esma European Securities and Markets Authority

Reply form for the Discussion Paper on Benchmarks Regulation

15 February 2016

European Securities and Markets Authority

Date: 15 February 2016

Responding to this paper

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

Instructions

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

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

Responses are most helpful:

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

Naming protocol

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

ESMA_DP_BMR _NAMEOFCOMPANY_NAMEOFDOCUMENT.

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

ESMA_DP_BMR _XXXX_REPLYFORM or

ESMA_DP_BMR _XXXX_ANNEX1

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

Deadline

Responses must reach us by 29 March 2016**.**

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

Publication of responses

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

Data protection

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

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_ DP_BMR_1>

Introductory Remarks

The Federation of European Securities Exchanges (FESE) represents 36 exchanges in equities, bonds, derivatives and commodities through 19 Full Members from 30 countries, as well as 1 Affiliate Member and 1 Observer Member. FESE represents public Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation.

At the end of 2014, FESE members had up to 9,051 companies listed on their markets, of which 7% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium sized companies across Europe to access the capital markets; 1,442 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets.

FESE supports efficient, fair, orderly and transparent financial markets that meet the needs of well protected and informed investors and provide a source for companies to raise capital and for investors to hedge their portfolios. As such, exchanges can be regarded as neutral providers of data, and in certain cases also indices, but without any conflict of interest between trading activity leading to beneficial ownership and the provision of data and/or the provision of indices and benchmarks.

FESE supports working with ESMA to construct a workable regime for benchmarks provided by trading venues.

Additional comments

However, FESE would also like to take this opportunity to raise an issues that is not included in the Discussion Paper. These are included below:

1. Definition of 'Regulated Data'

FESE considers that the provision requiring regulated data to be sourced "entirely and directly" should be further clarified.

The Level 1 text also does not specify the treatment of data sourced from Third Party vendors. There is currently legal uncertainty as to how vendors should be considered with regard to the "entirely and directly" provision. Index Administrators usually do not take direct feeds from trading venues but use Data Vendors in order to access trading venues data, both from trading venues in the EU as well as outside of the EU. Not subsuming this set up (regulated data sourced in through market data vendors) under the definition of "directly" would create additional unnecessary burden for benchmark administrator. Trading Venue Data sourced form Data Vendors is usually used for trading decisions and thus should be seen as an unchanged display / transmission of data. FESE strongly suggest to explicitly clarify that sourcing of raw data (meaning non-processed in a way generating derived data) from data vendors will not result in benchmarks falling outside of the scope of the definition for regulated data benchmarks. In this context, the vendor should be considered as a technical means to source the data from trading venues, and not a separate entity acting in between units.

2. Third country trading venues

Input data from 3rd country trading venues in general provides for the same assets in terms of quality (transaction based or firm bid offer data generated under the rules and surveillance of a trading venue) and broad availability of the data. Benchmark Administrators within and outside the EU offer regulated data benchmarks based on data generated on 3rd country trading venues in order to provide global investable benchmarks. This ensures sufficient choice for investors within the EU and enables them to benefit from market developments in third countries in a reliable, efficient and cost effective way. In case benchmark administrators could not benefit from the proportionate treatment as defined for regulated data benchmarks as well

for benchmarks based on data from 3rd country trading venues costs would significantly increase to the detriment of European end-users in the current low interest rate environment.

The MiFID II definition of trading venue referenced in article 3(1) (20a) is not limited to EU trading venues, meaning that the current text does not provide for a separate treatment of 3rd country data providers. FESE considers that the applicable conditions should be explicitly indicated as it is imperative that global-indices that use data from non-EU trading venues are regulated as regulated data benchmarks. Currently, there is discussion to amend the Level I text through the lawyer linguist process in order to encompass benchmarks based on data from trading venues outside the EU as well. FESE strongly supports this necessary adaption of the Level 1 text. Furthermore, in the IOSCO Assessment Methodology a Regulated Market or Exchange is defined as: “A market or exchange that is regulated and / or supervised by a Regulatory Authority.”

3. Interpretation of ‘single reference prices’

Based on our understanding of the intentions of the Level 1 text, we believe that there is no ambiguity that this exemption does not only cover prices being created solely ‘for reference’, but also ‘single prices’. Consequently, the exclusion applies to all prices of single financial instruments published by trading operators. Article 2 (2) ac, of the BMR states that it shall not apply to ‘the provision of the single reference prices of financial instruments” as defined in MiFID II. In the interest of legal certainty, FESE requests that ESMA further clarifies this to include all prices published by trading venues as part of their function as a market operator.

<ESMA_COMMENT_ DP_BMR_1>

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

<ESMA_QUESTION_DP_BMR_1>
FESE recommends to keep the definition of "made available to the public" as wide as possible, in order to ensure as broad investor protection as possible. In case of only a very limited definition of "made available to the public", there could be various possibilities for any index provider to conduct regulatory arbitrage, e.g. such as making information available to a closed user group only, which then could be interpreted as not having "made available to the public". This could be to the detriment of investors within the EU as well as provide for a distortion of a level playing field amongst competing index providers. Therefore, the current existing channels and modalities of publishing existing benchmarks may be used as guidance. In this context please refer as well to our comment below.
<ESMA_QUESTION_DP_BMR_1>

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

<ESMA_QUESTION_DP_BMR_2>
FESE considers that the initial goal of the BMR is Investor Protection including secure EU financial markets. In this context it seems natural that any issued financial instrument within the EU which refers to an index provided within the EU should be seen as having been published (made available to the public) alone by its inclusion as an underlying in a financial instrument or as a benchmark for performance evaluation impacting users as well as end investors. Even in case an index is not one of the broadly marketed indices within the EU, it might nevertheless have significant impact on a subset of EU investors depending on their exposure to it.

