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| 15 February 2016 |

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| Reply form for the Discussion Paper on Benchmarks Regulation |
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| 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](http://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](http://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>

31 March 2016

European Securities and Markets Authority (“ESMA”)

Re: Consultation Response to ESMA’s Discussion Paper Benchmarks Regulation

The European Money Markets Institute (“EMMI”) welcomes the opportunity to provide comments on ESMA’s Discussion Paper on Benchmarks Regulation (the “BMR”).

EMMI provides the following two indexes: [Euribor®](http://www.emmi-benchmarks.eu/euribor-org/about-euribor.html), the money market reference rate for the euro; and [Eonia®](http://www.emmi-benchmarks.eu/euribor-eonia-org/about-eonia.html%22%20%5Ct%20%22_blank%22%20%5Co%20%22Eonia), the effective overnight reference rate for the euro.

As an administrator of critical benchmarks, EMMI supports the objectives of the BMR to improve the governance and control over the benchmark process, thereby ensuring its reliability and protecting users and the broad financial market.

EMMI is continuously working to reinforce the transparency and enhance the governance framework to preserve the quality and integrity of its benchmarks, in line with the IOSCO’s Principles for Financial Benchmarks (the “IOSCO Principles”)[[1]](#footnote-2), through rigorous risk and controls standards and a comprehensive Code of Conduct and Code of Obligation for panel banks. Moreover, EMMI strives to develop new suitable benchmarks adapted to the current regulatory context.

EMMI supports the implementation of the BMR to ensure a robust framework but would further encourage ESMA to define level 2 provisions as close as possible with IOSCO Principles. Considering our experience as an administrator of critical benchmarks, we offer the following observations regarding the suggested standards:

* While an administrator must be responsible for the integrity of the benchmark by ensuring an appropriate methodology, governance and control framework, the contributors should remain responsible for the integrity, accuracy and reliability of their submissions in accordance with the Benchmark’s Code of Conduct and the regulatory requirements;
* Similarly, while the administrator must be able to access relevant information concerning internal controls and data/process validation at contributors’ level in the event that misconduct or any other irregularity is conducted, the primary responsibility with regard to the verifiability and record-keeping of relevant aspects of a contributor’s submissions should rest with the contributor, and
* While we appreciate the requirements within the BMR for mandatory contribution for critical benchmarks, EMMI advocates for a balance between the setting of strong standards and still providing a framework that encourages participation from contributors; thus ensuring the long-term viability of benchmarks within the EU.

Our response to ESMA’s Discussion Paper on the Benchmark Regulation is aimed at providing the perspective of an administrator of critical benchmark(s) with respect to certain questions set out in this discussion paper. EMMI believes that a proportional approach with regard to the different types and categories of benchmarks is appropriate. Our response should be read taking into account both EMMI’s perspective as an administrator of critical benchmarks as well as our support for a proportional approach.

EMMI would be pleased to continue assisting ESMA in the development of standards within the BMR.

Yours sincerely,

Guido RAVOET

Secretary General

European Money Markets Institute

<ESMA\_COMMENT\_ DP\_BMR\_1>

1. 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>

EMMI benchmarks, as critical, are widely made available to the public through multiple subscription arrangements on an immediate or delayed basis.

EMMI agrees that the characteristic of “being made available” should be defined in an open manner. We wish to point out that the channels and modalities of publication are central for administrators to define their subscription services. In that context, a differentiated access regime to a given benchmark should be allowed in order to support a business case based on distribution.

Additionally, if the current channels and modalities of distribution are to be reflected in the definition of “made available to the public”, such description should provide enough flexibility to allow future adaptation in light of the pace of innovation in financial technologies.

A too prescriptive approach may undermine the administrator’s ability to create a sustainable financial model ensuring its independence and the ongoing viability of the benchmark.

<ESMA\_QUESTION\_DP\_BMR\_1>

1. 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>

**.**EMMI adopted the FRAND approach[[2]](#footnote-3) (fair, reasonable and non-discriminatory) as a principle to design its offering of products and services since 1st January 2014. Conversely to licensees for standard essential patents, benchmark users (or other recipients) show diverse requirements in terms of access or other rights linked to the benchmarks. Therefore, EMMI applies the FRAND principles consistently within the market segments, broadly in line with the provisions of article 13b of the BMR.

**To conclude, benchmarks administrators that aim at providing fair, reasonable and non-discriminatory service or rights to all the entities in a given segment of the audience; should be allowed to offer different products and services across segments of the audience in order to address different needs**

<ESMA\_QUESTION\_DP\_BMR\_2>

1. 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>

EMMI agrees with ESMA’s proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle, in particular with regard to the fact that the development of the methodology and the governance arrangements, including oversight and accountability, constitute the core of the administrator’s responsibilities. We note, however, that certain administering responsibilities, for example, as with article 3 (3)(b) “collecting, analysing, and processing input data for the purpose of determining a benchmark” may be performed by third party agents who conduct their work under standards set by the administrator. This is acknowledged in IOSCO principle and Article 6 of the BMR.

