transitional arrangements as laid down in Art. 51 of the Regulation (EU) 2016/1011 (BMR), benchmark providers are currently faced with considerable uncertainties as to when they are required to apply for authorisation or registration in order to ensure business continuity. Art. 51 (1) of the BMR may be interpreted in different ways: a) only referring to the benchmark administrator irrespective of the single benchmarks provided or, b) referring to benchmark providers and specific benchmarks provided by the benchmark provider at the same time. In case a) applied, the grandfathering would allow the benchmark provider to continue launching and licensing new indices. However, if case b) would be the correct interpretation the benchmark provider would not benefit from the grandfathering rule. Immediate authorisation or regis-

tration would thus be necessary to allow the administrator to actively continue its business. This however, would require the authorisation / registration process to start earlier if possible.

2. **Registration instead of authorisation strongly supported for already supervised entities**

We consider the narrower requirements in case of registration of already supervised entities to be appropriate. In case a benchmark administrator is already a supervised entity by one competent authority, the necessary information should already be available. As regards financial information as defined in 2 b) of Annex I (Information to be provided in the application for recognition under Art. 32 of BMR) to be submitted in the authorization process, we would like to suggest that information may be provided as well in form of annual reports. As regards Financial Forecasts as defined within Annex I, 2 c) we would like to point out that in case of already supervised company's such forecasts should not be required on top. We explicitly consent with ESMA's proposal that in case of Registration no Financial Forecasts are required. We deem this to be proportionate. The additional task would increase cost while not providing additional benefits.

3. **DBG appreciates ESMA's flexible non-exhaustive list of governance arrangements**

DBG strongly appreciates ESMA's approach to provide for a non-exhaustive list of governance arrangements and the provided flexibility for the oversight function. DBG especially appreciates ESMA's decision to not mandate the inclusion of external stakeholders into the oversight function of a benchmark administrator due to the arguments discussed. The decision for flexibility will allow many IOSCO compliant benchmark providers to maintain already established structures or to only marginally adjust them, where necessary. DBG is of course considerate that the supervising NCA will have to be satisfied as regards the set-up.

4. **Third Country regulated trading venues as provider for input data**

DBG is concerned about the shortcoming at level 1 as regards the treatment of regulated data sourced from third countries and the significant impact this may have not only on benchmark administrators but also on benchmark users in the EU. According to level 1, regulated data from third countries will only be considered as regulated data either once the Commission has adopted an implementing decision that the legal and supervisory framework of that country is considered to have equivalent effect within the meaning of Article 28(4) of Regulation (EU) No 600/2014, or if it is sourced from a regulated market considered to be equivalent under Article 2a of Regulation (EU) No 648/2012 - which according to comments from ESMA representatives at the latest open hearing is rather unlikely to happen soon for many third country. If not treated as regulated data, the contributor regime would apply. We question the suitability of a contributor role for third country regulated trading venues as briefly discussed at the ESMA open hearing and consequently the application of a code of conduct. Unless a solution will be found EU investors risk losing access to highly efficient ETFs with non-EU exposure in the future.

5. **Procedure for consultation on material changes to the methodology**

It will be essential to have the possibility of emergency adaptions without a lengthy consultation period. Of course an exemption should remain an exemption and not become a rule. If applied sensibly, the exemption is a useful and indispensable instrument to safeguard the end user. For instance, in case an error in the methodology is detected and it needs immediate correction or in case of unexpected / black swan events not considered in the methodology a swift implementation of the amendment is of utmost importance and may prevent the end user from being negatively affected for a longer period, while waiting for consultation feedback. This cannot be in the interest of the EU regulators.

6. **Compliance statement significant benchmarks**

DBG strongly supports ESMA's sensible approach as regards a single compliance statement for significant benchmark providers versus multiple statements as discussed in the discussion paper. Furthermore, DBG agrees with ESMA that this will be minimising the administrative burden for benchmark administrators as intended.

7. **DBG strongly rejects disclosure of algorithms in publicly available benchmark methodologies**

In DBG's view this conflicts with the protection of intellectual property of benchmark administrators. Benchmark administrators invest significantly to provide new indices on a constant basis both in order to

compete effectively with other benchmark providers while increasing choice for end-users at the same time. While a disclosure to customers / licensed users is no issue, DBG deems it absolutely disproportionate to disclose certain relevant algorithms to the general public. DBG does not see any necessity to publish those information according to level 1 which clearly provides for a differentiation of publishing and making available.

<ESMA_COMMENT_ CP_BMR_1>

Q1: Do you consider the non-exhaustive list of governance arrangements to be sufficiently flexible? Are there any other structures which you would like to see included?

<ESMA_QUESTION_CP_BMR_1>
DBG appreciates ESMA's flexible non-exhaustive list of governance arrangements
DBG strongly appreciates ESMA's approach to provide for a non-exhaustive list of governance arrangements and the provided flexibility for the oversight function. DBG especially appreciates ESMA's decision to not mandate the inclusion of external stakeholders into the oversight function of a benchmark administrator due to the arguments discussed. The decision for flexibility will allow many IOSCO compliant benchmark providers to maintain already established structures or to only marginally adjust them, where necessary. DBG is of course considerate that the supervising NCA will have to be satisfied as regards the set-up.

Regulated trading venues should not be considered under the definition of a contributor
As regards point 2 in Annex I "Non-exhaustive list of governance arrangements", DBG would like to point out that regulated trading venues should not be considered to fall under the definition of contributor (this is in line with ESMA's confirmation in point 104 of the consultation paper). DBG pointed this out in the context of a discussion at the ESMA open hearing regarding third country regulated trading venues, which would have to be considered as "contributors" under the Benchmark Regulation, unless equivalence has been applied. The contributor model is in no way suitable or acceptable for regulated trading venues, be it inside the EU or in a third country. Please see as well the additional comments in this respect under the topic of "input data" further below.

