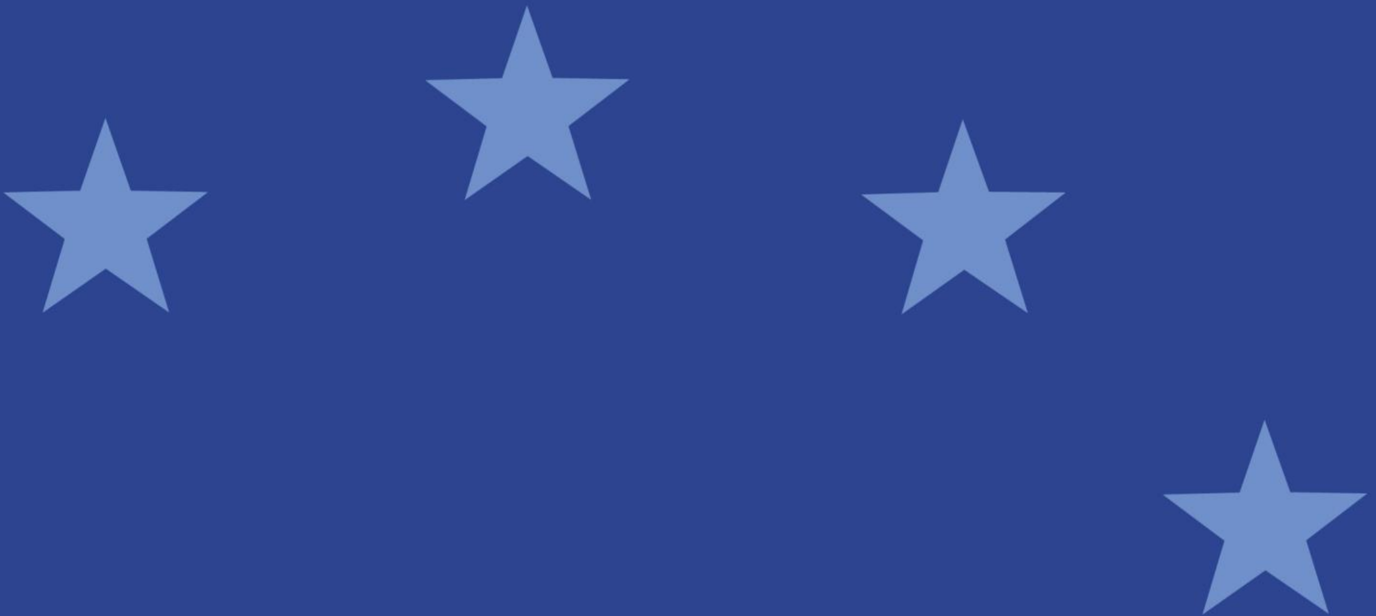
Reply form for the Consultation Paper on Benchmarks Regulation



1 June 2016

European Securities and Markets Authority

Date: 1 June 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_CP_BMR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

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

Naming protocol

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

ESMA_CP_BMR _NAMEOFCOMPANY_NAMEOFDOCUMENT.

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

ESMA_CP_BMR _XXXX_REPLYFORM or

ESMA_CP_BMR _XXXX_ANNEX1

Deadline

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

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

Publication of responses

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

Data protection

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

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_BMR_1>
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_CP_BMR_1>

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

<ESMA_QUESTION_CP_BMR_1>
Argus generally supports ESMA's analysis regarding "making available to the public" and the draft Technical Advice.

Argus would though like to draw to ESMA's attention that one aspect of the CP analysis is not fully correct. Paragraph 18 of the CP notes that "Making available of index values to the investors 'whatever technique is used' should include the dissemination of such index values to (a wider) public through their incorporation into the coupons, strike prices, differentials, and values of financial instruments and investment funds referencing it, as the investor can isolate the index value therefrom." (emphasis added)

It is not correct to say that an investor is always able to obtain the value of the underlying index from knowledge of the current (or any historic) value of a financial instrument referencing the index. Certainly the CP statement is not accurate in respect of commodity derivatives (including exchange-traded derivatives (ETD)) that use as a reference in final settlement a physical commodity price such as those produced by a price reporting agency (PRA).

