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>
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 annual external assurance audits — to date in 2013, 2014 and 2015 — 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 markets and the wider commodity industries, and the reporting of prices in the markets is just one integrated component of this.
<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>
Argus recommends that ESMA ensures that any definition of "made available to the public" for the purposes of BMR does not mean that an index is available to the public free of charge or otherwise available in the public domain.
<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>
Please see response to Q1.
<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>
As a general point, Argus is highly favourable to ESMA aligning to the greatest extent possible with established IOSCO international standards for benchmarks, across ESMA's work on all aspects of secondary legislation for BMR. Argus considers that maximal alignment with established international IOSCO standards for benchmarks greatly supports international regulatory convergence and minimises regulatory arbitrage. It supports regulatory and market efficiency and reduces unnecessary and avoidable costs.

In this regard, Argus notes that Recital 34 of BMR states:
"*This Regulation should take into account the Principles for financial benchmarks issued by the International Organization of Securities Commissions (IOSCO) ('IOSCO Financial Benchmark Principles') on 17 July 2013 as well as the Principles for Oil Price Reporting Agencies issued by IOSCO on 5 October 2012 ('IOSCO PRA Principles') which serve as a global standard for regulatory requirements for benchmarks.*"

Unfortunately, through selective quoting from BMR Recital 34, DP paragraph 24 may inadvertently give the mistaken impression that IOSCO has only issued *one* set of principles for benchmarks. But as Recital 34 makes quite clear, IOSCO has issued two sets of global benchmarks principles, to cover two different categories of benchmarks, and that each set, in the relevant circumstance, is considered by the co-legislators as "*a global standard for regulatory requirements for benchmarks*".

Therefore respecting the explicit legislative guidance at level 1, it is vital that ESMA takes full account of the IOSCO PRA Principles in all situations where these principles, rather than the IOSCO Financial Benchmark Principles, are the applicable set of IOSCO standards.

As ESMA will be aware and for the avoidance of doubt, IOSCO has made clear that the IOSCO PRA Principles apply to all commodity benchmarks produced by Price Reporting Agencies (PRAs), across all underlying commodities. IOSCO has stated that "*although the PRA principles were developed in the context of PRAs and oil derivatives markets, PRAs are encouraged to implement the principles more generally to any commodity derivatives contract that references a PRA assessed price without regard to the nature of the underlying*" (FR06/12).

IOSCO subsequently reaffirmed this when publishing the Principles for Financial Benchmarks, as well as in its more recent evaluation reports on implementation of the IOSCO PRA Principles (see FR05/2014 and

FR22/2015). Furthermore, IOSCO stated that "*it is important to keep the PRA Principles separate from the Financial Benchmark Principles*" and that "*given that work to align the two sets of Principles already took place and that IOSCO's review of implementation of the PRA Principles did not suggest that further alignment of PRA Principles with those for Financial Benchmarks is warranted, IOSCO does not believe that further alignment of PRA Principles with those for Financial Benchmarks Principles is justified*". (FR05/2014)

Argus supports the closest alignment of BMR to IOSCO standards and encourages ESMA to remain vigilant on all Level 2 and Level 3 policy development to fully respect the Level 1 text that the regulation should take into account the IOSCO PRA Principles as the IOSCO standards in all applicable circumstances.
<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>
Argus has some concern as to whether ESMA's approach is intended to, or could inadvertently result in, the scope of "use of a benchmark" extending to the holding of financial instruments by market participants in the physical commodities markets.

Argus notes that BMR Recital 3a clearly states: "*The holding of financial instruments referencing a certain benchmark is not to be considered as use of the benchmark*". DP paragraph 17 appears to recognise this, although we query why paragraph 17 only says that Recital 3a "*appears to suggest*" it. Recital 3a unequivocally states that the holding of a financial instrument referencing a benchmark is not to be considered as use of the benchmark.

DP paragraph 30 says that issuance "*should instead more generally cover the act of creating a financial instrument which references an index or a combination of indices… for the purpose of offering such instruments to third parties or of entering into reciprocal contracts with third parties, with the aim to seek financial resources or other aims (e.g. seeking coverage for the risk to which a natural person/legal entity is exposed to)*."