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

a) the technical means like indices and information about those indices are made available via a data feed accessible to multiple or a single party, a Market Data Vendor, the internet, a selected group of parties (members or customers) of a trading platform or SI, information provided per e-mail or mail, etc.

b) the commercial means like indices and information about those indices made available for free or at a fee, indices made available at discriminatory or non-discriminatory means, made available at a closed user group or at an open user group, etc.

Due to constantly changing markets this list / set of variables should not be exhaustive.
<ESMA_QUESTION_DP_BMR_2>

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

<ESMA_QUESTION_DP_BMR_3>
FESE supports aligning the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator.
<ESMA_QUESTION_DP_BMR_3>

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

<ESMA_QUESTION_DP_BMR_4>
In general, FESE is supportive of ESMA's intention to clarify the definition of 'use of a benchmark', and the implications of the application of the issuance principle. In providing this clarification, ESMA must consider that trading venues operate in different manners and provide the infrastructure necessary to trade a variety of different financial products but are actually not issuing or taking positions in such instruments. There must also be consideration given to other legislation which captures these products, such as the Prospectus Directive and PRIIPs Regulation and how new standards within the BMR could impact on their functioning. Therefore, it must be clarified that trading venues do not issue financial contracts and should not be considered as 'issuers'. We consider that ESMA's proposals could be further clarified in order to avoid legal uncertainty and to reflect current market standards.

Please note: ICE does not agree with these comments.
<ESMA_QUESTION_DP_BMR_4>

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

<ESMA_QUESTION_DP_BMR_5>
See our response to Question 4.
<ESMA_QUESTION_DP_BMR_5>

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

<ESMA_QUESTION_DP_BMR_6>
FESE supports most of ESMAs proposals. We especially agree with the comment made in point 32 that the text allows for the oversight function to take the form of a separate committee within the organisational structure of the administrator. We expect ESMA to include this form in their list of appropriate governance arrangements.

FESE as well agrees with ESMA that different Oversight Committees might need to be implemented depending on the nature of the benchmark and the knowledge of the actual committees set up by the benchmark administrator. FESE, however, would deem it sensible that ESMA leaves some discretion to the benchmark providers in this respect.

We appreciate ESMA's confirmation that proportionality shall be applied as well within the RTS to be developed.

Composition of the oversight function
The first two examples by ESMA are both referring to Art 5.2a. which addresses the ownership structure of a benchmark administrator. ESMA provides for two potential compositions in this respect.

In this context FESE would like to point out that under a proportionate regime, benchmarks which are not prone to manipulation due to the fact that they are based on regulated data and provided by a neutral provider not trading or holding instruments referenced to such a benchmark administered by the provider, should not be required to strict oversight function requirements. In any case it should be verified upfront if indeed a potential conflict of interest exists and if it cannot be mitigated as stated in Art 5.2 a.

The introduction of an external oversight function including users of those indices could dilute the requirements of the regulation since introducing conflicts of interest into the oversight committee. There is a significant risk that users may want to represent their own interests rather than the interests of the wider market. We believe it could introduce very serious conflicts of interest into benchmark administration, jeopardize the independence of the index and in the worst case could conflict with securities disclosures laws. This is particularly true for widely used benchmarks. Stakeholders include those parties who have issued financial products off of the index and are exactly the parties that could benefit from particular index changes. Additionally, if those parties get access to price sensitive information (such as planned index changes) before the rest of the market, this would again introduce conflict of interest in the Oversight Committee.

Furthermore, the BMR level 1 text does not require external parties to be included in the oversight. Requiring this on level 2 would potentially go against the level 1 text.

We need to point out as well that we do not agree with ESMAs interpretation that the function of benchmark oversight is to challenge the board or management of the benchmark administrator. Benchmark governance should ensure that benchmarks are being determined and calculated in a proper and reliable way. BMR is not about regulating the management of benchmark administrator businesses.

As regards the annual review as required within level 1 FESE would like to suggest to ESMA that in the light of proportionate regulation, the reviews may take place as per benchmark family instead as per benchmark.
<ESMA_QUESTION_DP_BMR_6>

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

<ESMA_QUESTION_DP_BMR_7>
FESE agrees that the governance structure may be accomplished through a series of committees. We believe the governance structure and terms of reference should be made public as IOSCO recommended.

However, FESE considers the introduction external parties, such as stakeholders and INEDs into benchmark governance structure as a potential problem of its own. The introduction of an external oversight function including users of those indices could dilute the requirements of the regulation since introducing conflicts of interest into the oversight committee. There is a significant risk that users may want to represent their own interests rather than the interests of the wider market. We believe it could introduce very serious conflicts of interest into benchmark administration, jeopardize the independence of the index and in the worst case could conflict with securities disclosures laws. This is particularly true for widely used benchmarks. Stakeholders include those parties who have issued financial products off of the index and are exactly the parties that could benefit from particular index changes. Additionally, if those parties get access to price sensitive information (such as planned index changes) before the rest of the market, this would again pose a risk to securities disclosure laws.

