



European Securities and
Markets Authority

Reply form for the Consultation Paper on Benchmarks Regulation



Responding to this paper

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

Argus Media (Argus) is a specialist publisher serving the physical commodities sector. Its main activities comprise publishing market reports containing price assessments, market commentary and news, and business intelligence reports that analyse market and industry trends.

A small number of Argus' published price assessments have been adopted by subscribers for use as benchmarks in derivatives contracts. Argus has fully implemented IOSCO's PRA Principles including successfully completing five annual external assurance audits — to date in 2013 (split into two audits), 2014, 2015 and 2016 — to verify compliance. Latest annual external audit report is available at: www.argusmedia.com/About-Argus/How-We-Work/

Argus and its main competitors have become known as 'price reporting agencies' (PRAs) — although the publishers themselves did not invent this term and in fact it is somewhat misleading. In reality, as a publisher Argus reports on the commodity markets and the wider commodity industries, and the reporting of prices in the markets is just one integrated component of this.

General comment on RTS in relation to BMR Articles 5, 11, 13, 15 and 16

As a general comment on all draft RTS in relation to BMR Title II, Argus asks ESMA to take particular care in order to avoid inadvertently introducing any legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text.

In particular, Argus notes that according to Article 19(1) of BMR, "*The specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark in question is a regulated-data benchmark or is based on submissions by contributors the majority of which are supervised entities.*"

Therefore, where a commodity benchmark qualifies for Annex II, the provisions of all BMR articles contained in Title II with the exception of Article 10 — ie Articles 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 — unequivocally do not apply either to the provision of or to the contribution to the benchmark.

However Argus notes that some commentary within the CP, as well as some drafting within specific proposed RTS, inadvertently appears misleading and even potentially incorrect on this point. This is particularly in relation to RTS on Article 16 BMR, which lies within Title II.

Therefore in order to avoid introducing any undesirable legal uncertainty and to fully respect the unequivocal derogations provided in the Level 1 text, Argus asks ESMA to ensure that its commentary in the forthcoming Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising the Level 1 derogations noted above in respect of Title II and commodity benchmarks qualifying for Annex II.

Argus furthermore asks ESMA to consider re-stating these Level 1 derogations directly in all the relevant draft RTS, perhaps in recitals. We believe that this would significantly increase ease of understanding and interpretation of the relevant RTS, for the benefit of all stakeholders including National Competent Authorities in their role as supervisory agencies enforcing the legislation, as well as for benchmark users, contributors and administrators.

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

Yes, please see our general comments, above, on RTS in relation to BMR Articles 5, 11, 13, 15 and 16. Argus is concerned that ESMA may inadvertently be at risk of introducing legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text, particularly in respect of commodity benchmarks qualifying for Annex II.

Argus therefore requests that the Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising these Level 1 derogations. Argus asks ESMA to consider re-stating the Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 5 (oversight function), perhaps in a recital.

<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>

Please see our general comments, above, on RTS in relation to BMR Articles 5, 11, 13, 15 and 16. Argus is concerned that ESMA may inadvertently be at risk of introducing legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text, particularly in respect of commodity benchmarks qualifying for Annex II.



Argus therefore requests that the Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising these Level 1 derogations. Argus asks ESMA to consider re-stating the Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 11 (input data), perhaps in a recital.

<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>

TYPE YOUR TEXT HERE

<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>

Please see our general comments, above, on RTS in relation to BMR Articles 5, 11, 13, 15 and 16. Argus is concerned that ESMA may inadvertently be at risk of introducing legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text, particularly in respect of commodity benchmarks qualifying for Annex II.

Argus therefore requests that the Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising these Level 1 derogations. Argus asks ESMA to consider re-stating the Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 13 (transparency of methodology), perhaps in a recital.