While we do not think it is ESMA's intention that paragraph 30 would cover a market participant in physical commodities (for example an industrial consumer of petrochemicals, an airline or an oil producer) transacting a commodity derivative on a trading venue, we believe that it would be extremely beneficial for ESMA to clarify and confirm this.

While paragraph 17 explains ESMA's understanding of Recital 3a that "*in other words, final investors do not qualify as users of benchmarks within the meaning of the BMR*", it would be very beneficial for ESMA to confirm, consistent with the Level 1 text, that ESMA recognises "*final investor*" includes market participants transacting a commodity derivative on a trading venue and thereby holding a financial instrument that references a particular benchmark.
<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>
TYPE YOUR TEXT HERE
<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>
Argus is not commenting substantively on each question in relation to Title II because we do not envisage that Title II will ever apply to our benchmarks, in light of the separate commodity annex that applies in substitution for Title II (other than Article 6), as established by Article 14a. This is because of the characteristics of participants in the physical markets and their general non-supervised status.

However we would point out to ESMA that should, for example through the impact of the narrowing of the ancillary activities exemptions available to physical commodities firms once MiFID2 comes into effect, it turn out in due course that a particular physical commodity benchmark does have a majority of submitters that are supervised entities as defined in BMR, in that case the relevant IOSCO standards are still the IOSCO PRA Principles.

As discussed in our response to Q3, Recital 34 makes clear the co-legislators' intent that: "*This Regulation should take into account the Principles for financial benchmarks issued by the International Organization of Securities Commissions (IOSCO) ('IOSCO Financial Benchmark Principles') on 17 July 2013 as well as the Principles for Oil Price Reporting Agencies issued by IOSCO on 5 October 2012 ('IOSCO PRA Principles') which serve as a global standard for regulatory requirements for benchmarks.*"

IOSCO has made clear that the IOSCO PRA Principles apply to all commodity benchmarks produced by PRAs, across all underlying commodities. IOSCO has stated that "*although the PRA principles were developed in the context of PRAs and oil derivatives markets, PRAs are encouraged to implement the principles more generally to any commodity derivatives contract that references a PRA assessed price without regard to the nature of the underlying*" (FR06/12). IOSCO has reaffirmed this, and the continued applicability of the PRA Principles, subsequently (see FR07/13, FR05/2014 and FR22/2015).

We therefore draw to ESMA's attention that even in the (unanticipated) event that a PRA commodity benchmark were not able to avail itself of Annex II and became subject to the full requirements of Title II, as far as the applicable RTS in respect of Title II are concerned ESMA needs to take the IOSCO PRA Principles fully into account for PRAs and not the IOSCO Financial Benchmark Principles.
<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>
Please see response to Q6
<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>
Please see response to Q6
<ESMA_QUESTION_DP_BMR_8>

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight func-

tions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

<ESMA_QUESTION_DP_BMR_9>
Argus believes in any cases where Article 5a applies to a Price Reporting Agency (PRA), the PRA could certainly establish one oversight function, rather than multiple ones, for all the benchmarks it provides. It would be more sensible and straightforward, and would reflect current PRA practice which has already been endorsed by IOSCO and its constituent national regulators as fit-for-purpose. All benchmarks provided by a PRA are sufficiently similar in characteristics that one oversight function is appropriate and, given suitable design, effective.
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
In any cases where Article 5a applies to a PRA, multiple oversight functions in addition to those currently required under the IOSCO PRA Principles would certainly result in substantial incremental cost, based on our existing experience of costs of establishment and ongoing maintenance of an effective oversight function. We see no merit in terms of outcomes to require multiple oversight functions in respect of PRAs. It would result in substantial incremental cost to the consumer with no additional benefit.
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
Please see responses to Q9 and Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<ESMA_QUESTION_DP_BMR_20>

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

<ESMA_QUESTION_DP_BMR_21>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<ESMA_QUESTION_DP_BMR_23>

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

<ESMA_QUESTION_DP_BMR_24>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<ESMA_QUESTION_DP_BMR_27>

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

<ESMA_QUESTION_DP_BMR_28>
Please see response to Q6

<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6

<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6

<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Please see response to Q6
<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>
Argus notes that, as stated in Article 14a, "*The specific requirements laid down in Annex II shall apply in substitution of the requirements of the Title II, with the exception of Article 6, to the provision of and contribution to commodity benchmarks, unless the benchmark is a regulated-data benchmark or is based on submissions by contributors which are in majority supervised entities.*"

Therefore, where a commodity benchmark qualifies for Annex II, the requirements of Article 11 do not apply since Article 11 falls within Title II.