Furthermore, the BMR level 1 text does not require external parties to be included in the oversight. Requiring this on level 2 would potentially go against the level 1 text.

We need to point out as well that we do not agree with ESMAs interpretation that the function of benchmark oversight is to challenge the board or management of the benchmark administrator. Benchmark governance should ensure that benchmarks are being determined and calculated in a proper and reliable way. BMR is not about regulating the management of benchmark administrator businesses.
<ESMA_QUESTION_DP_BMR_7>

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

<ESMA_QUESTION_DP_BMR_8>
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Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

<ESMA_QUESTION_DP_BMR_9>
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<ESMA_QUESTION_DP_BMR_9>

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

<ESMA_QUESTION_DP_BMR_10>
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<ESMA_QUESTION_DP_BMR_10>

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

<ESMA_QUESTION_DP_BMR_11>
FESE strongly supports ESMAs consideration of potentially different oversight functions in case an Index Provider administers both critical as well as non-critical benchmarks. In case an Index Administrator administers several 1000 indices which are non-critical and only one critical benchmark, it would be not sensible to use one and the same oversight committee, due to the fact that the members for the critical benchmark might need a different expertise compared to those for non-critical. We would therefore deem it proportionate as well as sensible to allow any Benchmark Provider in line with its business set-up to choose if and how to set-up the Oversight across different benchmarks according to their risk profile /classification. Please see as well our comments to Q 13 below.
<ESMA_QUESTION_DP_BMR_11>

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

<ESMA_QUESTION_DP_BMR_12>
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<ESMA_QUESTION_DP_BMR_12>

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

<ESMA_QUESTION_DP_BMR_13>
FESE likes to point out that regulatory requirements and compliance with such regulations usually and naturally provide for additional cost factors within the industry. However, as long as the underlying regulation is being defined and applied in a proportionate way, usually its overall benefits should outweigh its overall cost.

In order for the BMR not to increase cost along the value chain without benefits outweighing them, the regulation needs to provide for sufficient flexibility and proportionality for those being regulated while not creating significant unnecessary cost for the industry.
<ESMA_QUESTION_DP_BMR_13>

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

<ESMA_QUESTION_DP_BMR_14>
FESE believes that discretionary decisions for the determination of a benchmark should be made by those with sufficient knowledge of the benchmarks and the market those benchmarks represent e.g. managers of the index. We need to point out that we do not agree with ESMAs interpretation that the function of a benchmark oversight is to challenge the board or management of the benchmark administrator. Benchmark Governance should ensure that benchmarks are being determined and calculated in a proper and reliable way. The goal of the BMR is not about regulation of the benchmark administrator's business management.
<ESMA_QUESTION_DP_BMR_14>

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

<ESMA_QUESTION_DP_BMR_15>
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<ESMA_QUESTION_DP_BMR_15>

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

<ESMA_QUESTION_DP_BMR_16>
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<ESMA_QUESTION_DP_BMR_16>

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

<ESMA_QUESTION_DP_BMR_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_17>

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

<ESMA_QUESTION_DP_BMR_18>
FESE has concerns about the wording of paragraph 52 that "conflicts of interest should be clearly disclosed and effectively managed, where possible". If a conflict cannot be managed effectively, the cause of the conflict (or potential conflict) should be removed from the composition of an oversight function; representation from that stakeholder group should then be achieved in a different manner.

With reference to the possible exclusion of representatives of contributors from committee meetings dealing with monitoring, we would not consider this to be compatible with good governance principles as it could mean routinely excluding a category of the committee's representation, when that category would nevertheless have accountability under the terms of reference of the committee. We would instead advocate tasking a separate compliance or disciplinary panel with taking action for breaches of the code of conduct.
<ESMA_QUESTION_DP_BMR_18>

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

<ESMA_QUESTION_DP_BMR_19>
FESE supports the exemptions for storage of input data for regulated data benchmarks as lined out in level 1 already. Trading venues need to keep records already in line with regulations, e.g. MiFID II. There is no need to store this data as well at the Index Provider.

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

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

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

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

<ESMA_QUESTION_DP_BMR_19>

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

<ESMA_QUESTION_DP_BMR_20>
FESE agrees with ESMAs comments on the Open Hearing that record keeping is important in order to verify market abuse. We agree as well with ESMA that the cost for record keeping of data has generally declined during the last years. However, we still see differences, both as regards the sense to redundantly store data while a trading venue already is required to do so, and we need to point out that the vast amounts of regulated data which would need to be stored by a benchmark administrator using such data is significantly higher compared to low volume panel data for benchmark contributor data.

In this context FESE would like to point out that the accuracy of data generated by regulated trading venues is already ensured by the respective trading venues themselves which are on top being regulated under MAR and MiFID II as well. This is equally true for third country trading venues, in case they are equally regulated as EU trading venues. A requirement to additionally verify data would be disproportionate and result in over-regulation.

ESMA points out in its Discussion Paper that administrators of regulated data Benchmarks still remain subject to the verifiability of input data, although using regulated data. However, in this context ESMA rightly states as well that for regulated data used as input data, the requirements for verifiability shall be proportionate and in this context to be understood as checking the provenance as well as the transmission of the input data (lined out in point 68. on page 27 of the Discussion Paper). FESE explicitly agrees with ESMA on this understanding.