Rather, the value of such a commodity ETD at any time from its first trade up to just prior to expiry of the derivative contract, is the current market value of the derivative as discovered on the trading venue through the interaction of buyers and sellers in order to establish the current market price of the derivative. The market value of such a commodity ETD is therefore not a direct function of the value of the underlying index and it is not possible to extract or isolate the underlying index value from knowledge of the current (or any historic) value of the commodity ETD. Nor, similarly, can the underlying index value be extracted from knowledge of an option strike price or a differential.

In the special case of the point of expiry of the commodity ETD, there should in principle at that moment be convergence between the market value of the ETD and the underlying index value. However this is only a 'moment in time' convergence and in any case there may still not be absolute convergence in practice even at expiry due to frictional effects.

Therefore it cannot be assumed, and it is generally not the case, that knowledge of or access to the value of a financial instrument referencing in final settlement a particular underlying index (eg a physical commodity market price produced by a PRA) provides a person with ongoing access to the value of the underlying index itself. Similarly, nor does knowledge of a commodity ETD option strike price or a differential. In other words, a person's access to strike prices, differentials and values of financial instruments does not mean that the underlying index is in consequence necessarily made available to that person.

Argus therefore invites ESMA to reflect further on this point and its draft Technical Advice regarding "making available to the public", particularly the last clause of paragraph 2 of the draft Technical Advice.
<ESMA_QUESTION_CP_BMR_1>

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

<ESMA_QUESTION_CP_BMR_2>
Yes, Argus supports ESMA's proposed approach.
<ESMA_QUESTION_CP_BMR_2>

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

<ESMA_QUESTION_CP_BMR_3>

As a preliminary point Argus would like to express its appreciation to ESMA for the clarification provided in CP paragraph 51.

Regarding 'use of a benchmark' in respect of exchange-traded derivatives (ETDs), Argus agrees that 'use' directly relates to the determination of final amount payable under the derivative contract. This is, in effect by definition, precisely the way in which a benchmark is incorporated into the contract design of the ETD. In our view this falls full-square into limb (b) of the level 1 definition of 'use of a benchmark': "determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices".

In this context and in view of the discussion at our response to Question 1, Argus would like to point out that we do not believe CP paragraph 49 is fully correct. The paragraph says that "When engineering the terms of a financial derivatives contract that makes reference to a benchmark, either for the purpose of its trading or of its clearing, that benchmark effectively determines the amount payable under the said instrument, not only at the time of its first creation or offering but whenever it is traded or cleared, including when the outstanding positions in such derivatives are margined." (emphasis added)

As discussed in our response to Question 1, the value of a commodity ETD — ie the contract's current market value — at any time during its lifecycle other than at the moment of expiry is determined through the price discovery mechanism on the trading venue through the interaction of buyers and sellers in order to establish the current market price of the derivative. Therefore the market value during the active lifecycle of a commodity ETD is not directly determined by the value of the underlying index. This is certainly the case for commodity derivatives that use as a reference in final settlement a physical commodity price such as those produced by a price reporting agency (PRA).

Similarly, clearing of such a derivative, including daily calculation of variation margin, also does not depend on the underlying value of the index throughout the life of the ETD other than at contract expiry. Rather, on any particular day the variation margin is calculated on the difference between the market price at the time a given market participant transacted the ETD and the contract's current market price on the trading venue (eg the daily settlement price of the ETD). As discussed above and in our response to Question 1, none of these values is determined by the value of the underlying index. Argus considers that this is an important technical point for ESMA to be aware of in its analysis.
<ESMA_QUESTION_CP_BMR_3>

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

<ESMA_QUESTION_CP_BMR_4>
Argus supports ESMA's draft Technical Advice. We note that the text of the draft Technical Advice is not affected by the issue we raise in our response to Question 3.
<ESMA_QUESTION_CP_BMR_4>

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

<ESMA_QUESTION_CP_BMR_5>
Argus supports ESMA's proposal regarding the transitional regime and is grateful for ESMA's recognition of the concerns that many stakeholders have expressed regarding non-availability to administrators of reliable data and practical approaches to mitigating this problem.