<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>

TYPE YOUR 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_BMR_10>

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

<ESMA_QUESTION_CP_BMR_11>

Please see our general comments, above, on RTS in relation to BMR Articles 5, 11, 13, 15 and 16. Argus is concerned that ESMA may inadvertently be at risk of introducing legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text, particularly in respect of commodity benchmarks qualifying for Annex II.



Argus therefore requests that the Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising these Level 1 derogations. Argus asks ESMA to consider re-stating the Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 15 (contributor code of conduct), perhaps in a recital.

<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>
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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>
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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>
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<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>
Yes, please see our general comments, above, on RTS in relation to BMR Articles 5, 11, 13, 15 and 16. Argus is concerned that ESMA may inadvertently be at risk of introducing legal uncertainty regarding derogations that are unequivocally stated in the Level 1 text, particularly in respect of commodity benchmarks qualifying for Annex II.

Argus therefore requests that the Final Report and draft technical standards, as submitted to the European Commission, contains text unequivocally recognising these Level 1 derogations. Argus asks ESMA to consider re-stating the Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 15 (contributor code of conduct), perhaps in a recital.

<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>
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<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>

No. Argus is concerned regarding the discussion in paragraph 128 of the CP and an element of the draft RTS on BMR Article 16, which may inadvertently cause confusion and legal uncertainty.

We note that paragraph 128 says:

“The scope of application of the mandate is specified as not extending to contributors to non-significant benchmarks. Furthermore, paragraph 5 of Annex 1 BMR states that the mandate does not cover interest rate benchmarks: instead paragraphs 6 to 12 of Annex 1 contain rules specifically for contributors to interest rate benchmarks.” (emphasis added)

We note that unfortunately this CP paragraph does not also state that the scope of application of the mandate does not cover commodity benchmarks qualifying for Annex II. But this is also unequivocally the case, in compliance with BMR Article 19(1), and pursuant to which Article 16 BMR — which lies within Title II — does not apply to commodity benchmarks qualifying for Annex II. Such benchmarks are instead subject to Annex II, and ESMA will be aware that BMR contains no Level 2 mandate in relation to Annex II.

We are concerned that because paragraph 128 of the CP does not make clear that the scope of application of BMR Article 16 and the associated RTS does not cover commodity benchmarks qualifying for Annex II, while at the same time the paragraph does mention interest rate benchmarks, this may cause confusion and even potentially introduce legal uncertainty.

We therefore request that ESMA’s forthcoming Final Report and draft RTS, as submitted to the European Commission, contains text unequivocally recognising that Article 16 BMR and the associated RTS do not apply in respect of commodity benchmarks qualifying for Annex II. We ask that, for full clarity, such text in the Final Report covers all Level 1 derogations applying to these benchmarks — in particular all provisions of Title II except Article 10 (outsourcing).

Argus furthermore asks ESMA to consider re-stating these Level 1 derogations directly in all the relevant draft RTS, including this current one in relation to BMR Article 16 (requirements for supervised contributors), perhaps in recitals. We believe that this would significantly increase ease of understanding and interpretation of the relevant RTS, for the benefit of all stakeholders including National Competent Authorities in their role as supervisory agencies enforcing the legislation, as well as for benchmark users, contributors and administrators.

Additionally, we note that Article 2(5) of the draft RTS on BMR Article 16 says:

“Paragraph 2 shall not apply in the case of contributions to significant benchmarks or to commodity benchmarks that are not critical.”

But as discussed above, not all commodity benchmarks are in any case subject to this RTS, and we are concerned that the current wording may not securely allow for this. Therefore we recommend this paragraph in the draft RTS is amended to (additions **in bold underline**):

“Paragraph 2 shall not apply in the case of contributions to significant benchmarks or to **those commodity benchmarks that are subject to Article 16 of Regulation (EU) No 2016/1011 and that are** not critical.”