In more detail ESMAs proposal on the verifiability of regulated data could be substantiated as follows:

- Checking the provenance of the input data should be achieved by the initial selection of the regulated trading venue (including a third country venue) as the relevant data source for the benchmark in question, and the continuous use of this data source for input data.

- Checking the transmission of the input data should encompass checking the technical availability of the data during the calculation process (e.g. checking for streaming data during the transmission process). In general, in order to ensure the feasibility of the verification requirement in the face of huge amounts of processed data (e.g. millions of data per second over a complete day compared to panel based input data which potentially contains 100 data points at one point per day at max), it should in principle be sufficient to verify randomly selected data points instead of requiring the verification of each respective input data which is being used.

<ESMA_QUESTION_DP_BMR_20>

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

<ESMA_QUESTION_DP_BMR_21>
FESE agrees with ESMA on the concept of appropriateness as defined by ESMA and especially as regards the close links between methodology and data chosen by the benchmark administrator.

We agree as well with ESMA that there is no need to verify the appropriateness of input data on a daily basis as this would be disproportionate. For a proportionate application of the BMR further verification of appropriateness through the benchmark administrator other than through regular methodological reviews should not be required for regulated data benchmarks.
<ESMA_QUESTION_DP_BMR_21>

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

<ESMA_QUESTION_DP_BMR_22>
FESE would like to refer to its answer to Q 20 in this respect
<ESMA_QUESTION_DP_BMR_22>

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

<ESMA_QUESTION_DP_BMR_23>
FESE agrees with ESMAs view the appropriateness of input data is closely interlinked with the methodology of a benchmark.

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

For benchmarks based on other data than regulated data FESE generally agrees with the concept of appropriateness as elaborated in this section.
<ESMA_QUESTION_DP_BMR_23>

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

<ESMA_QUESTION_DP_BMR_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_24>

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

<ESMA_QUESTION_DP_BMR_25>
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<ESMA_QUESTION_DP_BMR_25>

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

<ESMA_QUESTION_DP_BMR_26>
FESE agrees that staff working in function related to benchmark contribution should have the appropriate knowledge to undertake the tasks to which they've been assigned. It is clear that if a member of staff is carrying out submissions or contributions on a consistent basis, then the need for regular training may be reduced.
<ESMA_QUESTION_DP_BMR_26>

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

<ESMA_QUESTION_DP_BMR_27>
FESE generally agrees with the concept of having three lines of defence. However, the prescriptive nature of having an internal audit function could cause unnecessary burden to smaller benchmark providers or contributors. We would like therefore to suggest that the third level support could also be provided by the compliance function (higher than level 2) or by a third party audit service.
<ESMA_QUESTION_DP_BMR_27>

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

<ESMA_QUESTION_DP_BMR_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_28>

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

<ESMA_QUESTION_DP_BMR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_29>

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

<ESMA_QUESTION_DP_BMR_30>
FESE strongly supports the proportionate approach as regards verifiability requirements lined out by ESMA in their discussion paper. In this context we explicitly support as well ESMAs view that the verifiability of regulated data should be limited to checking the provenance and as well as the transmission of the data.

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

- **Checking the provenance of the input data** should be achieved by the initial selection of the regulated trading venue (including a third country venue) as the relevant data source for the benchmark in question, and the continuous use of this data source for input data.

- **Checking the transmission of the input data** should encompass checking the technical availability of the data during the calculation process (e.g. for streaming data during the transmission process)**.** In general, in order to ensure the feasibility of the verification requirement in the face of huge amounts of processed data (e.g. millions of data per second over a complete day compared to panel based input data which potentially contains 100 data points at one point per day at max), it should in principle be sufficient to verify randomly selected data points instead of requiring the verification of each respective input data which is being used.

This is equally true for third country trading venues, in case they are equally regulated as EU trading venues. A requirement to additionally verify data would be disproportionate and result in over-regulation.
<ESMA_QUESTION_DP_BMR_30>

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

<ESMA_QUESTION_DP_BMR_31>
FESE believes that the starting point in considering differentiation between the supervised and non-supervised contributors should be the regulatory obligations to which the supervised contributors are subject so as to avoid regulatory duplication where possible.

We recognise that the size of contributors may constitute a practical impediment to broadening the application of the oversight measures imposed for front office contributions to all contributors. However, the impact on a benchmark of contributors having insufficient controls is not a function of size if the calculation methodology of the benchmark is to give equal weighting to all contributions. Within that context, a risk-based approach would seem appropriate, based on the quality and effectiveness of the controls.
<ESMA_QUESTION_DP_BMR_31>

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

<ESMA_QUESTION_DP_BMR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_32>

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

<ESMA_QUESTION_DP_BMR_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_33>

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

<ESMA_QUESTION_DP_BMR_34>
FESE appreciates ESMAs line out as regards the content of the methodology to be made public. We agree that the definition including the objective of the benchmark should be an integral part of the methodology, including its objective and the currency in which it is being determined.

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

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

In total FESE considers the list of elements as suggested by ESMA as sufficiently granular and should be included in the methodology where applicable. There might be indices where not all key elements would have to be included, e.g. there would be no contributor in the case of regulated data benchmarks.
<ESMA_QUESTION_DP_BMR_34>

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

<ESMA_QUESTION_DP_BMR_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_35>

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

<ESMA_QUESTION_DP_BMR_36>
FESE agrees that index methodologies should be transparent and made available to the public, with the caveats around recital 24 taken into account and as well strongly linked to the definition of "public" in line with Article 3 1.1 (a).
<ESMA_QUESTION_DP_BMR_36>

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

<ESMA_QUESTION_DP_BMR_37>
FESE agrees generally with the proposal of ESMA as regards the information to be made public within a methodology.