In particular we support ESMA's proposal that proxies, specifically including open interest data from exchanges in the case of notional amounts of derivatives, may be used when regulatory data under limbs (a), (b) and (c) of the draft Technical Advice are not available or are not sufficient.

For greater clarity, we would recommend the following clarificational amendment to limb (d) of the draft Technical Advice (suggested additions in ***bold italics***):

> Whenever data as set out above in paragraphs a), b) and c) is not available ***to an administrator or a competent authority according to the relevant case,*** or ***is*** not sufficient, when assessing benchmarks under the thresholds in Article 20(1) and Article 24(1)(a), the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds, or proxies for these values, such as open interest data, as reported by alternative private providers of information available to administrators and competent authorities may be taken into account. In such cases, the competent authority or the administrator shall provide written justification of this use, in particular in relation to the non-availability of the regulatory data.

<ESMA_QUESTION_CP_BMR_5>

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

<ESMA_QUESTION_CP_BMR_6>
Argus notes that ESMA proposes the measurement should be performed at a single specific point in time for purposes of assessing whether a benchmark is critical (Article 20(1)) and over a period of six months for purposes of assessing whether a benchmark is significant (Article 24(1)(a)). In the latter case, when a benchmark is not determined to be significant it becomes non-significant (Article 3(1)(27)), so that the proposed period of six months in effect would apply both to the determination of significant and of non-significant benchmarks.

Argus considers that the CP proposal in respect of critical benchmarks is unlikely to lead to robust determinations and encourages ESMA to reconsider on this point.

We believe that performing the calculation on a dataset representing a single specific point is unnecessarily arbitrary and poses an avoidable risk of giving an unrepresentative measurement. We cannot see a benefit of this approach and to the contrary we see a clear risk that conducting the measurement on a dataset representing a single (arbitrary) specific point is not effective in identifying benchmarks that are critical. In other words, there is an unnecessary risk of the measurement producing either ‘false positives’ or ‘false negatives’, neither of which is desirable.

We consider that it would be considerably more robust and representative across all asset classes to perform the measurement as an average over a dataset of a longer period — such as six months, as ESMA already proposes in the case of determining significant and non-significant benchmarks.

We note that performing the measurement over a longer period dataset will not inherently either increase or decrease the likelihood of any particular benchmark being determined as critical. In other words such an approach is completely neutral in terms of the likelihood that any particular benchmark falls above or below the critical threshold. But it would reduce the likelihood of producing ‘false positives’ or ‘false negatives’ — ie a benchmark failing to be classified as critical under the quantitative criteria because the data on the single day is unrepresentative and happens to be low while generally the benchmark exceeds the threshold and ought to be determined as critical (ie a ‘false negative’), or the opposite situation producing a ‘false positive’.

Argus notes that conducting the calculation for purposes of the critical threshold over a longer period dataset would be consistent with approaches in other EU legislation such as the EMIR clearing obligation in respect of non-financial counterparties (EMIR Article 10(1)), where that calculation is specified to be an average over 30 working days.

We also note that ESMA has rightly considered, at CP paragraph 80, the costs and complexity associated with conducting the measurements. But it seems to us illogical to conclude that for cost and complexity reasons the calculation for purposes of the critical threshold should be done only at a ‘point in time’, while

the calculation for significant and non-significant benchmarks should be done over a dataset of six months. Firstly, we do not believe that there is likely to be a material difference in cost or complexity associated with the two calculation approaches. But also, to the extent there may be any slight cost or complexity differences, it would clearly be greater cost and complexity to calculate over a dataset of six months (ie the significant and non-significant threshold calculation) than for the 'point in time' calculation (ie the critical threshold calculation). In other words, the proportionality would perversely apply in reverse, placing greater cost and complexity on administrators of non-significant benchmarks and least cost and complexity on those providing critical benchmarks.

Overall therefore Argus considers ESMA's proposal that the measurement should be performed over a dataset period of months — such as six months — to be the most representative and reliable methodology for robust measurement and we believe it should be applied equally for purposes of assessing whether a benchmark is critical (Article 20(1)) and whether significant/non-significant (Article 24(1)(a)).