Argus therefore requests ESMA to remain vigilant when developing draft RTS for Article 11 that these RTS fully respect, and do not even inadvertently unsettle, the clear derogation from Article 11 established by Article 14a in respect of all contributors (therefore including supervised contributors) and contributions to commodity benchmarks qualifying for Annex II.
<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>
Please see response to Q60

<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>
Please see response to Q60
<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>
Please see response to Q60
<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>
Please see response to Q60
<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>
Please see response to Q60
<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>
Please see response to Q60
<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>
Please see response to Q60
<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>

Please see response to Q60
<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>
Please see response to Q60
<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>
Please see response to Q60
<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>
TYPE YOUR TEXT HERE
<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>
Argus understands that ESMA considers the calculation of notional amount should measure the stock of derivatives, rather than flow. In other words, in respect of exchange-traded derivatives, this would equate to open interest data rather than traded volume data. Argus supports an approach based on stock — ie open interest for exchange-traded derivatives — as in line with Level 1.

For the avoidance of doubt, Argus does not support an approach based on flows since the resulting notional amount would obviously depend critically on the length of period over which such flows were measured and summed. Therefore in that case the calculation results would in effect be arbitrary, depending on what ESMA were to opine as the length of period over which flow should be totalled. But such an approach, and the arbitrary result, would not be consistent with Level 1. It would also inevitably result in ESMA making policy choices of a political nature, contrary to well-established legislative demarcations.

Based on our understanding of ESMA's thinking and our support for an approach based on the measurement of the stock of derivatives referencing a benchmark, Argus has significant practical concerns regarding ESMA's suggest approach of using Trade Repositories (TRs) as the primary source of data for calculating notional amounts of derivatives.

Argus believes that in respect of exchange-traded derivatives referencing a specific benchmark, the most effective, reliable and accessible source of data on open interest (ie stock) is directly from the EU trading venue(s) themselves where such derivatives are listed for trading. Such data is usually readily available and, coming directly from the trading venue(s), may be considered accurate and reliable.

In contrast, Argus notes that TR data is not available to administrators or the public in the required level of granularity and indeed Argus queries whether TRs are even permitted to make such granular data available to anyone other than national regulatory authorities (NRAs). Furthermore, ESMA will be aware of widespread concerns — including among NRAs — that data from TRs is not currently of sufficiently high quality or reliability. It would clearly be a necessary requirement that an administrator could access, and be able itself to perform proportionate verification checks on, the notional amount data at a sufficiently granular level in regards all the administrator's benchmarks.

In addition, there is as yet no agreed system of 'unique underlier ID' for the underlying benchmark referenced in derivatives contracts, in respect of the data reported to TRs under EMIR. ESMA will be aware that work on this at an international level is being led by IOSCO-CPMI within its work stream on unique product identifiers, but this initiative is only at a relatively early stage. The absence of unique identifiers for underlying benchmarks potentially creates a very substantial practical impediment to obtaining meaningful reliable data at an individual benchmark level from TRs.

Argus also has concerns whether, in calculating notional amounts, data from TRs will be able to capture only those derivatives that are in scope of BMR and at the same time ensure that data on derivatives reported to TRs but which are not in scope of BMR are clearly excluded from the calculation. We note in this context the definitions in BMR of 'financial instrument' and 'benchmark' and resulting scope perimeters.

Argus notes that elsewhere in the DP — eg paragraph 296 — ESMA makes clear that it considers that responsibility lies with the administrator to monitor the total value of financial instruments/contracts and investment funds referencing a benchmark for purposes of monitoring this value and the various thresholds established under BMR (critical, significant, etc). But administrators cannot be expected to bear legal responsibility for monitoring a calculation in respect of which a) the mandated source of the data is widely regarded not to be sufficiently reliable, and b) administrators may in any case not have access to the necessary data or any ability to conduct proportionate verification checks.