DBG strongly suggests the additional inclusion of "market operators in role of administrator"
In reference as well to the above comment (including our detailed comments as regards the topic of input data further below in our responses) point 2 of Annex I refers to administrators who are not wholly owned or controlled by contributors. While we feel that the definition of contributors still has some blurred understanding and for the avoidance of doubt, we would appreciate a clarification in Annex I, point 2 as regards the different role and nature of regulated trading venues. Unlike in the LIBOR scandal, where front-office contributors were submitting indicative and in some parts manipulated prices while the controlling entity was holding / trading positions on own account referencing those benchmarks, market operators are different. Market operators of regulated trading venues are not actively trading but organizing and supervising markets. LIBOR like scenarios are not possible in this respect.

Therefore, DBG proposes to **amend the text of point 2 of Annex I** as follows:

> *A committee, where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function,* ***or where the administrator is a market operator in line with Art. 3 (1) (17) (j) of Regulation (EU) 2016/1011.*** *The committee shall include:*
>
> *i. persons involved in the provision of the relevant benchmarks in a non-voting capacity;*
>
> *ii. at least two members of staff representing other parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities; and*
>
> *iii. where appropriate staff members in accordance with subparagraph 2(ii) are not available, at least two independent members;*

<ESMA_QUESTION_CP_BMR_1>

Q2: Do you support the option for the oversight function to be a natural person who is not otherwise employed by the administrator?

<ESMA_QUESTION_CP_BMR_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_2>

Q3: Do you support the concept of observers and their inclusion in the oversight function?

<ESMA_QUESTION_CP_BMR_3>
DBG supports the concept of observers and their inclusion in the oversight function due to the reasons listed by ESMA. DBG is convinced that selected participants even without voting rights might act as sounding board for discussions and considerations at oversight committee level. For the avoidance of doubt, however, DBG would like to ensure that both – constant observers as well as special observers for selected topics – may be included in the oversight committee meetings going forward. However, contrary to ESMA DBG would consider observers (guests) to be internal employees rather than external persons. The comments made above as such refer to internal observers rather than external ones. DBG would recommend that ESMA allows for both.
<ESMA_QUESTION_CP_BMR_3>

Q4: Do you think that the draft RTS allows for sufficient proportionality in the application of the requirements? If no, please explain why and provide proposals for introducing greater proportionality.

<ESMA_QUESTION_CP_BMR_4>
As pointed out in the answer to Q 1, DBG strongly appreciates the flexibility ESMA proposes as regards the set-up of the oversight committee(s). In this respect, we would like to suggest that the relevant regulatory requirements would be slightly adapted to resemble the proposed flexibility in an adequate way. Accordingly, DBG would like to propose some minor adjustments in the wording of the recitals as follows:

a) ESMA states that the inclusion of contributors and users is left to the decision by the administrator, which DBG welcomes and deems most sensible. As DBG feels that the text in the recital was not sufficiently clear in this respect, we would like to propose the following adaption:

   Recital (6) last sentence:

   *It is therefore appropriate that they **may** be considered as members for such benchmarks.*

b) In order to allow for internal expertise on selected topics affecting the benchmark administration, DBG would appreciate the inclusion of an additional recital in the draft RTS.

   Recital (7a) (new):

   ***Furthermore, staff of the administrator might be invited on a non-permanent basis in order to contribute information to the oversight committee on particular topics. Invited staff may change according to topic, while having no voting rights**.*

c) ESMA states that the inclusion of observers is left to the discretion of the administrator, which DBG welcomes and deems most sensible. However, DBG feels that the text in the recital was not sufficiently clear in this respect and would thus like to adapt as follows:

   Recital (9):

   *Observers may also join the oversight function **on request by the administrator.***

d) DBG strongly appreciates the flexibility granted by ESMA as defined in recital (12). However, we would like to suggest the following adaption:

   Recital (12):
   *In case the oversight function is a committee, [...] criteria to select members **~~and observers~~ amongst others** […] can operate without impediment. **Where observers should be included at the discretion of the administrator, criteria to select observers should be developed.***

e) DBG supports the **optional inclusion of external members** to the oversight committee, however, not the mandatory one. We would deem it appropriate that Art. 1 (5) would be softened accordingly. We see no basis for such a mandatory requirement in the level 1 text. Furthermore, as a market operator we would not deem it appropriate to have a competing market operator sitting in an oversight committee while business secrets might be discussed.

Art. 1 (5):

> *Where a benchmark is a regulated-data benchmark, the administrator **may** consider including as members […]*

f) In line with all our comments above we propose as well to soften Art. 1 (9) as follows:

> *"Observers **may be ~~joining~~ permitted to join** the oversight function […]"*

<ESMA_QUESTION_CP_BMR_4>

Q5: Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?

<ESMA_QUESTION_CP_BMR_5>
Please see DBGs comments to Q 4.
<ESMA_QUESTION_CP_BMR_5>

Q6: Do you agree with the appropriateness and verifiability of input data that the administrator must ensure are in place? Please elaborate.

<ESMA_QUESTION_CP_BMR_6>
DBG generally agrees with ESMA's draft RTS on input data. However, there are certain issues where DBG would strongly appreciate clarification by ESMA. We understand that some of the relevant issues rather are level 3 topics, however, it would be most sensible to take those open issues into consideration already on level 2 as much as possible.

Non-transaction data from regulated market and front-office functions are of different quality
DBG considers that there is a difference between non-transaction input data from a regulated trading venues or non-transaction data generated by a front-office function. While pre-trade data from regulated trading venues are constantly monitored and supervised and are usually executable on venue once advertised, pre-trade data generated by front office personnel for the submission to an index provider is usually not executable and therefore often correctly labelled as "indicative quotes". It was such kind of contributor quotes which were part of the LIBOR scandals. DBG would as such deem it most sensible to be clear in the recital as regards this difference, as the processes applied for those different sets of data will be different too.

