Reply form for the Discussion Paper on Benchmarks Regulation
Responding to this paper

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

Nasdaq wishes to highlight a few issues, all of which are not addressed in the Discussion Paper:

Definition of ‘single reference prices’

Nasdaq is concerned that whereas financial instruments are defined in MiFID II, ‘single reference prices’ are not. We are concerned that the inclusion of “reference” introduces ambiguity to the application of the Level 1 text as ‘single price’ is a well-established concept, the term ‘single reference price’ is not. We consider that the ambiguous drafting could potentially open up for unintended consequences, as the text could be interpreted as only excluding prices being created solely ‘for reference’ and actually including ‘single prices’ within the scope of the regulation. Moreover, while Recital 15a clarifies that single reference prices should apply to “where a single price or value is used as a reference to a financial instrument, for example where the price of a single security is the reference price for an option or future, there is no calculation, input data or discretion”, the legal impact of recitals is disputed. It would be helpful to include a clarification in line with the stated intention of the co-legislators, and not allow the inclusion of ‘single prices’ within the scope of the regulation.

Definition of ‘Regulated Data’

The provision requiring regulated data to be sourced “entirely and directly” should be further clarified.

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

3rd country regulated markets

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

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

IOSCO Principles
Nasdaq would generally encourage as much as possible the recognition of the IOSCO principles, both in the development of technical standards and in the actual supervision and enforcement of the regulatory framework for benchmarks. The IOSCO principles are sound and also allow for appropriate application for various types of benchmarks and administrators. For non-EU administrators and benchmarks, it would hence make sense to as far as possible allow entities complying with IOSCO to also operate within the EU.
<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?

The requirement of an index to be “published or made available to the public” should be interpreted as broadly as possible, given that restricting “public availability” to cover only very broad publication runs a risk of regulatory arbitrage and does not provide the investor protection intended by this regulation. Regulators should reflect on the fact that some administrators may have an incentive not to be transparent about their indices, in case no public information would be understood as not “made available to the public”, allowing administrators to completely escape the scope of the Regulation. This would result in unintended consequences contrary to the intention of the Regulation. Any information on the index performance given to one or several investors should be deemed to be a publication in the sense of BMR Art 3 (1) (1)(a).

Nasdaq is in favor of making all indexes broadly available to the public. The essential item is to make the value of the benchmark publicly available by broadly distributing the level through major financial data vendors.

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?

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)?

Nasdaq strongly supports the alignment of the IOSCO Principles, including when it comes to the overall responsibility of the administrator.

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?

Generally, Nasdaq agrees with ESMA’s proposal for financial instrument definition. The additional aspects that need further clarity are differentiation between financial instruments which are physically backed and exchange listed (ETFs) and those which are un-listed and private transactions.

However, it is important to note that exchanges are not “issuers” of financial instruments and the listing of financial instruments should not be caught under the definition of “issuance”. We generally consider that regulated markets are not, and should not be considered issuers in the sense of creators of securities.
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?

Regarding derivatives, it should be noted that exchanges create contracts but do not issue instruments. Where regulated markets act as benchmark administrators they should not be caught within the scope of the definition for ‘use of a benchmark’ for benchmarks for which they are the administrator.

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?

As stated in the introductory remarks, Nasdaq believes the self-identified IOSCO principles are appropriate for oversight for benchmark administrators which are focused on rules-based, objective and transparent index creation and calculation. These principles should be the basis for the governance requirements in the EU also.

We underline that different arrangements may be appropriate for different types of, for instance, benchmarks, production procedures, input data, contributors and administrators, which is why a one-size-fits-all approach should be avoided.

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?

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.

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

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?

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

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.

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

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.
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?

Type your text here

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?

Type your text here

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?

Type your text here

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.

Nasdaq is in favor of the record retention which is in place due to compliance of IOSCO regulation. Due to the significant number of data points and records required to maintain, adding additional requirements would create an undue burden on benchmark administrators which would increase cost and limit viability of new benchmark creation.

We also question whether it will be possible for a benchmark administrator to fully be aware of which contributors have “substantial exposures”.

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)?

Regarding verifiability, we question how this would apply to regulated data that is already covered by both Market Abuse Regulation and MiFID II reporting requirements. We would like to emphasise that the accuracy of data generated by regulated trading venues is already ensured by the respective trading venues themselves. This is equally true for third country trading venues, if they are regulated in an equivalent manner as EU exchanges.

To avoid undue regulatory burden, benchmark administrators should consequently have suitable requirements for appropriateness checks for input data from regulated markets. Therefore, in practice no addi-
tional verification should be required, regardless of whether the regulated data is generated on exchanges within or outside of the EU.

In general, and notwithstanding the comments above, in order to ensure the feasibility of the verification requirement in the face of huge amount of processed data, it should in principle be sufficient to verify randomly selected data points instead of requiring the verification of each respective input data that is being used.