Argus recognises that the definition of 'financial instrument' in BMR also covers in-scope instruments traded via a systematic internaliser (SI) and that therefore these must also be taken account of when calculating the notional amount. Since in the specific and limited case of in-scope contracts traded via SIs, Argus is not currently aware of any better source of data than TRs, it may be necessary for such data to be obtained from TRs. However this would very much represent a 'least worst' solution for SIs and, as discussed above, in the case of exchange-traded derivatives we believe there are much better alternatives.

Regarding exchange-traded derivatives referencing a specific benchmark, Argus therefore recommends that instead of an approach based on data from TRs, ESMA adopts an approach of using stock data — ie open interest data — directly from the EU trading venue(s). We believe this will provide for substantially more reliable and accessible in-scope data.
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_77>

Q78: Do you agree with the 'relative impact' approach, i.e. define one or more value and "ratios" for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

<ESMA_QUESTION_DP_BMR_78>
Argus broadly supports ESMA's approach in defining quantitative ratios that look at impact on GDP, against total assets in the financial sector, total value of financial instruments/contracts traded in one particular or all Member States, value of all credit agreements and consumer/corporate loans.

Subject to seeing further detail from ESMA fleshing out these approaches, these seem broadly to reflect appropriate objective criteria that would identify benchmarks that are genuinely systemic or critical in nature.
<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>

Subject to seeing further detail, we broadly support ESMA's current thinking that ratios based on GDP, credit agreements, consumer/corporate loans, total assets in the financial sector, and total financial instruments/contracts traded in a particular or all Member States, all potentially appear good metrics to use for objective grounds.
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
As a preliminary point on all DP chapter 11 questions on benchmark statements, Argus would like to draw to ESMA's attention that many of the detailed aspects required to be addressed by administrators in the benchmark statement overlap with elements required to be set out in the published methodology. This is particularly the case for commodity benchmarks subject to Annex II (which as ESMA will be aware is in effect a codification of the IOSCO PRA Principles).

We provide four examples to illustrate this overlap between Article 15 and Annex II:

Example 1
Article 15(1)(a) of BMR requires that the benchmark statement "*shall clearly and unambiguously defines [sic] the market or economic reality measured by the benchmark*"

while under Annex II point 5(a*)* of BMR *"The administrator shall specify the criteria that define the physical commodity that is the subject of a particular methodology".*

There is clearly a significant overlap between these two requirements.

Example 2
Article 15(2) of BMR requires that the benchmark statement contains "*the rationale for adopting the benchmark methodology*",

while Annex II point 2(a) requires "*Along with the methodology, the administrator shall also describe and publish the rationale for adopting a particular methodology".*

These are directly duplicate requirements.

Example 3

Article 15(1)(c) requires the benchmark statement to contain "*the criteria and procedures used to determine the benchmark, including a description of the input data, the priority given to different types of input data, minimum data needed to determine a benchmark, the use of any models or methods of extrapolation and any procedure for rebalancing the constituents of a benchmark's index*",

while Annex II point 1(a) requires the methodology to "*contain and describe all criteria and procedures that are used to develop the benchmark, including how the administrator uses the input data including the specific volume, concluded and reported transactions, bids, offers and any other market information in its assessment and/or assessment time periods or windows, why a specific reference unit is used, how the administrator collects such input data, the guidelines that control the exercise of judgment by assessors and any other information, such as assumptions, models and/or extrapolation from collected data that are considered in making an assessment*",

and furthermore Annex II points 1(d) and 1(e) require that the methodology shall contain and describe:
"(d) criteria that identify the minimum amount of transaction data required for a particular benchmark calculation. If no such threshold is provided for, the reasons why a minimum threshold is not established shall be explained, including setting out the procedures where there is no transaction data;
(e) criteria that address the assessment periods where the submitted data fall below the methodology's recommended transaction data threshold or the requisite administrator's quality standards, including any alternative methods of assessment including theoretical estimation models. These criteria shall explain the procedures used where no transaction data exist;

Elements of these requirements are directly duplicate, while others significantly overlap.