Therefore, we would suggest the following adaption:

Recital (4):

> *Verifiability is highly dependent on the type of input data used. For example, regulated data by themselves present a high degree of verifiability as a result of the application of sectoral disciplines. By contrast, types of input data that are less easily verifiable, notably non-transaction data **from front office function**, may still meet the requirement of verifiability if sufficient submission metadata is available to conduct extensive validation checks.*

Verification of regulated data rather than validation

DBG is concerned that **recital (5)** does not take into consideration the specificities of regulated data benchmarks. While evaluation and validation should play an ongoing role in case of contributor data via submitters (e.g. as regards the quality of the submitted data), input data from trading venues for regulated data benchmarks requires different processes in the benchmark administrator's processes. Once the administrator has decided for a data source like a regulated trading venue, the only sensible test could be the verification, that the correct data source is being set-up and used. The data content itself will be always highly reliable and qualitative data as the referenced entities are strictly and broadly regulated including their data generation and publication processes. Regulated data provides for unquestionable sets of 100% reliable data. This holds true for data sourced directly or via a market data vendor (directly and entirely). Further evaluation or validation of such data would not only be fully unnecessary but more than overall disproportionate.

Therefore, we would suggest the following adaption:

Recital (5):

> *Evaluation and validation of input data* ***or verification of input data sources as defined in Art. 3 (1) (24) of Regulation (EU) 2016/1011*** *are ongoing obligations for administrators, which are conditional on the verifiability of input data.*

Proposed processes and requirements not suitable for regulated data

DBG is concerned that the proposed draft technical standards by ESMA do not fully adjust the necessary distinct requirements for regulated data benchmarks in a sufficient manner. The proposed processes and requirements suggested by ESMA may be suitable to contributors or submitters, but for regulated data benchmarks they are neither fully suitable nor even necessary. As regards Art. 1 of ESMA's draft technical standards, DBG generally agrees with most of the wording. However, DBG would like to ask for fine tunings in order to avoid any potential misunderstandings and ambiguities in the future. In detail: when an administrator of regulated data benchmarks develops a new benchmark, he usually decides on the respective data sources which will be used for the sourcing of necessary input data. In contrast to most contributor data, input data used for regulated data benchmarks is already "readily available" and as such usually consumed by a broad public e.g. for investment decisions and / or valuations. Data sourced from a regulated trading venue as such would then not need to be checked further like for relevant thresholds in DBG's view. While DBG assumes that ESMA already takes into consideration different requirements of input data across different benchmarks by nature by referring to "as applicable" in Art. 1 (1), DBG would like to ask for further clarification as lined out below. Furthermore, as regards Art. 1 (2), DBG would like to include a clarification ensuring that regulated data benchmarks as well may comply with the Benchmark Regulation in future.

Therefore, we would suggest the following adaption of Article 1 – Appropriateness of input data:

> 1. *Administrators shall specify requirements to ensure that the input data obtained is appropriate in view of the methodology and that it accurately and reliably represents the market or economic reality that the benchmark is intended to measure. The requirements shall cover at least, as applicable to the relevant type of input data and benchmark:*
>
>   *(a) relevant thresholds for quantity* ~~*and,*~~ ***or*** *quality of input data;*
>   *(b) hierarchy of input data types;*
>   *(c) justification required for use of other than the primary types of input data;*
>   *(d) justification required for the exercise of any discretion or expert judgement in the contribution of input data.*
>
> *2. Appropriateness shall be monitored on an ongoing basis through evaluation and validation* ***or verification of input data sources defined in Art. 3 (1) (24) of Regulation (EU) 2016/1011****.*

Code of Conduct neither applicable nor suitable for regulated data

DBG agrees with ESMA as regards the clarification in Art. 2 (1) of the draft RTS that input data is verifiable when it can be checked to be accurate **or to stem from a reliable source**. This goes hand in hand with the proposal of a clarification under Art. 1 (2) as lined out above. We furthermore appreciate ESMA's comment in point 104 that regulated data does not count as contribution. However, the draft proposal by ESMA in our view is not yet distinct enough when referring to the relevant requirements and processes applicable to benchmark administrators. DBG therefore sees the need to fine tune Art. 2 (2). The article applies to all benchmark administrators while the terminology "submission of metadata" only applies to the Code of Conduct which DBG does not consider applicable for regulated data benchmarks. ESMA explains in point 60 that from *"a practical perspective, this additional information is a duplicate of the list of relevant submission metadata that must be recorded by the contributor and that are included in the draft RTS on code of conduct."*

Therefore, we would suggest the following adaption of Article 2 – Verifiability of input data:

> *1. Input data is verifiable when it can be checked to be accurate or to stem from a reliable source.*
>
> *2. In order to demonstrate the verifiability of input data, an administrator shall ensure the availability of* ***all information necessary. This shall include, where applicable, submission*** *metadata required to carry out the checks referred to in Art. 3.*

Third country regulated trading venues as provider for input data

DBG is concerned about the shortcoming at level 1 as regards the treatment of regulated data sourced from third countries and the significant impact this may have not only on benchmark administrators but also on benchmark users in the EU. According to level 1, regulated data from third countries will only be considered as regulated data either once the Commission has adopted an implementing decision that the legal and supervisory framework of that country is considered to have equivalent effect within the meaning of Article 28(4) of Regulation (EU) No 600/2014, or if it is sourced from a regulated market considered to be equivalent under Article 2a of Regulation (EU) No 648/2012 - which according to comments from ESMA representatives at the latest open hearing is rather unlikely to happen soon for many third country. If not treated as regulated data, the contributor regime would apply. We question the suitability of a contributor role for third country regulated trading venues as briefly discussed at the ESMA open hearing and consequently the application of a code of conduct. Unless a solution will be found EU investors risk losing access to highly efficient ETFs with non-EU exposure in the future.