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

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

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

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

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

We do not agree with the identification of concepts and underpinnings of data validation. Equity index benchmarks which are based upon exchange-listed securities that are governed by exchange listing rules, the data validation is not applicable.

On benchmarks which are based on contributor prices which are not publicly created, further validation could be viewed as necessary but depending on the source the requirements could not be necessary.

The IOSCO principles are viewed to create the proper administration of benchmarks in cases where data validity is required.
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>
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<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>
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<ESMA_QUESTION_DP_BMR_27>

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

<ESMA_QUESTION_DP_BMR_28>
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<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>
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<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>
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<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>
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<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>
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<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.

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”?

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.

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.

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.

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?

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?
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>
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<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>
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<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>
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<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>
Nasdaq believes benchmark administrators need to have flexible standards for various benchmarks depending on the asset class, the usage of the benchmark, and whether it is categorized as critical or significant. The focus should be to ensure the quality of the data.

Data types are very different for benchmarks. A benchmark which only uses exchange-based, publicly available data would have different levels of standards than an index which is comprised of prices that are privately sourced. At the core, the IOSCO principles provide a good guide this process of standards for each type of benchmark and should be followed.

<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>
TYPE YOUR TEXT HERE
<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>
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<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>
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<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>
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<ESMA_QUESTION_DP_BMR_47>

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

<ESMA_QUESTION_DP_BMR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_48>

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

<ESMA_QUESTION_DP_BMR_49>
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<ESMA_QUESTION_DP_BMR_49>

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

<ESMA_QUESTION_DP_BMR_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_DP_BMR_50>

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

<ESMA_QUESTION_DP_BMR_51>
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<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?

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?

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

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

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?

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

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

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?

What is important in the further detailing is to not develop standards which unduly duplicate already existing rules for supervised entities, such as exchanges.

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?

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

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?

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?

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?
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?

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

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?

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?

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.

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.

This question raises a number of issues, such as how to deal with complex and structured products. Also, administrators can only report information from other parties when a license agreement allows this.
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?

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

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

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.

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.

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.

Nasdaq provides comments on both approaches:

- The empowerment specifies that the nominal amount of all financial instruments other than derivatives should be assessed for the calculation.

In general the classification of structured products is often unclear due to the nature of the products. A proper classification assumed, there are further issues to be considered as regards this asset class. When
it comes to structured products, the nominal value is a purely legal/theoretical value which does not reflect how much money is invested in the product. The assets actually invested are more relevant and are reflected by the notional value. To ensure an adequate interpretation of the data, we would advise considering the notional instead of the nominal value of structured products, if such data should be counted at all.

- The empowerment specifies that the notional amount of derivatives shall be used. When assessing the notional amount of ETDs, it should be calculated as average daily notional value per month in EUR. As regards a benchmark within a financial instrument referencing a combination of various benchmarks, we suggest to only account for the respective percentage (weighting on its benchmark constituent equally) of notional or nominal amount of the benchmark in question due to the following reasons:
  - The market for instruments referencing a combination of various benchmarks is extremely broad and diverse. In order to account for the relevant risk exposure per instrument, it would be necessary to check the respective prospectus per instrument. The effort would be massive and absolutely disproportionate.
  - In the case of a benchmark deriving from the use of another benchmark, the sole administrator of that derived benchmark should be affected by the calculation of the threshold as he computes it in a way which result is no longer directly impacted (unlike the composite benchmark) by the behaviour of the used universe.

Additionally, it is unclear where the data used to calculate the thresholds shall originate from respectively be collected from.

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.

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.)?

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?

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>
Nasdaq believes the burdens for a non-significant benchmark should not be subject to the same compliance statement as a significant benchmark.

According to Article 14c (6) and 14d (2), administrators of significant and non-significant benchmarks respectively may decide not to comply with a number of governance requirements following a “comply or explain approach”, i.e. the administrators need to explain why non-compliance is appropriate in a compliance statement, for which ESMA is empowered to develop a template. Given that most benchmark administrators already issue - often externally certified - compliance statements as regards the IOSCO Principles, ESMA should leave room for discretion in order to allow administrators to use as much as possible from their IOSCO-compliance-statements.

<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>
The principle that benchmarks should define a market or economic reality is fair and the description of that benchmark’s target market or economic reality should be made readily and publicly available.

The estimation of market size (transaction volume or other trading related metrics) should not be a requirement of the benchmark provider. The benchmark provider is creating a value to accurately reflect the reality of the market or economic segment regardless of trading characteristics.

A benchmark provider should take into consideration observable market liquidity and/or size and number of participants within a certain market segment while constructing a benchmark to reflect that market or economic reality. Those considerations should be implemented through the benchmark methodology documentation and made easily available. Guidelines cannot be easily established to govern each and every market segment or to create a reasonableness test.