Separately and in addition to the above, we would also encourage ESMA to include the following clarificational amendment to the first paragraph of the draft Technical Advice (suggested additions in ***bold italics***), in order to remove any possible ambiguity in the wording of the Technical Advice as to whether the calculation to be performed over the six month period is an arithmetic average or a summation. While it is clear from ESMA's discussion elsewhere in the CP that the calculation to be performed is an average, we would encourage this to be directly specified in the draft Technical Advice.

> The following measures, expressed in EUR (contracts in other currencies shall be converted into EUR using the daily euro foreign exchange rate published by the European Central Bank on its website), should be taken into account when assessing benchmarks under the thresholds in Article 20(1) (~~at a specified point in time~~*) and under the thresholds in Article 24(1)(a) (***average*** over a period of six months):
>
> *Also recommended as 'average over a period of six months', as discussed fully in our response above.

Lastly, we fully support ESMA's proposed approach in respect of indirect references to a benchmark within a combination of benchmarks.

<ESMA_QUESTION_CP_BMR_6>

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

<ESMA_QUESTION_CP_BMR_7>
Argus would oppose any mandatory use of an Administrator's licensing agreements as there is no provision for such an obligation at Level 1 and it would appear to be ultra vires to introduce one. The approach could perhaps be considered on a strictly voluntary basis — ie an Administrator could voluntarily choose or agree to provide a list of its licensees to a national regulatory authority (NRA) for the NRA to issue the licensees with a questionnaire — but in practice there seem in most cases to be much better options available for ESMA to consider.

For many Administrators, mandatory use of licensing agreements would be a highly disproportionate and burdensome approach, both for the Administrator and its NRA. Administrators may well have thousands, or tens of thousands, of licensees as customers. Furthermore, only a tiny fraction of these licensees may be using any data for the purposes of a 'benchmark' as covered by BMR and the license agreement may not enable the Administrator to know which of its licensees are using the data in this manner. In the case of publishers such as PRAs, licenses are typically not specific to usage of any data for 'benchmark' purposes but are general subscription licenses to a publisher's periodicals (similar to a corporate subscription license to the Financial Times or The Economist). This makes such license agreements unsuitable in any case as a starting point to identifying financial instruments, as ESMA recognises in CP paragraph 83.

It would clearly be disproportionate and burdensome, both to Administrators and NRAs, for the former to be required to provide a list of all licensees where only a small but unknown number of them is using any data for the purposes of a 'benchmark' as covered by BMR, and the latter to send what may amount to tens or even hundreds of thousands of questionnaires to licensees across all Administrators under the NRA's jurisdiction. Many licensees may not respond to the questionnaire and we cannot see any legislative mechanism for responses to be made obligatory, especially for those licensees that are not EU supervised entities — which is generally the case for customers of publishers such as PRAs. Furthermore, corporate subscriptions may be with a parent entity at group level, including a non-EU group parent, and cover all of the group's subsidiaries globally. We have grave doubts that any 'mandatory' questionnaire addressed to the licensee parent — for example non-EU and non-supervised — would provide the NRA with meaningful information in respect of all the parent's relevant subsidiaries and enable the NRA to identify any benchmarks "used" within the meaning of BMR by the licensee's group.

ESMA correctly notes that license agreements typically contain confidentiality obligations on the parties. License agreements also generally contain personal data. Such agreements fall clearly within the realm of confidential business secrets. Therefore contractually and legally it is likely to be highly problematic for an Administrator to provide an NRA with information such as a list of licensees and contact information derived from its license agreements. Administrators would in any case presumably want to see NRAs subject to strict liability for any loss or damages suffered by the Administrator as a result of such highly confidential commercial information — effectively a list of all the Administrator's customers — not being adequately safeguarded by an NRA and it is unclear that an NRA would be prepared to take on such liability.

Much better options seem generally to be available and more proportionate for identifying underlying benchmarks within the meaning of BMR.