Example 4

Article 15(1)(c) requires the benchmark statement to "*lay down technical specifications that clearly and unambiguously identify the elements of the calculation of the benchmark in relation to which discretion may be exercised, the criteria applicable to the exercise of such discretion and the position of the persons that can exercise discretion, and how such discretion may be subsequently evaluated*",

and Article 15(2)(d) requires the benchmark statement to set out "*the controls and rules that govern any exercise of discretion or judgment by the administrator or any contributors, to ensure consistency in the use of such discretion or judgment*",

while Annex II point 1(a) requires the methodology to "*contain and describe… the guidelines that control the exercise of judgment by assessors",*

and furthermore under Annex II point 1(b) *"its procedures and practices that are designed to ensure consistency between its assessors in exercising their judgment"*.

Once again there is significantly overlap between the requirements set out in Article 15 in relation to the benchmark statement and those in Annex II in relation to published methodology.

Please note there are many further examples of these overlaps and Argus would be happy to provide more examples if of further assistance to ESMA.

In pointing out these areas of significant overlap between the benchmark statement requirements and those in respect of the published benchmark methodology for commodity benchmarks subject to Annex II, Argus fully recognises that ESMA is unable to change the Level 1 text and also that it must fulfil its Level 2 mandate.

In practice, in terms of compliance with the significantly overlapping requirements in Article 15 and Annex II, Argus expects that a relevant administrator will seek to co-locate the benchmark statement with the published methodology for the benchmark. In other words, we would expect that an administrator would incorporate the benchmark statement into the published methodology with, where relevant, a particular piece of text serving both purposes.

We note that nothing in BMR prohibits such an approach and it would seem to be the most practical way (if an administrator so chooses) for an administrator to comply with the many significantly overlapping requirements of Article 15 and Annex II. After all, the policy purpose of the benchmark statement and of the methodology is to provide transparency to users and the public. It would surely therefore be perverse, as well as introduce unnecessary cost, control risks and avoidable bureaucratic burden, to require multiple overlapping documents — which would inevitably leave the public and users more confused and less well-informed.

Argus therefore requests that ESMA, in fulfilling its Level 2 mandate on Article 15, pays close regard to the existence of these many overlaps between Article 15 requirements and certain elements of Annex II, and ensures that an administrator can remain able to fulfil its obligations through incorporating the benchmark statement into the published methodology, should the administrator so choose.

Moving to the specific questions posed in DP section 11.3, as illustrated at length above, Annex II of the Level 1 text already sets out many overlapping requirements with Article 15. Indeed, as illustrated, Annex II generally elaborates in further detail and granularity on the requirements.

Therefore Argus considers that in regards Article 15 RTS and in respect of commodity benchmarks qualifying for Annex II pursuant to Article 14a, there is no necessity for ESMA to specify further than what is already specifically provided for in the Level 1 text across Article 15 and Annex II.

Furthermore such an approach would fully respect the Level 2 mandate in Article 15(3) which requires ESMA to distinguish for different types of benchmarks as well as take into account the principle of proportionality. We note further that this is closely analogous to the approach ESMA already proposes in section 11.4.3 in respect of regulated-data benchmarks.
<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>
As discussed more fully in Q82, as regards Article 15 RTS and in respect of benchmarks qualifying for Annex II pursuant to Article 14a, we consider that there is no necessity for ESMA to specify further than what is already specifically provided for in the Level 1 text across Article 15 and Annex II. This is because Annex II of the Level 1 text already sets out many overlapping requirements with Article 15 and indeed the annex generally elaborates in further detail and granularity on the overlapping requirements.

Such an approach would fully respect the Level 2 mandate in Article 15(3) which requires ESMA to distinguish for different types of benchmarks as well as take into account the principle of proportionality. We note further that it is closely analogous to the approach ESMA already proposes, in section 11.4.3 in respect of regulated-data benchmarks.