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

<ESMA_QUESTION_CP_BMR_19>
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Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA_QUESTION_CP_BMR_20>
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Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA_QUESTION_CP_BMR_21>

No. Argus respectfully does not agree with the proposed wording of RTS Article 4 point (f). The current proposed wording is:

“outline, on an aggregate level, the professional profiles of the contributors to the benchmark and explain, where applicable, why the benchmark is predominantly based on contributions by non-supervised entities.”

In the first place, Argus considers RTS Article 4 point (f) as unnecessary and we request its deletion. Article 4 point (f) is clearly an incremental requirement that does not in our view relate, either directly or indirectly, to any of the components of the benchmark statement specified in the Level 1 text in BMR Article 27. Argus notes that ESMA has withdrawn its previous proposal that the benchmark statement should include a reference to the compliance statement because of “the fact that Article 27 of the BMR does not make any reference to the compliance statement” (CP paragraph 184). Argus notes that, entirely similarly, Article 27 of the BMR does not make any reference to the provision of the professional profiles of contributors to a benchmark or to an explanation of why a benchmark may be predominantly based on contributions by non-supervised entities. Therefore Argus believes that RTS Article 4 point (f) is unnecessary and exceeds the Level 1 text, and we request its deletion.

If ESMA is nevertheless minded to retain RTS Article 4 point (f), Argus calls for amended wording.

We note that the current proposed wording does not coincide with the Level 1 wording of BMR Article 19(1), which sets out the conditions governing when a commodity benchmark is subject to the separate commodity annex in substitution to BMR Title II. In particular, BMR Article 19(1) uses the construction “the majority of which”, whereas the current proposed wording of RTS Article 4 point (f) uses the terminology “predominantly based on”.

If ESMA is minded to retain Article 4 point (f) in some manner, we think it is unhelpful and would introduce significant legal uncertainty for the draft RTS to use a different terminology than that used at Level 1 — in essence for the draft RTS to re-cast the Level 1 formulation regarding the conditions under which a



benchmark is subject to the commodity annex. We see no legal basis for the Level 1 text to be re-cast and believe it would be a clear over-step for the draft RTS to do so.

Furthermore, we note that the Level 1 text of BMR Article 19(1) is specifically formulated using a negative construction — ie that Annex II applies to the provision of and contribution to a commodity benchmark *unless* certain conditions apply (ie unless the benchmark is a regulated-date benchmark or is based on submissions by contributors the majority of which are supervised entities). We therefore believe that for legal precision, if ESMA retains Article 4 point (f) in some manner, the draft RTS should adhere to this negative construction used in the Level 1 text and not seek to re-cast the Level 1 requirements in other terms, such as via a positive construction.

We therefore call for the deletion of Article 4 point (f) of the draft RTS on the basis that it is unnecessary and exceeds the Level 1 text. However if ESMA is nevertheless minded to retain Article 4 point (f) in some manner, we ask for an amended wording as follows (additions **in bold underline**, deletions **~~in bold struck-through~~**):

“outline, on an aggregate level, the professional profiles of the contributors to the benchmark and explain, where applicable, why the benchmark is **not based on submissions by contributors the majority of which are supervised contributors. predominantly based on contributions by non-supervised entities**”

<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>

TYPE YOUR TEXT HERE

<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>

Argus agrees with ESMA that the Level 1 text explicitly calls for the application processes for authorisation and registration to be distinct, with the latter to be a more streamlined process, and for ESMA to take account of the principle of proportionality when developing the draft RTS.

In this context, while Argus broadly supports ESMA’s general approach, we have several specific concerns regarding the current proposals.

Firstly, we are concerned to ensure that the proposed draft RTS incorporates sufficient flexibility, in a legally secure way, to permit applicants to provide only those information elements that are applicable to them and not to be under a legal obligation to provide information elements that are not applicable. For example, applicants in respect of commodity benchmarks qualifying for Annex II are subject to the substituted requirements of BMR Annex II in place of Title II (except Article 10) and this has important implications for which information elements of the application process are applicable in this case.