Argus believes that a target long-term solution should be for a list of benchmarks to be obtained from regulatory data. We explore this more fully below. Furthermore, Argus recommends that ESMA extends its proposed Transitional Regime approach in respect of market data, so that NRAs and Administrators would be permitted to use other sources of data, including data held by private providers, to identify on a reasonable basis benchmarks within the meaning of BMR, until such time as regulatory data is available from which to derive a list of benchmarks.

For example in respect of benchmarks used in financial instruments, under an extended Transitional Regime a list could be extracted from data reported by trading venues under Article 27 MiFIR and/or Article 4(1) MAR (which is specifically modified by BMR Article 55 to provide such data). This data will be contained in ESMA's public database of listed financial instruments under Article 27(1) MiFIR and made available on ESMA's website, as the CP notes in paragraph 76. Assuming ESMA's database is sufficiently well-designed and searchable, extracting from it a list of benchmarks provided by any particular Administrator ought to be feasible.

Under an extended Transitional Regime, an NRA and/or an Administrator could also elect to use data directly from trading venues in order to establish a list of the Administrator's benchmarks used in financial instruments. For example this could be where the Administrator is aware, on a reasonable basis, which EU trading venues list a financial instrument that references a benchmark provided by the Administrator.

And as a target long-term solution regarding benchmarks used in financial instruments, once regulatory data from Trade Repositories (TRs) is sufficiently available and reliable, a list could be extracted from the ISINs reported to the TRs. Ultimately this regulatory data should include a 'Underlier ID' uniquely identifying each benchmark — for example as contained within Unique Product Identifiers (UPIs), currently being worked on at IOSCO level and expected to be brought into harmonisation with the ISINs system.

In the case of benchmarks used to measure the performance of investment funds, this is not an area where any Argus price assessments are used as benchmarks to the best of our knowledge, and so we have limited experience. Argus recognises that identifying benchmarks is currently less easy in respect of investment funds, as the CP discusses. However we believe that an approach combining a target long-term solution that uses regulatory data, with a Transitional Regime, would work well here too.

We believe that ultimately the most appropriate long-term solution would be for investment managers to have an obligation to report the underlying benchmark used to measure a fund's performance, so that such information becomes available in the form of regulatory data. This reporting obligation would presumably need to be in relation to AIFMD and the UCITS Directive and we encourage ESMA to raise this with the European co-legislators as an urgent issue that needs addressing with a Level 1 solution.

Until such regulatory data is available in respect of investment funds, under an extended Transitional Regime an NRA and/or an Administrator could use other data that may be available. For example an Administrator may know those of its licensees that are fund managers and may, on a reasonable basis, be aware from public data which are its benchmarks used to measure the performance of investment funds.

For those Administrators who consider, on a reasonable basis, that they produce benchmarks used to measure the performance of investment funds, an extended Transitional Regime could provide a strictly voluntary scheme whereby the Administrator could voluntarily choose or agree to provide a list of its licensees to an NRA, for the NRA to issue the licensees with a questionnaire in respect of such usage.

For all the reasons we set out earlier however, Argus would strongly oppose any mandatory use of an Administrator's licensing agreements, including to identify benchmarks 'used' in respect of investment funds. We do not believe there is the legal empowerment for any mandatory approach; it would in many cases be highly disproportionate; it would breach contractual confidentiality undertakings and it is likely in any event to be ineffective in practice for many categories of licensee. If an Administrator has no licensees that are investment managers, it would in all events clearly be unreasonable for any such obligation to be contemplated or applied.

<ESMA_QUESTION_CP_BMR_7>

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

<ESMA_QUESTION_CP_BMR_8>
Argus supports the proposed criteria and considers that they are appropriate and sufficient.

We would additionally like to query with ESMA one extract of the draft Technical Advice where we believe there may be inadvertent errors as the text is not consistent with the discussion and analysis in the CP.