FESE explicitly agrees as well with ESMAs view that it should be the administrator's responsibility to determine the frequency of any internal review.

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

As regards the publication of persons either a part of the Governance or as Contributors, due to data protection reasons, we would recommend to publicly display held positions within firms rather than the personal name of those members within those functions. Names could be disclosed on inquiry in case a justified reason is being provided.
<ESMA_QUESTION_DP_BMR_37>

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

<ESMA_QUESTION_DP_BMR_38>
FESE agrees in most points with ESMA especially as well regarding the information of stakeholders as regards material changes, especially that there are as well practical aspects as regards a methodology change which should not be overlooked. Clarification by ESMA within an RTS would therefore be appreciated.

Contrary to Art 7 b 1. (iii) and Art 7 b 2. (a), FESE would like to point out as well that there may be (black swan) events which might require swift action of the benchmark administrator as regards their methodology adaption which might make a deviation from usual processes necessary as well regarding the timing of

information. FESE fully agrees that this would be extraordinary circumstances only, however, they should be considered by ESMA as well. Here ESMA should ideally clarify that in those exceptional circumstances the usual timeline of consulting customers / stakeholders may be reduced if required.

It is important (as expected by IOSCO Principle 12) that stakeholders' summary comments, and the Administrator's summary response to those comments, should be made accessible to all stakeholders after any given consultation period, except where the commenter has requested confidentiality. We regard this as sufficient and do not consider it necessary to publish stakeholders' comments in detail. Stakeholders should be able to rely on the Administrator's distillation of consultation feedback. Furthermore, FESE agrees with ESMA as well that the oversight of a benchmark should effectively challenge the qualification of a change in methodology including its classification as material or non-material.

Point 132 within the Discussion Paper as suggested by ESMA could be difficult to be provided, depending on the expected granularity pursued by ESMA. Not always is the Benchmark Provider aware about in which way its benchmark is being used. Therefore, if ESMA would intend to include such a requirement, it should be both proportionate as well as a recommendation only.
<ESMA_QUESTION_DP_BMR_38>

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

<ESMA_QUESTION_DP_BMR_39>
FESE would like receive ESMAs view on the question if a consultation may as well be conducted within an external stakeholder/consultative working group, in which case the replies would initially only be shared within this Advisory Group before being communicated to the broader market.

Furthermore, regardless of which sort of consultation would be considered as adequate by ESMA, we would deem it sensible for the benchmark Administrator to provide for a summary of the received back-back to the public while a listing of all consultation feed-backs could increase cots across the line. In case ESMA pursues such an "opportunity" we would deem it most sensible only in the case of "critical benchmarks" if at all.
<ESMA_QUESTION_DP_BMR_39>

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

<ESMA_QUESTION_DP_BMR_40>
FESE agrees that the requirements should be universal, irrespective of the benchmark type as long as in line with BMR recital 24 potential IP rights of the benchmark administrator are being protected.
<ESMA_QUESTION_DP_BMR_40>

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

<ESMA_QUESTION_DP_BMR_41>
FESE agrees that the requirements should be universal, irrespective of the benchmark type.
<ESMA_QUESTION_DP_BMR_41>

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

<ESMA_QUESTION_DP_BMR_42>
FESE agrees that the proportionality is sufficient
<ESMA_QUESTION_DP_BMR_42>

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

<ESMA_QUESTION_DP_BMR_43>
FESE agrees that an Administrator could employ a standard code of conduct for all of its benchmarks, which should be tailored based on the degree of use (critical, significant, non-significant) of a benchmark, on the underlyings and the different applicable methodology and on the supervised nature of the contributors as well as potentially the geographic location of the Benchmark.

We suggest that it should be for each Administrator to decide whether or not to employ a standard code of conduct for its benchmarks.
<ESMA_QUESTION_DP_BMR_43>

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

<ESMA_QUESTION_DP_BMR_44>
FESE believes that, as stated in paragraph 138, the purpose of the code is to specify the responsibilities for contributors with respect to input data, record keeping, suspicious input data reporting and conflict management requirements.