Furthermore in respect of benchmarks qualifying for Annex II pursuant to Article 14a, and in recognition of the significant overlaps between Level 1 requirements in Article 15 and those in Annex II, in fulfilling its Level 2 mandate on Article 15 ESMA should ensure that an administrator can remain able to fulfil its obligations through incorporating the benchmark statement into the published methodology, should the administrator so choose.
<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>
No. See response to Q83
<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>
No. See response to Q83
<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>
No. See response to Q83
<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>
TYPE YOUR TEXT HERE
<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>
No. See response to Q83
<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>
TYPE YOUR TEXT HERE
<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>
No. See response to Q83
<ESMA_QUESTION_DP_BMR_92>

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

<ESMA_QUESTION_DP_BMR_93>
As a general introductory comment to DP chapter 12 on authorisation and registration of an administrator (BMR Article 23), but indeed of applicability across the whole Level 1 text, Argus notes that the Level 1 text does not request any rules or clarification from ESMA on the application of the separate regime for commodities as provided for by Article 14a. Nowhere in the BMR is there any explanation or description as to the manner in which Article 14a(1) is to be applied, nor is there any mandate for ESMA to further specify this. Therefore in respect of draft RTS in relation to authorisation and registration of an administrator, but also more widely across all Level 2 measures, Argus requests that ESMA takes particular care to ensure that it does not exceed its legal mandate in this area.

Article 23 BMR states that "*the applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation*". In the DP, ESMA states that its mandate to specify the information to be provided in the application "*offers the opportunity to ensure that the requirements are appropriate for the diversity or profiles and types of providers of benchmarks*". In particular, question 93 invites comment on what type of information is 'information of a general nature' and what type of information is 'financial information'.

Argus agrees that the information contained in paragraphs 287 and 288 are appropriate in the context of commodity benchmark administrators falling within the scope of Annex II of the BMR.

As regards paragraphs 289 and 290, Argus agrees that it could be appropriate to provide information on its operations where those are regulated activities, but not where those are unregulated activities as the scope of what information ought then to be provided would then be so vague as to be meaningless. An obligation to provide information on activities falling outside the scope of the benchmark regulation would also fall far outside the mandate that ESMA has been granted which is to assist in the delineation of that information which is necessary to meet requirements laid down in the BMR. If an applicant carries out activities outside the scope of the BMR that are moreover not regulated by any competent authority then, by definition, these cannot be relevant to any application made by the administrator to a competent authority. Therefore the reference in paragraph 289 to a programme of operations should be limited to regulated activities only.

Regarding point b) on financial information such as capital and financial resources including private resources and any plans on accessing financial markets, any such information should be limited to that already required to be published by company law. ESMA would be exceeding its mandate if it were to

place new reporting obligations on benchmark administrators that went beyond the scope of existing company law obligations. The Level 1 text provides no justification for the introduction of new reporting obligations.
<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>
As regards points c), d) and e) referenced in paragraphs 292, 293 and 294 of the DP, the Level 1 text does not provide any justification for such intrusive measures and these would appear to go far beyond the mandate that ESMA has been granted by the Level 1 text.

In the event that ESMA is minded to proceed then, as stated above in response to Q93, such information should be provided only in relation to regulated activities and not in relation to any unregulated activities as the scope of what information ought then to be provided would be so vague as to be meaningless.

Further, any such information should in the case of PRAs be aligned with and should go no further than what is provided for in the IOSCO PRA Principles, which Argus already complies with and which it is audited against by independent external auditors.
<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>
In paragraph 299 the DP states '*for commodity benchmarks, it is important that the applicant provides the information necessary for assessing the applicable regime*'. Further, it states '*it is ESMA's view that such information is pivotal*'.

As discussed in our introductory comments to Q93, we note however that the Level 1 text does not request any rules or clarification from ESMA on the application of the separate regime for commodities as provided for by Article 14a. Nowhere in the BMR is there any explanation or description as to the manner in which Article 14a(1) is to be applied, nor is there any mandate for ESMA to further specify this. ESMA should therefore take particular care to ensure that it does not exceed its legal mandate in this area.
<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>
The Level 1 text makes clear that, compared to registration, '*authorisation requires a more extensive assessment of the administrator's application*'.

Argus therefore agrees with ESMA's assessment that the registration process should be similar to the authorisation regime but adapted in a proportionate (i.e. a lighter) manner.

ESMA considers excluding some of the information requirements such as b) financial information and h) specific situations. Argus would advise going further than this.