We believe that clause (e)(1) of the draft Technical Advice should, consistent with ESMA's discussion at CP paragraphs 102 and 105 second bullet, refer to 'number of derivative contracts that reference the benchmark' rather than 'number of different types' of such contracts. It is surely the number of contracts, rather than the number of different types of such contracts, that is the relevant factor to consider in assessing potential impacts on market integrity. Furthermore, classifying derivatives into 'different types' would introduce an unnecessary complication and require additional detailed consideration and stakeholder consultation. As far as Argus is aware, there is no agreed exhaustive reference list of all the different types of derivatives that exist and the partial categorisation provided by MiFID/MiFIR (see CP paragraph 55) would not be sufficient for such purpose.

Secondly, we propose that clause (e)(1) should be brought in line with clauses (g), (h)(1), (h)(2), (j)(1), (j)(2), (k), (i)(1), (i)(2), and (i)(3) of the draft Technical Advice, which all use the "significant share of" concept that ESMA proposes and which Argus supports as appropriate.

We therefore recommend the following amendments (deletions in ~~***struck-through bold italics***~~, additions in ***bold italics***)

> e. The diversity of financial instruments and financial contracts referencing the benchmark, and in particular:
>
> > 1. the number of ~~***different types of***~~ derivative contracts that reference the benchmark, in the Member State(s) considered and ***whether this is a significant share*** ~~***its relevance***~~

~~***in terms of an estimate***~~ of the total number of ~~***types of***~~ derivative contracts traded in the financial system of the Member State(s) considered;

<ESMA_QUESTION_CP_BMR_8>

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

<ESMA_QUESTION_CP_BMR_9>
Argus considers that there would likely be benefit in ESMA developing guidance in relation to "significant share of", as this would help promote clarity of application as well as supervisory convergence.

In considering indicative guidance on actual percentages or ranges that could be a "significant share of", one option ESMA might wish to consider is to look to European competition policy for any relevant guidance. Competition policy is a complex area but notions of significant market power, while often sector specific, are broadly-speaking typically considered to reflect a market share of the order of 25-40% or greater. This could potentially provide useful policy guidance for ESMA in terms of what may be considered for the relatively close concept of "significant share of".
<ESMA_QUESTION_CP_BMR_9>

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

<ESMA_QUESTION_CP_BMR_10>
Yes, Argus supports the draft Technical Advice.
<ESMA_QUESTION_CP_BMR_10>

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

<ESMA_QUESTION_CP_BMR_11>
Yes, Argus supports the criteria in the draft Technical Advice. We have no additional criteria to propose.

We would however like to draw to ESMA's attention a concern, also expressed by other stakeholders, regarding the status of benchmarks that are new during the period between entry into force and the date of application of BMR. If a benchmark is new during this period, and if none of the transitional provisions of Article 51 are held to be applicable to this category of benchmark, then there is a real risk of provoking disorderly conditions, market disruption and contract frustration.

It would appear that if none of the transitional provisions of Article 51 are held to be applicable to this category of benchmark, then the administrator of such a benchmark would require to be authorised or registered under Article 34 on the very date of application of BMR. And absent such authorisation/registration on the very date of application of BMR, it would seem that the benchmark — already 'in use' within the meaning of BMR by a supervised entity in the EU — could no longer continue to be used.

Therefore if usage of the benchmark were for example in an ETD, all trade in the ETD would presumably be required to be immediately halted and the trading venue would be required to immediately suspend or de-list the contract despite all open positions. This would clearly generate disorderly conditions and engender market disruption.

But it would be highly unrealistic to expect that a national regulatory authority (NRA) could always in practice be in a position to authorise or register an administrator on the very date of application of BMR. Such an application can be expected to take the NRA weeks and perhaps months to process, even if the administrator has been able to pre-submit an application for authorisation/registration prior to the date of BMR's entry into application and the NRA has been in a position to accept such an early submission.

Argus would therefore like to encourage ESMA to reflect further, including in relation to its draft Technical Advice, as to whether some or all of the transitional provisions of Article 51 can, consistent with the level 1 text, be clarified as applicable to a benchmark that is new during the period between entry into force and the date of application of BMR. We note for example that the concept of "existing benchmark" used in Articles 51(3) and 51(4) does not coincide with the language of Article 51(1) which relates to an "index provider providing a benchmark on … [the date of entry into force of this Regulation]".

<ESMA_QUESTION_CP_BMR_11>