Validation of regulated data disproportionate

DBG questions the applicability of the requirements in Art. 3 (1) for regulated data benchmarks, given the real-time nature of the data. These requirements do not appear well suited for regulated data. Considering that regulated data is already subject to extensive requirements for upholding market integrity, including the Market Abuse Regulation and MiFID II / MiFIR, further checks of the input data would appear ill-suited and unnecessary. So unless ESMA's clear intention was to not refer to regulated data at all in Art. 3 as *Art 3 (1) states: "Evaluation, consisting of at least the following formal checks on each* ***individual input data contribution"*** - which would be clearly our preferred solution - we would at least ask for further customization. The two alternative proposals are defined below:

Therefore, we would suggest the following adaption of Article 4 – Regulated Data Benchmarks:

> *Administrators of regulated data benchmarks are not subject to Article 3* ~~***paragraph 2.***~~

Alternatively, we would suggest the adaption of Article 3 – Evaluation, ~~**and**~~ validation ***and verification***

> *Verifiability of input data implies that administrators are able to carry out the following checks on these data:*
> *1. Evaluation, consisting of at least the following formal checks on each individual input data contribution:*
> *(a) whether the input data is contributed by an authorized submitter or;*

(aa) (new) in case a is not applicable whether the data is originating from a market operator as defined in point (18) of Art. 4 (1) of Directive 2014/17/EU, or a trade repository as defined in point (2) of Regulation (EU) No 648/2012 of the European Parliament and the Council;
(b) whether input data is provided on time;
(c) whether input data is provided in the format specified
(d) whether input data fulfils the quantitative threshold set in the methodology, if any.

As regards Art. 3 (1) (d) we would appreciate as well if ESMA could define the "quantitative thresholds" required under this article in case the article is applicable as well for regulated data benchmarks.
<ESMA_QUESTION_CP_BMR_6>

Q7: Do you agree with the internal oversight and verification procedures that the administrator must ensure are in place where contributions are made from a front-office function in a contributor organisation? Please elaborate.

<ESMA_QUESTION_CP_BMR_7>
Code of Conduct unsuitable for Regulated Markets
DBG is very concerned that Art. 3 (1) (24) (a) (i) of the Benchmark Regulation in combination with the current poor state of equivalence decisions in case of third country regulated trading venues vs the EU will provide for significant unintended negative consequences as regards the provision of benchmarks within the EU addressing other geographies than the EU as underlying investment exposure. The potential alternative role of a contributor for a third country regulated trading venue – as discussed at the ESMA open hearing in Paris - and the accompanying Code of Conduct in such a case is in no way suitable for input data provided by a regulated trading venue - be it a regulated trading venue located within the EU or outside the EU.
The level 1 text of the Benchmark Regulation clearly requires the application of a code of conduct in Art. 11 (1) (e).
Unless there would be a clear correction at level 1 (ex post), in order to avoid the negative consequences for EU capital market and EU investors, the only alternative DBG could envisage would be an additional and more suitable and proportionate concept for third country regulated data sources at level 2.
<ESMA_QUESTION_CP_BMR_7>

Q8: Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark's methodology is traceable and verifiable?

<ESMA_QUESTION_CP_BMR_8>
Traceability and Verifiability
DBG generally appreciates ESMA's considerate suggestions and considers traceability and verifiability as achieved once an index methodology is in line with points 85. to 89. of the consultation paper and publicly available on the administrator website. While generally agreeing with ESMA, DBG still has some additional questions and proposals for adaption as lined out below.

Definition of "estimated size of the underlying market"
Art. 1 (2) of the draft RTS refers to an "estimated size of the underlying market". For the avoidance of doubt, DBG would appreciate if ESMA could kindly clarify the exact definition. DBG assumes that Art. 12 (2) (a) Benchmark Regulation and Art. 1 (2) of the draft RTS refer to the size of a market of the overall group of potential constituents in general (e.g. the EU equity market) and agrees that some general indications might be included. However, DBG would deem it disproportionate if detailed figures would need to be provided by a benchmark administrator, especially in case of administrators of a large amount of indices. DBG therefore suggests that this requirement shall be deleted.

Definition of "unit of measurement of the benchmark"

Art. 1 (3) of the draft RTS refers to “unit of measurement of the benchmark”. Most indices are expressed as dimensionless quantity and would simply be measured in index points. DBG would appreciate clarification by ESMA on this point. This might be as well a question for level 3.

Art. 1 (1) (14) of draft RTS – disclosure of algorithms in the publicly available benchmark methodologies

DBG strongly rejects the disclosure of algorithms in the publicly available benchmark methodologies as required in Art. 1 (1) (14) of the draft RTS. In DBG’s view this conflicts with the protection of intellectual property of benchmark administrators. Benchmark administrators invest significantly to provide new indices on a constant basis both in order to compete effectively with other benchmark providers while increasing choice for end-users at the same time. While a disclosure to customers / licensed users is no issue, DBG deems it absolutely disproportionate to disclose certain relevant algorithms to the general public. DBG does not see any necessity to publish those information according to level 1, which clearly provides for a differentiation of publishing and making available.

Art. 1 (1) (15) draft RTS – contingency measures during conditions of market stress

Defining detailed contingency measures for stressed markets is difficult, as usually these are exceptional situations whose concrete materialization, effects and implications are difficult to foresee. The development of high-level and generic rules is a possibility, but detailed “action plans” would likely result in something which is concretely not applicable or that leaves out certain scenarios. **DBG would therefore strongly recommend ESMA to adapt the text accordingly and abstain from “detailed action plans”.**

<ESMA_QUESTION_CP_BMR_8>

Q9: Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?

<ESMA_QUESTION_CP_BMR_9>

Frequency of the methodology review should be proportionate

DBG agrees on most suggestions made by ESMA. However, the frequency of the methodology review should be proportionate to the type of benchmark (for instance, a broad-based market capitalization equity index based on regulated data would likely not need an annual review due to the nature of the index). In no case should the additional requirements as formulated in the draft RTS exceed the level 1 text here.

<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the procedure for consultation on material changes to the methodology?