Argus recognises and appreciates the inclusion of recital (2) of the draft RTS, which says:

“Certain information requested in this Regulation might not be applicable depending on the characteristics of the applicant or of the benchmarks provided and intended for use in the European Union.”

We also recognise the inclusion of Article 1(3) of the draft RTS, which states:

“The application shall include an explanation for any requirement of this Regulation that does not apply to an applicant or to the benchmarks it provides that are intended for use in the Union.”



However to give further legal clarity and certainty elsewhere, particularly within the substantive provisions of the draft RTS, we ask ESMA to consider the following two amendments (additions **in bold underline**):

Article 1
General requirements

1. The applicant shall provide the information that covers, **as applicable**, but may not be limited to, the items:
- a. listed in Annex I when applying for authorisation;
 - b. listed in Annex II when applying for registration;
 - c. listed in Annex III where the applicant is a natural person.

ANNEX I
Information to be provided, **as applicable**, in the application for authorisation

Secondly, we believe that the current wording of Article 1(4) of the draft RTS is insufficient as it does not take account of the facts that:

- a) The applicant may fall under Annex II or Annex III of the draft RTS, rather than always under Annex I, depending on the nature of the applicant and of the benchmark(s), and we see no reason why in the former two cases the applicant should not also be able to provide elements of the required information in the form of the documents set out in Article 1(4)(a)-(c); and
- b) The methodology will be subject to disclosure pursuant to BMR Annex II, rather than pursuant to BMR Article 13, in the case of a commodity benchmark qualifying for BMR Annex II.

We therefore recommend the following two amendments (additions **in bold underline**):

4. The applicant shall not be required to provide some of the elements of information specified in Annex I, **Annex II or Annex III as applicable**, as part of the application for an authorisation or registration, to the extent that the information is provided to the competent authority, along with the application, in the form of:
- a. the benchmark statement envisaged by Article 27 of Regulation (EU) No 2016/1011;
 - b. the methodology subject to disclosure pursuant to Article 13 **or Annex II** of Regulation (EU) No 2016/1011;
 - c. a compliance statement envisaged by Article 25 or 26 of Regulation (EU) No 2016/1011.

Argus has two further specific concerns regarding the current draft RTS for BMR Article 34. We deal with these in our responses, below, to other questions on this chapter of the CP.

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



<ESMA_QUESTION_CP_BMR_25>
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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>

No. Argus notes that the final paragraph of Article 1(1) of the draft RTS would explicitly force an applicant that is a non-supervised entity and that provides only commodity benchmarks to apply in all cases for authorisation rather than registration. Argus is extremely concerned that this appears not to correctly reflect or take proper account of the Level 1 text.

Firstly, BMR Article 51(2) provides, during a transitional period, for a competent authority to decide to register (rather than authorise) an applicant index provider, subject to certain specified conditions. Importantly, this applies equally to an applicant that is a non-supervised entity and that provides only commodity benchmarks (provided that none of these is a critical benchmark). Therefore we are concerned that the final paragraph of Article 1(1) of the draft RTS may be in direct violation of this Level 1 provision.

Moreover, while BMR Article 19(1) provides that BMR Articles 24, 25 and 26 shall not apply to the provision of and contribution to a commodity benchmark, a commodity benchmark can nevertheless fall within the definition of 'non-significant benchmark' as defined in BMR Article 3(1) point (27). Therefore while the article laying down detailed Title II-related requirements for non-critical benchmarks — ie Article 26 — does not apply to a commodity benchmark pursuant to Article 19(1), for purposes of determining whether an applicant should apply for authorisation or registration — which relies on the Article 3(1) point (27) definition of 'non-significant benchmark' — a non-supervised entity providing only a commodity benchmark could indeed qualify to seek registration rather than authorisation. This is precisely the purposive intent of the co-legislator, in Argus' understanding and experience during the Level 1 process.