As ESMA states in paragraph 308 '*in the case of an application for registration by a supervised entity, the contents of the application for registration might be scaled down in consideration of the fact that some of the information elements to be provided are already in the availability of the relevant competent authority*'.

It would be logical therefore in the case of a supervised entity not to ask for any information beyond that which has already been provided to the competent authority in the application for supervision — indeed it could be a subset of this. The result would be that applications for registration would not need to contain the information specified in points c), d) and e) which will already have been provided.

For non-supervised entities there should be an even greater recognition of the principle of proportionality. This could be achieved by requiring no more than the information specified in points a), b) and f).
<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>
Argus notes that the information to be provided under this heading is '*all information necessary to satisfy the competent authority that it has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation*'.

It is suggested that for commodity benchmarks produced by PRAs this could be satisfied by the presentation of an independent audit against the IOSCO PRA Principles together with any additional information over and above that which is contained in the audit which would be needed to satisfy the authorisation or registration process. In practice it is expected that this would only be very limited additional information.

Furthermore, Argus would like to draw to ESMA's attention errors in DP paragraphs 317 and 324(iii), which in both cases seem incorrectly to imply that in order for a third country index provider to be able to apply under the recognition regime, the third country index provider must as a pre-condition be a supervised entity in its home country and have a competent authority in that third country that is responsible for its supervision.

This is not correct, as Article 21a(5) makes clear.

Article 21a(5), fourth subparagraph, states:
"*Without prejudice to the third subparagraph, no recognition shall be granted unless the following additional conditions are met:*
(i) where the administrator located in a third country is subject to supervision, an appropriate cooperation arrangement is in place between the competent authority of the Member State of reference and the third country authority of the administrator, in compliance with the regulatory technical standards adopted pursuant to paragraph 4 of Article 20, in order to ensure at least an efficient exchange of information that allows the competent authority to carry out its duties in accordance with this Regulation;"

Article 21a(5) clearly states that the cooperation arrangement between competent authorities is required "*where the administrator located in a third country is subject to supervision*" and it directly follows therefore

that it is not required where the administrator located in a third country is not subject to supervision in its home country.

Furthermore ESMA will be aware that in later drafts of the Level 1 BMR text than that used as the basis for the DP, the co-legislators have further clarified their clear intent that the recognition regime should be available to a third country index provider whether or not it is a supervised entity in its home country and that there is no intent for supervision as a pre-condition to exist.

Paragraph 5 of Article 21a (renumbered to Article 32 in later versions of BMR) now reads: "*An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with the competent authority of its Member State of reference. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 and shall provide the list of its actual or prospective benchmarks which may be used in the Union and shall, where applicable, indicate the competent authority responsible for its supervision in the third country.*"

We draw ESMA's attention to "… *and shall, where applicable, indicate the competent authority responsible for its supervision in the third country".* The addition of "*where applicable*" further makes clear the co-legislators' evident intent that there is no pre-condition for the third country index provider to be a supervised entity in its home country and the recognition regime should be available to a third country index provider whether or not this is the case.

A similar clarification can be seen in later versions of BMR in paragraph 7 of the same article and in paragraph 1(c) of Article 25a on the register of administrators and benchmarks (renumbered to Article 36 in later versions of Level 1 BMR).
<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>
Paragraph 327 states that '*Article 21(6) states that ESMA's advice should address whether the conditions for such exemption appear to be fulfilled based on the information provided by the administrator in the application for recognition*'.

However as we noted in our response to Q95, the Level 1 text does not request any rules or clarification from ESMA on the application of the separate regime for commodities as provided for by Article 14a. Nowhere in the BMR is there any explanation or description as to the manner in which Article 14a(1) is to be applied, nor is there any mandate for ESMA to further specify this. ESMA should therefore take particular care to ensure that it does not exceed its legal mandate in this area.
<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>
As a preliminary point, Argus notes that Article 21b(8) of BMR states: "*The Commission shall take into account elements such as the specificities of the underlying market or economic reality the benchmark seeks to measure, the need for proximity of the benchmark provision with such a market or economic reality, the need for proximity of the benchmark provision to contributors, the material availability of input data due to different time zones, specific skills required in the benchmark provision.*"

While DP paragraph 331 identifies three groups of elements mentioned in Article 21b(8) as examples to be taken into account by competent authorities when assessing whether objective reasons exist, Argus notes that Article 21b(8) also identifies "*the specificities of the underlying market or economic reality the benchmark seeks to measure*" as another important stated example. Argus therefore requests that ESMA in its guidance to the Commission, and the Commission in its proposed delegated acts, take full account of the complete text of Article 21b(8) including all groups of elements mentioned in the Article as non-exhaustive examples.