Nasdaq nevertheless points out that there may be difficulties in measuring this for all benchmarks. We would also encourage avoiding duplicating reporting requirements and would prefer to produce benchmark statements per family rather than per individual benchmark.

<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>
Each market segment or economic reality will generally be very dynamic in nature and thus there can be many and often unplanned circumstances which benchmark determination will be unreliable.

<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>
Where discretion can be applied to a benchmark, that should be made clear through benchmark methodology documentation.
The benchmark should continue to follow IOSCO Principles in determination and governance of applicable rules which can account for areas of discretion.

<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.

<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>
Yes the concise description of additional requirements on interest rate benchmarks is sufficient. <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>
Commodity benchmarks, when comprised of publicly listed contracts (e.g. physical or cash-settled futures listed on an exchange) should not be, and thus we agree with the delineation between regulated data benchmark and non-regulated data commodity benchmark.

<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>
Yes.

<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>
We agree with the suggested additional content and would like to add a measure of assets and transactional volumes also be taken into consideration on the classification of a benchmark as critical.

Given the challenge in tracking unlisted assets (e.g. OTC transactions, unlisted structured products, etc.) we suggest only utilizing UCITS IV funds which have mandatory asset reporting. The asset level should be reviewed on a periodic basis that accounts for the necessary time to track assets and have the benchmark users report back to the authority per benchmark.
Transaction volumes (e.g. listed-derivative contracts) will have a requirement from the listing exchange to report volumes to aid in determination of critical benchmark on periodic basis not to exceed once per calendar year.

Proper identification of critical benchmarks with clear, concise and measurable metrics for determination of critical versus significant should be viewed as required before progressing in determination of rules governing the critical benchmark administrator.<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>
It is not an optimal procedure to develop these rules before the determination of which benchmarks are significant has been done. It would have been preferable to have proper identification of significant benchmarks with clear, concise and measurable metrics for determination of critical versus non-significant, before progressing in determination of rules governing the significant benchmark administrator.<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>
It is not an optimal procedure to develop these rules before the determination of which benchmarks are significant/non-significant has been done. It would have been preferable to have proper identification of significant benchmarks with clear, concise and measurable metrics for determination, before progressing in determination of rules governing the benchmark administrator.<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, not at this time.<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>
Entities which are already authorised and supervised, such as exchanges, have already submitted certain information and are under a continuous reporting requirement. It would make sense to not require duplicative reporting.<ESMA_QUESTION_DP_BMR_93>

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

<ESMA_QUESTION_DP_BMR_94>
TYPE YOUR TEXT HERE
Q95: Do you agree with the proposals outlined for the above points? Do you see any areas requiring particular attention or adaptation?

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

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

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?

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

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

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

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

At this stage, administrators located in a third country, if following IOSCO compliance, should be viewed favorably as able to freely operate within ESMA regulations the same as local providers.

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.

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?

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.

If a benchmark were to be changed due to need to follow ESMA guideline and result in breach of financial contracts, that benchmark should be allowed to continue its current duty with regards to those financial contracts without interruption.

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?

Open-ended funds which track a benchmark that would have to undergo substantial changes to follow ESMA guidelines could greatly change the financial contract the benchmark user (fund company) and client (investor) have engaged in for that particular investment vehicle. As that situation is open ended, it is not easily resolved within the ESMA guidelines and must be further studied to understand investor impact.
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>
Yes, the two options adequate, however further study is required on the time limit and threshold.
<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>
A fixed time-limit to resolve a non-compliant benchmark for the financial instruments tracking the benchmark can be useful to encourage a change in benchmark policy or creation of a new benchmark. However the time limit must be viewed reasonably and creation of a new compliant benchmark and appropriate testing to ensure its market representativeness may take longer than a fixed period of 24 months. Thus further study with financial market participants is required to better gauge both the time limit and minimum number of users.
<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>
No further suggestions at this time.
<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>
We do not agree that users of benchmarks should liaise directly with the competent authority of the administrator’s authority. Often times, the benchmark administrator authority will be a different regulatory authority or agency and not part of the user’s direct notion. What is most important is that all involved Competent Authorities have the same understanding and interpretation of the rules. We encourage ESMA to continue its work on ensuring harmonized implementation of EU legislation also as regards the Benchmark Regulation.

<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>
It is possible for the benchmark providers/user to provide competent authority an estimate of the number and value of financial instruments provided that a reasonable time frame is agreed upon on delivery of data and that all data is viewed as estimated only. Benchmark providers are generally only able to track benchmark usage via self-reporting of benchmark users. If the users do not accurately self report the administrator/provider will not be aware and thus cannot be held accountable for that accurate tracking of benchmark usage especially in determination of critical and significant benchmarks.

<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>
Listed and publicly available financial contracts could be tracked for each benchmark and an estimate then created on the affected quantity from a cessation/adaptation of non-compliant benchmarks.

<ESMA_QUESTION_DP_BMR_113>