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

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

<ESMA_QUESTION_DP_BMR_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_45>

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

<ESMA_QUESTION_DP_BMR_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_46>

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

<ESMA_QUESTION_DP_BMR_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_47>

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

<ESMA_QUESTION_DP_BMR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_48>

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

<ESMA_QUESTION_DP_BMR_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_49>

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

<ESMA_QUESTION_DP_BMR_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_50>

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

<ESMA_QUESTION_DP_BMR_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_51>

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

<ESMA_QUESTION_DP_BMR_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_52>

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

<ESMA_QUESTION_DP_BMR_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_53>

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

<ESMA_QUESTION_DP_BMR_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_54>

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

<ESMA_QUESTION_DP_BMR_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_55>

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

<ESMA_QUESTION_DP_BMR_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_56>

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

<ESMA_QUESTION_DP_BMR_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_57>

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

<ESMA_QUESTION_DP_BMR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_58>

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

<ESMA_QUESTION_DP_BMR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_59>

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

<ESMA_QUESTION_DP_BMR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_60>

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

<ESMA_QUESTION_DP_BMR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_61>

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

<ESMA_QUESTION_DP_BMR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_62>

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

<ESMA_QUESTION_DP_BMR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_63>

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

<ESMA_QUESTION_DP_BMR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_64>

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

<ESMA_QUESTION_DP_BMR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_65>

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

<ESMA_QUESTION_DP_BMR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_66>

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

<ESMA_QUESTION_DP_BMR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_67>

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

<ESMA_QUESTION_DP_BMR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_68>

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

<ESMA_QUESTION_DP_BMR_69>
Yes. FESE notes the comment in paragraph 188 that, "[…] less strict rules could apply to those submitters that may take a position on financial instruments as part of their core business (e.g. insurance, reinsurance, pension funds) and those for which this could only occur occasionally (e.g. market operators, central counterparties, trade repositories)". We are of the view that market operators, central counterparties and trade repositories would only become party to an unmatched trading position in exceptional circumstances (e.g. on the default of a participant) and with the purpose of eliminating a position (or at least minimising a position) rather than creating one.
<ESMA_QUESTION_DP_BMR_69>

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

<ESMA_QUESTION_DP_BMR_70>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_70>

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

<ESMA_QUESTION_DP_BMR_71>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_71>

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

<ESMA_QUESTION_DP_BMR_72>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_72>

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

<ESMA_QUESTION_DP_BMR_73>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_73>

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

<ESMA_QUESTION_DP_BMR_74>
FESE believes that it is important to avoid double-counting when calculating the total value of assets referencing a benchmark. We recommend that the methodology for assessing the net asset value of investment funds referencing a benchmark excludes cleared financial instruments given that the nominal amount of cleared financial instruments other than derivatives and the notional amount of cleared derivatives will be accounted for under assessment of notional outstanding/positions.
<ESMA_QUESTION_DP_BMR_74>

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

<ESMA_QUESTION_DP_BMR_75>
As a general matter, FESE supports the proposal put forward by ESMA to use the notional amount of derivatives for the calculation of the total value of a benchmark. However, we would encourage ESMA to consider different sources of data for the assessment of different benchmarks. Benchmark Administrators are usually well-placed to advice on the appropriate methodologies and sources of information, and often will have already done such calculations. It should be recognized that some benchmarks, such as LIBOR, are used on a daily basis as each day there is a derivative contract being priced against that benchmark, whereas other benchmarks will only be used on the expiry day of a derivative contract.

ESMA should specify whether the notional amount should be calculated at a certain point in time or as an average over a specified time period. The notional amount of derivatives can vary significantly over time and the transaction data held by Trade Repositories do not accurately reflect the contracts' value. Furthermore, we recommend that the 'net notional value', which better captures the co-dependency of value, is used rather than a gross one to calculate the materiality and scale of benchmarks. This area of discussion is pertinent to any consideration of 'use of benchmarks in a combination of benchmarks', as referenced in 8.2.5, section 214 of the Discussion Paper:

The following response refers to para 204 and the definition of nominal amount under point c.

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

- <u>Price related issues:</u>
  Many commodity prices, in particular energy commodities but also agricultural commodities, follow a strong seasonal pattern. For the sake of an example, natural gas prices tend to be high in winter and lower in summer. An extreme case in this respect is power as it is not storable. Spot prices in Power market strongly change from day to day (dependent on power demand, availability of renewable energy sources etc.). Considering this, we strongly advise not to understand the calculation of the notional amount on an appointed day as this would surely lead to distortions. In an extreme case it could lead to a situation where a Benchmark is being overvalued if the valuation takes place on a day where prices tend to be high, or being undervalued if valuation takes place on a day where prices tend to be high.

  To avoid this, we suggest considering an average price over a year. In particular, where commodity derivatives reference commodities that face a limited storability or where timing is of importance,

e.g. natural gas, power or freight, ESMA should also consider not to taking the spot market price but rather a derivative price as a component for determining the notional value. This might well be an average price of the most liquid derivative contract.

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

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

This uncertainty on commodity markets clearly needs to be taken into consideration, as it is mostly only trading venues providing reliable data on the nominal amount referencing a Benchmark.
<ESMA_QUESTION_DP_BMR_75>

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

<ESMA_QUESTION_DP_BMR_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_76>

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

<ESMA_QUESTION_DP_BMR_77>
FESE considers that legal certainty is required. There are concerns amongst benchmark providers that they must classify all their benchmarks as “critical” in order to avoid legal repercussions. FESE considers that such an approach would undermine the intended proportionality of the application of the BMR. ESMA must therefore provide legal certainty and clarity under which classification a benchmark, or benchmark family falls in relation to both quantitative and qualitative criteria. FESE has concerns with the ability to put in place a robust methodology, in particular with regard to what data repositories will be used and if ESMA will mandate certain information to be more available for threshold calculation.

For assets referencing a combination of benchmarks, only the portion of the value which refers to the single benchmark should be taken into account. Furthermore, for the calculation of the notional value of contracts which are priced against the difference between the values of two benchmarks, we would expect that only the relevant net price exposure of the differential is taken into account, rather than the outright prices of the two benchmarks.
<ESMA_QUESTION_DP_BMR_77>

Q78: Do you agree with the ‘relative impact’ approach, i.e. define one or more value and “ratios” for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the

financing of households and corporations) that need to be assessed according to Article 13(1)(c), sub-paragraph (iii)? If not, please elaborate on other options that you consider more suitable.