<ESMA_QUESTION_CP_BMR_10>

DBG agrees in most aspects with ESMA. However, DBG has additional comments and proposals as lined out below.

Publication of Comments

DBG appreciates the proportionate treatment of significant benchmarks as regards the feed-back statement lined out in Art. 4 (2) of the draft RTS. Referring to the same issue, DBG would like to propose a slight amendment of the text to increase its clarity and in order to align with recital (9) on this topic.

Art. 4 (2) a) should read: “*a statement of the administrator on the comments received in relation to the proposed changes*”.

Procedure for consultation on material changes to the methodology

DBG appreciates ESMA’s use of the terminology as lined out the IOSCO Principles for benchmarks and would suggest the alignment between the terminology used by ESMA in Art. 3 of the draft RTS, where ESMA refers to stakeholders like IOSCO while in recital (7) and (8) ESMA refers to users and potential

users. While fully agreeing to the consultation of users, DBG questions the necessity to include as well potential users in the consultation. DBG deems the terminology of "potential user" generally as too broad and undefined – as it could encompass initially everybody - and would like to refer to stakeholders instead, at least in case of significant and non-significant benchmarks for proportionality reasons. As regards ESMA's view stated in point 98 of the consultation paper, DBG would like to point out again that it will be essential to have the possibility of emergency adaptions without a lengthy consultation period. Of course an exemption should remain an exemption and not become a rule. If applied sensibly, the exemption is a useful and indispensable instrument to safeguard the end user. For instance, in case an error in the methodology is detected and it needs immediate correction or in case of unexpected / black swan events not considered in the methodology, a swift implementation of the amendment is of utmost importance and may prevent the end user from being negatively affected for a longer period, while waiting for consultation feedback. This cannot be in the interest of the EU regulators. It is DBG's understanding that the Benchmark Regulation itself takes such cases into account in Art. 27 (1) (c) BMR which states: "*provide notice of the possibility (in the Benchmark statement) that factors, including external factors* ***beyond the control*** *of the administrator, may necessitate changes to, or the cessation of, the benchmark.*" Of course. Such a swift change should be properly documented, notified to the stakeholders and subject to ex-post audit to ensure it was in the interest of the stakeholders. While not seeing any contradiction to level 1, DBG would appreciate ESMA's support on this issue for the benefit of EU as well as non-EU investors. Not allowing for emergency adaptions would not only negatively impact EU investors but as well non-EU investors and as such EU benchmark providers as their benchmarks would potentially be less resilient compared to non-EU produced benchmarks and as such loose customers in a global competitive market.

DBG would therefore strongly suggest to add the following text into the draft RTS:

Art. 3 (2) (new):

> *In case of unexpected events which are not covered by the methodology and which could negatively impact users, the benchmark administrator might adapt the methodology without a consultation period. Such a deviation from the consultation process as defined in paragraph 1 would need to be documented in detail including evidence of why the consultation process could not be followed in that instance. Benchmark users should be informed accordingly without delay.*

<ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with this approach? Please explain your response.

<ESMA_QUESTION_CP_BMR_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_11>

Q12: Do you agree with this approach? What are the different characteristics of contributors that should be taken into consideration in this RTS? How should those characteristics be taken into account in the provisions suggested in this draft RTS? Please give examples.

<ESMA_QUESTION_CP_BMR_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_12>

Q13: Should the substantial exposures of individual traders or trading desk to benchmark related instruments apply to all types of benchmarks for all contributors?

<ESMA_QUESTION_CP_BMR_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_13>

Q14: Do you agree with the proposals for the reporting of suspicious transaction in this draft RTS? Please explain your answer.

<ESMA_QUESTION_CP_BMR_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_14>

Q15: Are there any provisions that should be added to or amended in the draft RTS to take into consideration the different characteristics of benchmarks? Please give examples.

<ESMA_QUESTION_CP_BMR_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_15>

Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

<ESMA_QUESTION_CP_BMR_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_16>

Q17: Do you agree with the draft technical standards in relation to the governance and control arrangements for supervised contributors to benchmarks? Please provide reasons.

<ESMA_QUESTION_CP_BMR_17>
Third Country regulated markets are not "supervised contributors"
For the avoidance of doubt DBG would like to point out that market operators of regulated trading venues are supervised entities in line with Art. 3 (1) (17) (j) BMR but by no means "supervised contributors". Art. 3 (1) (8) BMR defines "contribution of input data" as "*providing any input data not readily available to an administrator […]*". This is by no means the case as regards publicly available trading data provided by regulated trading venue, both in the EU and in third countries. The contributor role, as lined out above, is in no aspects applicable to the set-up and the organization of a regulated trading venues and such we see a vacuum as regards the inclusion of high quality input data provided by third country trading venue. This could finally lead to a lack of cost-efficient and reliable investment opportunities (ETFs) for EU investors at a time where pensions become ever more critical in an ageing population. In this context we would like to take the opportunity to point out as well that Art. 16 BMR should not be applicable to either EU regulated trading venues nor third country trading venues.
<ESMA_QUESTION_CP_BMR_17>

Q18: In particular, can you identify specific aspects of the draft Regulation that should be applied differentially to different supervised contributors in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors?

<ESMA_QUESTION_CP_BMR_18>
In this context please revert to DBG comments to Q 17.
<ESMA_QUESTION_CP_BMR_18>

Q19: Do you agree with ESMA's specifications of the criteria?

<ESMA_QUESTION_CP_BMR_19>

DBG strongly appreciates ESMA's clarification, that a decision taken by an administrator to opt out of the application of one or more provisions according to Art. 25 BMR, could only be impeded by a competent authority after demonstrating the appropriateness of such a decision by the NCA.
As regards Art. 1 (1) (a) (i), we miss the clear inclusion of regulated data and as such would like to propose the following amendment, which at the same time clarifies as well that regulated data is not provided by contributors but readily available:

Art. 1 (1) (a) (i):

> *(i) whether the benchmark is based **on readily available data**, transaction data, **or in case of contributed data** if contributors are supervised entities or whether additional measures apply […] that increase the robustness of input data;*

DBG would like to propose a rephrasing of Art. 1 (1) (a) (ii) as lined out below, which we deem clearer to understand.