Furthermore, and while not of direct relevance to Argus as we do not publish indexes on interest rates, we note that the above analysis is the same for interest rate benchmarks pursuant both to BMR Article 18 and Article 3(1) definitions, and we note further that the final paragraph of Article 1(1) of the draft RTS (correctly) makes no reference to interest rate benchmarks.

Argus notes that ESMA has stated, perfectly correctly, in its recent Final Report — Technical advice under the Benchmarks Regulation (ESMA/2016/1560), that "the interpretation of the text of the BMR is ultimately an issue for the European Court of Justice". ESMA has also, in that Technical Advice and in the context of Article 51 transitional provisions and their application to "existing benchmarks", paid extremely close attention to the Level 1 text across different Level 1 articles, to the precise logic of the legal drafting across different articles and to the purposive intent of the Level 1 text (see paragraphs 187-188 of ESMA/2016/1560). Argus therefore invites ESMA to apply an equal approach to its analysis of how BMR Article 34 interacts with the definitions of "non-significant benchmark" and "commodity benchmark". We also ask ESMA to avoid an approach at Level 2 that runs a substantial risk, ultimately, of being rejected by the ECJ.

In summary therefore, we believe that the final paragraph of Article 1(1) of the draft RTS is incompatible with the Level 1 text for the several reasons discussed above and we request its deletion. We therefore call for the following amendment (deletions in **bold struck through**):

~~**Applicants providing only commodity benchmarks shall provide the information listed in Annex I if it is a non-supervised entity, or the information listed in the first column of Annex II in case it is a supervised entity.**~~

<ESMA_QUESTION_CP_BMR_26>



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

<ESMA_QUESTION_CP_BMR_27>
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Q28: Do you agree with the proposals outlined for requirements for other information?

<ESMA_QUESTION_CP_BMR_28>

When considering in aggregate the full extent of the requirements across this draft RTS, Argus remains concerned by the overall heavy burden of documentation required from an applicant, both for authorisation and registration, which we continue to regard as potentially disproportionate and excessive. We ask ESMA to consider ways to alleviate this burden.

We appreciate ESMA's request for quantitative data to substantiate such views and to assist ESMA's cost-benefit analysis. Argus is pleased to respond constructively to this request.

As ESMA may be aware, Argus currently undergoes an annual external audit of our compliance with the IOSCO PRA Principles. As one specific element of this process, Argus has to produce annually a document setting out how we meet the requirements of the PRA Principles. Given that BMR Annex II is very closely based on the IOSCO PRA Principles, we note that the activity of producing a document setting out how we meet the requirements of the PRA Principles is very closely equivalent to the specific item Annex I point 6(g) of the draft RTS: "With respect to any commodity benchmark, specific information on how the requirements set out in Annex II of Regulation No 2016/1011 are implemented." ESMA will be aware that the requirements of Annex II of BMR comprise approximately 57 individual elements.

In the context of the IOSCO principles, Argus has undertaken the exercise to produce such a document five times already since 2012. On each occasion the exercise has required between 3-4 weeks' full time effort for one member of staff. (For the avoidance of doubt, please note that this is the internal resource required merely to produce the document setting out how we meet the requirements of the PRA Principles; the internal resource required for purposes of the full external audit itself is very considerably greater.)

Meanwhile, we note that under the draft RTS, the proposed information required of an applicant for authorisation comprises approximately 70 individual elements. For an applicant that provides only commodity benchmarks falling under BMR Annex II, we note that approximately 60-65 individual elements specified in the RTS Annex I could still be considered relevant, of which point 6(g) is just one single item (and which itself contains 57 elements). And as discussed above, we know from five years' actual experience that point 6(g) alone requires between 3-4 weeks' full time effort for one member of staff.

We of course appreciate that not all the 60-65 individual applicable elements of RTS Annex I will take 3-4 weeks' resource for a member of staff — some elements set out in the RTS are only minor and consist of easily-available information. However Argus remains concerned by the overall burden of documentation required from an applicant, particularly in the case of authorisation but also for registration. For the former, we are significantly troubled when considering the resource needed in total to respond to full set of 60-65 requirements, and in the knowledge from actual previous experience that at least some of the individual items will require 3-4 weeks' full time resource for a member of staff.