Argus agrees that all the elements mentioned in Article 21b(8) may be important to take into consideration, depending on the specific characteristics of a given benchmark, underlying market and administrator, and that these provide a non-exhaustive list of examples. Argus has some concern however as to how far it is possible or practical to go in terms of specifying particular numeric measures that competent authorities must use to determining whether the objective reason condition is fulfilled for a given benchmark.

Argus does not believe that this assessment by competent authorities, across an extremely wide and highly diverse universe of benchmarks, is readily susceptible to being reduced to an arithmetic evaluation of whether a specified numeric threshold is reached by a particular benchmark. We do not, for example, consider that it would be appropriate for the Commission to establish numeric thresholds such as the minimum percentage of submitters that must be located outside the EU, the minimum geographic distance between the EU and the underlying market measured by the benchmark, or the maximum percentage of input data that can be available from submitters within time zones of EU Member States, in order for there to be considered an objective reason for a benchmark to be provided in a third country and endorsed for use in the EU. We believe that such an approach would be overly-simplistic, and would not permit competent authorities to take account of the particular characteristics of a given type of benchmark, underlying market and administrator and their context. It would likely result overall in inferior-quality assessments by competent authorities.

We believe that an assessment by competent authorities should be more holistic and adaptable to particular circumstances, with the potential to consider quantitative and qualitative factors in an overall assessment. Therefore we believe the Commission should not specify particular measures and establish numeric thresholds which competent authorities would be restricted to. Rather, the Commission should establish a non-exhaustive list of possible factors as further guidance for competent authorities in an objective assessment and to facilitate regulatory convergence. Please see our response to Q102 for further possible factors.
<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>
As noted in our response to Q101, Article 21b(8) of BMR identifies "*the specificities of the underlying market or economic reality the benchmark seeks to measure*" as another stated example of elements it may be important to take into consideration when assessing 'objective reason'.

Argus believes that there could be many other elements it may be important to be taken into consideration and that these may vary widely across the highly diverse universe of benchmarks.

In relation to commodity benchmarks produced by publishers such as price reporting agencies, two further elements we believe are likely to be highly relevant are:

- The locations globally of the main operational offices of the administrator's group. This will be particularly important in cases where benchmark administration is only an ancillary activity and not the main purpose or activity of the enterprise.

For example, reflecting that the main activity of Argus is a business publisher, and that the production of price assessments used as benchmarks is an integral part of the much wider activity of the production of integrated publications, Argus' operations are organised globally around regional publishing hubs in arrangements typical to those of the publishing industry in general.

- The locations globally of subscribers to a publisher's publications (including benchmarks), including the locations of non-EU trading venues that use a given index in a listed derivative contract.

<ESMA_QUESTION_DP_BMR_102>

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

<ESMA_QUESTION_DP_BMR_103>
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<ESMA_QUESTION_DP_BMR_103>

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

<ESMA_QUESTION_DP_BMR_104>
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<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>
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<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>
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<ESMA_QUESTION_DP_BMR_108>

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

<ESMA_QUESTION_DP_BMR_109>
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<ESMA_QUESTION_DP_BMR_109>

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

<ESMA_QUESTION_DP_BMR_110>
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<ESMA_QUESTION_DP_BMR_110>

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

<ESMA_QUESTION_DP_BMR_111>
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<ESMA_QUESTION_DP_BMR_111>

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

<ESMA_QUESTION_DP_BMR_112>
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<ESMA_QUESTION_DP_BMR_112>

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

<ESMA_QUESTION_DP_BMR_113>
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<ESMA_QUESTION_DP_BMR_113>