Art. 1 (1) (a) (ii):

> *(ii) **whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark while the administrator's organisational structure does not prevent incentives for manipulation;***

For the avoidance of doubt, DBG would appreciate clarification by ESMA that besides the methodology (which refers to input data of course) the nature of the input data would receive an equal weighting as it makes a substantial difference in a benchmark.

Art. 1 (1) (a) (iii):

> *(iii) whether there are proven cases [...] with a similar methodology **and similar input data** provided by an administrator of similar size and organisational structure;*

Furthermore, Art. 1 (1) (iv) is referring to a third party who might be interested to manipulate a benchmark. We deem this to be an unclear and disproportionate requirement and as such would like to ask ESMA to dismiss it.

Art. 1 (1) (b) (i) refers to the administrator being a participant in the market or economic reality – we would appreciate a clarification that this refers to active trading and not to the provision of infrastructures as in the case of regulated markets.

We would also suggest the following adaption of Art. 1 (1) (f) (i):

> *(i) the degree of which input data is based on contributors or whether the input data is **~~transaction data~~** **readily available data** […]*

<ESMA_QUESTION_CP_BMR_19>

Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA_QUESTION_CP_BMR_20>
Compliance statement for significant benchmarks
DBG strongly supports ESMA's sensible approach as regards a single compliance statement for significant benchmark providers versus multiple statements as discussed in the discussion paper. Furthermore, DBG agrees with ESMA that this will be minimising the administrative burden for benchmark administrators as intended.

Therefore, DBG explicitly supports the following proposals:

a. the proposed structure of the compliance statement with multiple sections,
b. the "general section" and its content,
c. and especially, the "core section" which should be clustered according to groups of benchmarks (whether or not belonging to the same family of benchmarks) and explicitly with points 162, 163 in the consultation paper.

DBG of course fully agrees as well with ESMA's proposal in point 166. DBG only has one additional suggestion as regards point c) above. ESMA states that in the core section the administrator should indicate to which benchmarks the waived provisions do not apply. While agreeing with the information to be made available, DBG would like to optimize the form in which the information should be presented. DBG therefore suggests that in case all benchmarks are affected in the same way as regards the provision the administrator has chosen not to apply, it would be possible just to refer to all benchmarks provided by the administrator instead of itemizing each individual benchmark.

Section B point 4 in "*Annex I – Template for the compliance statement under Art. 25 (7) of Regulation (EU) No 2016/1011*" should be adapted accordingly. Instead of reading "*4. List of all single benchmarks / families of benchmarks, including where available single identifier*", DBG would propose that a general statement may be included which refers to all benchmarks provided by the administrator like "*4. List of all single benchmarks / families of benchmarks, including where available single identifier,* ***or where applicable a statement that all benchmarks provided by the administrator are affected the same***".

In case however, more than one core section becomes necessary, or the administrator provides significant as well as non-significant benchmarks, DBG agrees it will be necessary to itemize the respective benchmarks accordingly in the relevant core sections.

Compliance statement non-significant benchmarks
DBG strongly supports ESMA's proposal as regards a single compliance statement for significant benchmark providers versus multiple statements as discussed in the discussion paper. Furthermore, DBG agrees with ESMA that this will be minimising the administrative burden for Benchmark Administrators as intended.

Similar to the comments above for significant benchmarks, DBG would like to suggest that in case all benchmarks are affected in the same way as regards the provision the administrator has chosen not to apply, it would be possible just to refer to all benchmarks provided by the administrator instead of itemizing each individual benchmark.

<ESMA_QUESTION_CP_BMR_20>

Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA_QUESTION_CP_BMR_21>
As regards Regulated Data Benchmarks
DBG strongly agrees with the proposal in point 194 of the consultation paper to limit the benchmark statement to the description of input data and the sources used for regulated data benchmarks.

In general
As regards point 181 of the consultation paper, DBG appreciates that ESMA took note that a certain flexibility is needed when defining circumstances when measurements of benchmarks may become unreliable. DBG considers that for Art. 1 (2) (c) of the draft RTS, a general statement about exceptional market conditions would suffice. Again we need to point out that it is impossible to define all exceptional market conditions upfront which requires that administrators need to retain a certain flexibility for the sake of investors.

DBG very much welcomes ESMA's decision to not require the reference of the compliance statement within the benchmark statement as DBG fully agrees with all points summarized by ESMA (see point 183 /

184 of the consultation paper). DBG strongly appreciates as well ESMA's sensible decision as lined out under point 188.

As regards point 187 of the consultation paper, DBG questions the mandatory requirement in Art. 1 (1) (b) which requires to include a reference to geographic boundaries. However, such reference might not be meaningful or relevant for certain benchmarks while still be requested to be included. DBG would therefore suggest to redraft accordingly:

Art. 1 (1) b):

> *geographical boundaries of the measured market or economic reality**, where applicable**;*

As regards Art. 1 (1) c) we question the applicability to regulated data benchmarks, especially as regards Art. 1 (1) c) (i). We would therefore ask for the following modification:

Art. 1 (1) c):

> c) ***if applicable**, any other relevant information.*

As regards Art. 1 (2) we wonder how this would be applicable to regulated data benchmarks. We therefore would suggest to exempt regulated data benchmarks from this requirement.

Furthermore, we question the necessity to expose single persons and would suggest to actually only provide information about the inhabited position of the person due to data protection rights.