<ESMA_QUESTION_DP_BMR_78>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_78>

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

<ESMA_QUESTION_DP_BMR_79>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_79>

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

<ESMA_QUESTION_DP_BMR_80>
FESE generally agrees with the approach to clarify and define the criteria of the assessment by national Competent Authorities. ESMA should develop clear guidance in relation to the acceptance and rejection under Article 14c P2.

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

(a) Vulnerability of a benchmark

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

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

Therefore, ESMA should not only consider different functions of a firm providing benchmarks and other services, but instead should consider the interest for potential manipulation (e.g. holding positions). Please note in this context the Neutral Benchmarks Providers foremost interest is to provide attractive and reliable benchmarks. Therefore, it is a self-interest by the provider that manipulation does not occur.

FESE would abstain to consider the nature of Benchmark only when looking for potential historical cases of manipulation. In any case the nature of the benchmark should be complemented with the nature of the

provider (e.g. being neutral in contrast to holding positions referencing the benchmark in question). We agree, however, that the absence of any evidence as regards the nature of the benchmark in question in general should be considered as a positive sign for the decision making process.

(b) Nature of the input data

FESE agrees with ESMA as regards their comments made in point 231. page 74 and strongly supports ESMA in their view.

FESE would like to point out, that we agree with ESMAs point 232. as long as the wording "the administrator is itself engaged in the market the benchmark is intended to represent" is clarified as "is holding positions in financial instruments referencing the benchmark in question..". Being engaged is too vague to provide for clear guidance.

(c) Level of conflict of interest

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

(d) Degree of discretion of the administrator

FESE agrees with ESMA on their analysis that depending on the quality of input data the discretion of the benchmark provider is reduce as there is no need and no incentive to calculate or augment the input data. In this context again we would like to point out that besides transaction data as well firm bids/offers from trading venues should be considered as reliable input data in the sense of regulated data. We would expect using regulated data, the NCA would not require additional application of the above mentioned articles.

(e) Impact of the benchmarks on markets

FESE needs to point out that the calculation of thresholds as defined in level 1 provides for significant challenges as lined out in this paper above. We deem those thresholds to provide for a critical part of the BMR as it is not yet clear on which data basis, according to which rules and in line with which verification measures those thresholds will be generated. Already in level 1 we have witnessed that even regulators were not able to provide for a consistent and sensible methodology.

(f) Importance of the benchmark to financial stability

See responses to (e)

(g) Nature, scale and complexity of the provision of the benchmark

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

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

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

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

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

<ESMA_QUESTION_DP_BMR_80>

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

<ESMA_QUESTION_DP_BMR_81>
FESE would like to suggest that ESMA should allow for discretion in order to enable administrators to use as much as possible from their IOSCO compliance statements when making a statement for the BMR.

According to Article 14c (6) and 14d (2), administrators of significant and non-significant benchmarks respectively may decide not to comply with a number of governance requirements following a "comply or explain approach", i.e. the administrators need to explain why non-compliance is appropriate in a compliance statement, for which ESMA is empowered to develop a template.

It should be clear how the respective administrator should complete the statements and how it can offer enough information to the NCA if it has chosen to "explain" rather than "comply"; it should also be clear what additional information can be requested by the NCA to ensure compliance of the BMR.

For reasons of proportionate regulation we urge ESMA to consider also allowing a single statement, rather than numerous statements, for benchmarks that have substantially the same makeup even if they're not part of the same "family".
<ESMA_QUESTION_DP_BMR_81>

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

<ESMA_QUESTION_DP_BMR_82>
FESE would like to point out that in many commodity markets – also if their Benchmarks are Regulated Data Benchmarks- there is a low level of transparency on the market size. Many market players in many commodity markets do not publish transaction volume as they tend to be active on the markets exclusively for hedging purposes.
<ESMA_QUESTION_DP_BMR_82>

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

<ESMA_QUESTION_DP_BMR_83>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_83>

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

<ESMA_QUESTION_DP_BMR_84>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_84>

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

<ESMA_QUESTION_DP_BMR_85>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_DP_BMR_85>

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

<ESMA_QUESTION_DP_BMR_86>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_86>

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

<ESMA_QUESTION_DP_BMR_87>
FESE considers that the publication of key elements that shall be done with each Benchmark publication shall not be too burdensome in order to not delay Benchmark publication. Where Benchmark determination follows the same pattern every time a Benchmark is determined it shall also be possible to refer to former publications as there is no added value in renewing the statement every time. We would also like to make very clear that it should not be necessary to mention more than the profession of the contributors. Mentioning more details could lead some of them to ceasing their contributions, making some of rather illiquid commodity markets even more opaque.

We also belief that IOSCO has already gone a long way together with Price Reporting Agencies to establish a standard for Benchmark Statements for Commodity Benchmarks. We encourage ESMA to follow the example of the IOSCO-Compliance Statements of Price Reporting Agencies.
<ESMA_QUESTION_DP_BMR_87>

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

<ESMA_QUESTION_DP_BMR_88>
FESE fully agrees with ESMA´s approach regarding the Benchmark Statement for Regulated Data Benchmarks. In particular trading venues are already very closely supervised by the respective competent authority.
<ESMA_QUESTION_DP_BMR_88>

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

<ESMA_QUESTION_DP_BMR_89>
FESE has some reservations about including an unqualified reference to “Information about the degree of utilisation of the benchmark in general and also with regard to different Member States”.