In this regard, we are also struck by the differences in burden seemingly being proposed at Level 2 for an EU-based applicant versus for a third-country applicant. If a wide difference persists, we believe it would clearly risk encouraging regulatory arbitrage — with applicants incentivised to take steps in order to be able to apply as a third-country applicant rather than as an EU applicant. A situation that materially penalises EU applicants in comparison with non-EU applicants seems manifestly unfair towards EU firms, including creating an un-level playing field with their non-EU competitors.

Specifically, we note that the draft RTS for recognition of a third-country administrator (Article 32 BMR) proposes that an applicant may provide the required information in the form of a report by an independent external auditor of an applicant's compliance with IOSCO Principles.

The possibility for a third-country applicant to present the required information (or a subset of it) in the form of a pre-existing independent external auditor report on compliance with IOSCO Principles, derives directly from the Level 1 text — ie BMR Article 32(2) for the recognition regime and Article 33(1) for the endorsement regime. But Argus cannot see anything in the Level 1 text that would prevent ESMA from applying or allowing an equal possibility in respect of an EU applicant. It seems to us as manifestly proportionate and supportive of a level playing field, and fully compatible with the Level 1 text, for ESMA to permit this possibility at Level 2 for an EU applicant.

Furthermore, we note that ESMA has already taken care, in other BMR contexts, to minimise or avoid unequal treatment between EU administrators vis-à-vis non-EU administrators. In its recent Final Report — Technical advice under the Benchmarks Regulation (ESMA/2016/1560), in the context transitional provisions, ESMA has said “Additionally, it appears to be appropriate to [...] in a way that results consistent with the provision of Article [...], in order to prevent unequal treatment of benchmarks provided within the Union vis-a-vis benchmarks provided from third-countries.” (paragraph 189, ESMA/2016/1560). Argus believes it would be equally valid and appropriate, and fully consistent with the Level 1 text, for ESMA to minimise unequal treatment in the context of an application by an EU applicant for authorisation or registration versus the equivalent processes for a non-EU applicant.

Therefore, as one effort to minimise the burden on EU applicants, and in order (borrowing from ESMA's own words in the CP) “not to make the process uselessly burdensome”, we ask ESMA to consider the addition of the following clause (d) in draft RTS Article 4(1). (additions **in bold underline**):

d. an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable;

This proposed new clause is directly modelled on paragraph 4(a) of Article 1 of the draft RTS on BMR Article 32 (recognition) — see CP page 142.

While the above approach represents Argus' preferred option, should ESMA not be minded to accept this formulation we propose that the draft RTS should explicitly permit a national competent authority, at its discretion, to choose to accept information contained in an independent external auditor report on compliance with IOSCO Principles, to the extent that the national competent authority is satisfied that the independent external auditor's report contains the relevant information that the applicant is required to include in its application.

Our second preference would therefore be for the following paragraph to be added as an additional paragraph to Article 1(4) of the draft RTS (additions **in bold underline**):

The competent authority may choose to permit the applicant to provide elements of the information specified in Annex I, Annex II or Annex III as applicable, in the form of an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable, and to the extent that the competent authority is satisfied that such an assessment by an independent external auditor contains the required information.

<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>

Argus asks ESMA to consider one small clarificational amendment to Article 1 paragraph 4 of the draft RTS, to make clear that sub-points (a) and (b) of the paragraph are alternatives, and that the information is not required to be contained in both (a) and (b) in order for it to be admissible for provision by the applicant (additions **in bold underline**):

4. The applicant shall not be required to provide information in accordance with Annex I to the extent that the information is contained in **either of the following**:
 - a. an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable;
 - b. the certification provided by the competent authority of the third country where the applicant is located, attesting compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable.

<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>
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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?

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