Art. 1 (3) c):

> *c) […] including a clear reference to **the position** of the persons that evaluates any exercise of discretion […];*

DBG strongly appreciates the draft RTS as regards the Art. 2 and considers it as proportionate to regulated data benchmarks. However, as regards recital (5) and Art. 3 (c), DBG questions the applicability of both regimes at the same time, e.g. here the combination of the regulated data benchmarks regime and the interest rate benchmark regime. As far as interest rate instruments are traded on a regulated market (usually government bonds) the input data quality is not different to other trade data (e.g. equity) generated on a regulated trading venue. DBG therefore questions the reference made by ESMA to Annex I of the BMR and would suggest an amendment accordingly.

DBG assumes that the above goes hand in hand with Art. 3 (1) (c), which refers to potential delays in the publication of an interest rate benchmark. Assuming that this comment refers to the potential delay allowed under MiFID II, DBG would like to point out that regulated trading venues usually publish data in real-time without any delay – only in very few circumstances this is not the case while the public is being informed about the different publication model. Usually, only OTC data submitted to APA like reporting facilities use publication delays. In any case DBG would appreciate clarification by ESMA of that matter.

DBG generally agrees with the proposed specifications of the contents of the benchmark statement. In particular, DBG welcomes the fact that ESMA acknowledges the potentially limited access to reliable data with the consequence of granting a high level of proportionality to benchmark administrators within the context of Art. 1 (c) of the respective draft technical standards.
However, DBG would nevertheless welcome clarification on the following points:

- Related to Art. 1 (c) (i): DBG would like to point out that where information on actual or potential market participants is provided their personality rights need to be respected and their anonymity needs to be protected.

- Related to Art. 1 (c) (ii): DBG would much appreciate if ESMA would define what may be understood as barriers to market access.

Related to the provisions for commodity benchmarks of the draft technical standards, i.e. Art. 4 DBG would like to note the following:

- DBG would very much welcome if ESMA clarified if the provisions shall be valid for Commodity Benchmarks instead or in addition to Art. 1 and 8 of the draft RTS.

<ESMA_QUESTION_CP_BMR_21>

Q22: Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.

<ESMA_QUESTION_CP_BMR_22>
DBG agrees with ESMA's proposed specifications in Art. 8 of the draft RTS affecting the updates of benchmarks statements.
<ESMA_QUESTION_CP_BMR_22>

Q23: Do you agree with the general approach to distinguish the contents of the application with reference to the cases of authorisation or registration?

<ESMA_QUESTION_CP_BMR_23>
DBG appreciates ESMA's approach to distinguish the contents of the application with reference to the cases of authorisation or registration. We highly value this approach as an efficient and proportionate implementation of the intended safeguards within the industry as intended by the benchmark regulation while limiting initial effort and cost to a necessary scope. Once the legal entity of a benchmark administrator is already supervised by a competent authority relevant information usually forming part of an authorisation process are already available.
<ESMA_QUESTION_CP_BMR_23>

Q24: Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

<ESMA_QUESTION_CP_BMR_24>
General: narrower requirements for registration process strongly supported
In line with DBG's answer provided to Q 23 we consider the narrower requirements in case of registration to be appropriate. In case a benchmark administrator is already a supervised entity by one competent authority, the necessary information should already be available.

Annex I (Authorisation)
As regards financial information as defined in point 2 b) of Annex I to be submitted in the authorization process, we would like to suggest that information may be provided as well in form of annual reports. As regards Financial Forecasts as defined within Annex I, point 2 c) we would like to point out that in case of already supervised company's – indifferent to the competent authority being the same or not – and while annual reports might be publicly available – such forecasts should not be required on top. The additional task would increase cost while not providing additional benefits.

Annex II (Registration)
Please note that the same comments DBG made above on particular issues as described in Annex I, of course apply as well to the respective articles in Annex II. We explicitly consent with ESMA's proposal that in case of Registration no Financial Forecasts are required. We deem this to be proportionate.
<ESMA_QUESTION_CP_BMR_24>

Q25: Are the requirements covering the information on the applicant's internal structure and functions appropriate?

<ESMA_QUESTION_CP_BMR_25>
DBG generally agrees with ESMA's proposal on the internal structure
DBG generally agrees with ESMA's proposal on the internal structure. However, as regards details on resources DBG deems point 3 c) of Annex I as superfluous and dispensable. The number of employees might change over time, or might even be misleading in case significant parts of the benchmark determination process have been outsourced or might be automated to a large degree. DBG would therefore argue in favour of deletion of Art. 3 c) of Annex I and Art 3 c) of Annex II.

We would like to point out again that in case of Regulated Data Benchmarks, policies and procedures for monitoring the activities of a contributor's adherence to the code of conduct do not apply in line with ESMA's comments in point 104 of the consultation paper.

Consequently, point 5 a), Annex I should read:

> *"policies and procedures for monitoring the activities of the provision of a benchmark, including **where applicable"**.*

In general terms DBG agrees with the outlined requirements. However, DBG would be grateful for the following information:

- Related to point 221 of the consultation paper, DBG assumes that the requested information shall be provided in general terms. DBG wonders if updates will be necessary if changes in the provided information occur – and if so what would be the timeframe for this?
- Furthermore, DBG would be grateful if ESMA defined a process for the case that the application for registration is refused by a National Competent Authority. In this case, when is an administrator allowed to request registration again?

<ESMA_QUESTION_CP_BMR_25>

Q26: Are the requirements described dealing with the benchmarks provided appropriate? In particular, is the way in which the commodity benchmarks requirements are handled acceptable?

<ESMA_QUESTION_CP_BMR_26>
Synthetic descriptions strongly appreciated in case efficient clustering will be possible
DBG appreciates ESMA's considerate approach that detailed descriptions on benchmarks provided (as defined in point 6 of Annex II) shall be substituted by a synthetic description for non-significant benchmarks and may be substituted by a synthetic description in the case of significant benchmarks. However, this may most likely only yield cost savings on a macro level, in case the synthetic descriptions should focus on benchmarks or families or even on groups of similar benchmarks (in line with what has been proposed by ESMA as regards the compliance statements) taking into account that several administrators administer thousands of benchmarks which may all be very similar in its nature, which could make an authorization process too demanding for NCAs in terms of timing unless further efficiencies are being created. DBG would appreciate if ESMA could consider our proposal.