The reason for our reservations is the lack of comprehensive information about the degree of utilisation of the benchmark in general and particularly with regard to different Member States. As such, any statement concerning the utilisation of a benchmark would need to be expressed in general terms and would need to include explicit caveats (e.g. in relation to data availability).
<ESMA_QUESTION_DP_BMR_89>

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

<ESMA_QUESTION_DP_BMR_90>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_90>

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

<ESMA_QUESTION_DP_BMR_91>
Referring to 279 we opt for Option 1 as Option 2 and 3 do not deliver additional information and content but pose more burdens to the administrators of non-significant Benchmarks.
<ESMA_QUESTION_DP_BMR_91>

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

<ESMA_QUESTION_DP_BMR_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_92>

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

<ESMA_QUESTION_DP_BMR_93>
FSE considers that disclosure of financial information is not justified by level 1 – except for critical / systemically relevant benchmarks. Therefore, a full disclosure of financial information does not seem proportional.
<ESMA_QUESTION_DP_BMR_93>

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

<ESMA_QUESTION_DP_BMR_94>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_94>

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

<ESMA_QUESTION_DP_BMR_95>
FESE refers particularly to para 296. and 299.

In many commodity markets the availability of representative data is rather scarce. This clearly needs to be considered by the Authorities when evaluating applications from administrators from the commodity sector – regardless of the Benchmarks being regulated data-Benchmarks or falling under Annex II.

With a reference to 299 it is our view that it needs to be deemed necessary to mention contributors´ profession, but it shall not be necessary to name single contributors by name. In some cases contributors are well established associations that are not focused on providing market data, but so as a service for their members or contributors may well be companies that are active on the markets for hedging purposes but do not wish to be named.

<ESMA_QUESTION_DP_BMR_95>

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

<ESMA_QUESTION_DP_BMR_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_96>

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

<ESMA_QUESTION_DP_BMR_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_97>

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

<ESMA_QUESTION_DP_BMR_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_98>

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

<ESMA_QUESTION_DP_BMR_99>
FESE considers that the RTS should provide clarity, in line with the Level 1 text, as to under which circumstances benchmarks based on trading venue data from outside the EU would be considered regulated data benchmarks, enabling the administrator to subsequently benefit from the exemptions specified in Article 12a. To prevent market disruption and a decline of transparent investment vehicles allowing investors to benefit from the development of growth markets beyond the EU, data sourced from 3rd country trading venues subject to an equivalent regulation to MiFID should be considered regulated data.

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

In order to ensure legal certainty, clear guidance is needed as regards the information 3rd country administrators need to submit to their Member State of reference in order to claim the exemptions subsequent to the classification to a specific benchmark category. In order to reflect established market practices and ensure the competitiveness of benchmark administrators in a global industry, cost related reasons as well as joint ventures with strategic partners in markets outside the EU should be acknowledged as objective reasons for an endorsement.

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

- IOSCO’s summary in Chapter 2 of IOSCO’s Principles for Financial Benchmarks Final Report in 2013 , or

- the Key Indicia associated with the Principles, as set out in IOSCO's published Assessment Methodology.

Whichever level of granularity is chosen should be applied consistently at least across all applicants of a particular type. Also, all of the competent authorities of the Member States of reference should of course strive to assess applications consistently amongst themselves.
<ESMA_QUESTION_DP_BMR_99>

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

<ESMA_QUESTION_DP_BMR_100>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_100>

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

<ESMA_QUESTION_DP_BMR_101>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_101>

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

<ESMA_QUESTION_DP_BMR_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_102>

Q103: Do you agree that in the situations identified above by ESMA the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references a benchmark? If not, please explain the reasons why.

<ESMA_QUESTION_DP_BMR_103>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_103>

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

<ESMA_QUESTION_DP_BMR_104>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_104>

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

<ESMA_QUESTION_DP_BMR_105>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_105>

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

<ESMA_QUESTION_DP_BMR_106>
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<ESMA_QUESTION_DP_BMR_106>

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

<ESMA_QUESTION_DP_BMR_107>
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<ESMA_QUESTION_DP_BMR_107>

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

<ESMA_QUESTION_DP_BMR_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_108>

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

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

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

In the first case, it is not clear why national benchmark providers might be required to declare the use of benchmarks which they do not themselves administer. Also, in the second case, competent authorities would surely receive many multiples of reports about some benchmarks and yet there could not be certainty that all benchmarks in use would in fact be identified. It may be generally less burdensome if ESMA and/or each national competent authority published a list of benchmarks and invited notification of any omissions.
<ESMA_QUESTION_DP_BMR_109>

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

<ESMA_QUESTION_DP_BMR_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_110>

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

<ESMA_QUESTION_DP_BMR_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_111>

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

<ESMA_QUESTION_DP_BMR_112>
FESE considers that there is little likelihood that benchmark providers could estimate the number and value of financial instruments/contracts referencing to a non-compliant benchmark – please see our response to Q89.

The ability of supervised entities to provide the competent authority with an estimate of the number and value of financial instruments/contracts referencing a non-compliant benchmark is likely to vary depending on the type of supervised entity – some should find it a simple matter whereas for others it would be a burdensome and potentially imprecise task.
<ESMA_QUESTION_DP_BMR_112>

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

<ESMA_QUESTION_DP_BMR_113>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_113>