Additional wording suggestions
DBG would like to continue to point out that regulated trading venues are no contributors in the sense of the Benchmark Regulation and as such for the avoidance of doubt suggest a small adaption of Annex II, point 6c) by including the note "*where applicable*" at the end of the sentence.

Furthermore, as administrators might not cover all asset classes with their benchmarks we would as well suggest to include "where applicable" as well in Annex II, points 6 f), 6 g), 7 a) (iv) and 7 a) (v).

Annex I, point 7 b) (i), refers to a description of the methodology. We would like to propose that benchmark statements might be accepted by the NCA especially in case the administrator produces a significant number of benchmarks / benchmark families.

Furthermore, DBG would like to take the opportunity again to speak out against too detailed data requirements in order to describe the underlying market or economic reality.

DBG generally agrees that the registration form for administrators of commodity benchmarks shall stick to the provisions according to Annex II of the regulation (level I). However, in DBG's opinion the proposed form according to Annex II for the draft technical standards on authorisation and registration go beyond that. DBG also considers more flexibility for commodity benchmarks adequate as their universe is very diverse and fears that not all their aspects might be covered in the current draft.

- According to point 6 c) of Annex II of the above mentioned draft technical standards information on contributors is requested.
    - Here DBG considers aggregate information e.g. on their professional profile adequate. It is impossible to name single contributors to a commodity benchmark as these contribute on a voluntary basis and there is no obligatory Code of Conduct foreseen within Annex II of the regulation (level I). DBG thus asks ESMA to clarify that information on contributors within the registration form shall only be provided on an aggregate level.
    - Some commodity benchmarks may not even have contributors as they are based on publicly available price information that is not provided for benchmark determination purposes. Therefore, DBG suggests accepting "aggregate information on price sources" instead of "contributors" within the form for registration of administrators of commodity benchmarks according to point 6 c) of Annex II.

<ESMA_QUESTION_CP_BMR_26>

Q27: Is the specific treatment for a natural person as applicant appropriate?

<ESMA_QUESTION_CP_BMR_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_27>

Q28: Do you agree with the proposals outlined for requirements for other information?

<ESMA_QUESTION_CP_BMR_28>
Submission of registration documents only in one language
As regards point 9 b) of Annex I, DBG would strongly appreciate if ESMA could define in its draft RTS that any documents will have to be submitted to the NCA in one language only. This would be in line with Art. 2 of the draft RTS on recognition for third country providers. Submitting documents in several languages would increase cost while lengthening the time for preparing all documents without any real benefit.

DBG welcomes that ESMA aims at giving concrete guidelines particularly for the registration process. However, DBG has some concerns regarding point 235 of the consultation paper (related to Art. 34 (4) BMR) and asks ESMA to provide guidelines what kind of information may be requested here. This may otherwise lead to differing levels of regulation within the member states.

<ESMA_QUESTION_CP_BMR_28>

Q29: Do you agree with the approach followed in the draft RTS as regards the general information that a third-country applicant should provide to the competent authority of the Member State of reference?

<ESMA_QUESTION_CP_BMR_29>
Clear Date for Registration is needed

It is of utmost importance for DBG and its affiliated companies to actively participate in the global and EU Index Market. We are hence concerned about any insecurities as regards a clearly specified timeline for authorisation and registration and the transitioning rules. Due to the differing views on the interpretation of the transitional arrangements as laid down in Art. 51 of the Regulation (EU) 2016/1011 (BMR), benchmark providers are currently faced with considerable uncertainties as to when they are required to apply for authorisation or registration in order to ensure business continuity. Art. 51 (1) of the BMR may be interpreted in different ways: a) only referring to the benchmark administrator irrespective of the single benchmarks provided or, b) referring to benchmark providers and specific benchmarks provided by the benchmark provider at the same time. In case a) applied, the grandfathering would allow the benchmark provider to continue launching and licensing new indices. However, if case b) would be the correct interpretation the benchmark provider would not benefit from the grandfathering rule. Immediate authorisation or registration would thus be necessary to allow the administrator to actively continue its business. This however, would require the authorisation / registration process to start earlier if possible.

Financial Information to be accepted in form of annual reports
As regards Financial Information as defined in Annex I, point 3 b) to be submitted in the authorization process, we would like to suggest that information may be provided as well in form of annual reports. As regards financial forecasts as defined Annex I, point 3 c), such forecasts should not be required on top. The additional task would increase cost while not providing additional benefits.

Human Resources
The number of employees as requested in point 4 c) of Annex I might change over time, or might even be misleading in case significant parts of the benchmark determination process have been outsourced or might be automated to a large degree. DBG would therefore argue in favour of deletion of point 4 c) of Annex I.

Sources for information
Annex I, point 10) d) refers to sources for information submitted according to point 10 a) and b). We would appreciate further clarification as regards the expected content.

<ESMA_QUESTION_CP_BMR_29>

Q30: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should provide in order to explain how it has chosen a specific Member State of reference and which are the identity and role of the appointed legal representative in such State?

<ESMA_QUESTION_CP_BMR_30>
DBG agrees with ESMA's approach here.
<ESMA_QUESTION_CP_BMR_30>

Q31: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should give around the benchmarks it provides and that are already used or intended for use in the Union? In particular, do you agree with the proposals regarding the information to be provided on the types and the categories to which the benchmarks belong to?

<ESMA_QUESTION_CP_BMR_31>
We are concerned about the requirement of a third country administrator to notify the relevant regulator as to when a benchmark falls or exceeds the threshold AUMs. Independent administrators do not necessarily know the AUMs of a benchmark since they do not directly create the products investors use. The product providers are not compelled to disclose that information based on contractual arrangements. An administrator must thus be held to a best efforts standard in dealing with the thresholds.
<ESMA_QUESTION_CP_BMR_31>