In this context, we would like to underline that, while the administrator must be responsible for the integrity of the benchmark by ensuring an appropriate methodology, governance and control framework, the contributors should remain responsible for the integrity, accuracy and reliability of their submissions in accordance with the code of conduct and the regulatory requirements. Similarly, while the administrator must be able to access relevant information concerning internal controls and data/process validation at contributors’ level in the event that misconduct or any other irregularity is conducted, the primary responsibility with regard to the verifiability and record-keeping of relevant aspects of a contributor’s submissions should rest with the contributor.

<ESMA\_QUESTION\_DP\_BMR\_3>

1. 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>

The definition of issuance with the EU, as outlined within Directive 2003/71/EC, applies to securities offered to the public or admitted to trading.   The market convention and legal standards are that issuance applies to securities and not to other financial instruments, including derivatives.  We note that a broader set of financial products are invoked under “use of a benchmark” within Article 3 (5) (b and c) and therefore there should be no need to redefine the concept of issuance within Article 3 (5) (a). With the caveat expressed in response to Q5 below, EMMI considers that the current definition, as outlined within Article 3(5), covers all forms of “use of a benchmark” and is sufficiently broad to provide investor protection.

<ESMA\_QUESTION\_DP\_BMR\_4>

1. 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>

The discussion paper states that the concept of issuance “should instead more generally cover the act of creating a financial instrument which references an index or a combination of indices (mainly bonds, derivatives and investment funds as further explored in Chapter 8 of the Discussion Paper) for the purposes 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 per-son/legal entity is exposed to)”.

In our view, it is not entirely clear whether this concept of issuance as proposed by ESMA would also entail “manufacturing” of financial instruments, where the product manufacturer is not the issuer. The reference to “creating a financial instrument” seems to broadly refer to the concept of product manufacturer (i.e. the concept that is also relevant for purposes of MiFID II), instead of issuer. However the reference to “seeking financial resources” or coverage could suggest that only issuers are concerned.

In the context of EMMI activities, we define very specific rights for market operators and CCPs in connection with possible creation of financial instruments or financial contracts for trading:

·      under the Futures Trading License, organisations may use EMMI benchmark data as an underlying reference rate for a financial markets futures contract they operate; or a daily, weekly, monthly or quarterly settlement price in relation to a futures contract that they operate.

·     under the Clearing Services License, organisations may use EMMI benchmark data as reference rates in the member clearing activities of the company; a daily, weekly, monthly or quarterly settlement price in relation to member clearing services that they operate.

EMMI believes that the activities covered by these licenses could fall under Article 3(5) a, b or c, depending on the type of product.  However we would encourage ESMA to offer clarification that the incorporation of a *third-party administered benchmark into a contract specification by a market operator or CCP does indeed fall under the concept of “use of a benchmark”.*

<ESMA\_QUESTION\_DP\_BMR\_5>

1. 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>

Yes, EMMI generally agrees with the proposed list of appropriate governance arrangements for the oversight function.

However, EMMI believes that ESMA should further clarify the oversight function’s role in decision-making processes. Following article 37, *“the main purpose of the oversight function is to ensure an effective challenge to the Board or equivalent management of the benchmark administrator.”* From the proposed consultative text it is not sufficiently clear whether the oversight function (i.e. Steering Committee) should have a role to challenge the administrator’s management or advisory role, or whether it should also be considered a decision-making body (please also refer to responses to Q14 to 16).

EMMI has established a sound and robust governance structure. This governance structure is composed of different entities to assess the governance and control framework of its benchmarks, methodological considerations and elements of transition, if need be. The governing bodies include the EMMI Board of Directors, the EMMI General Assembly and the Euribor-Eonia Steering Committee.

The EMMI Board of Directors (supported by the Audit Committee and the Conflicts of Interest Oversight Committee) and EMMI General Assembly are responsible for reviewing and approving high critical issues related to the benchmarks provided by EMMI. However, the EMMI General Assembly and EMMI Board of Directors delegate responsibility for the day-to-day management of all aspects of the methodology and governance and control framework of the benchmark setting process to the Steering Committee. In this context, the Steering Committee serves as the primary governing body to oversee all aspects of the benchmark setting process. Furthermore, the Steering Committee is the adjudication body with respect to the Code of Conduct and therefore has the right to impose sanctions for violations to the Code.

**In this context, EMMI believes that the oversight function should be the responsible body to oversee the proposed governance arrangements and any issues related to the oversight of the benchmark(s).**

<ESMA\_QUESTION\_DP\_BMR\_6>

1. 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>

Yes, EMMI believes that believes that these proposals sufficiently address the needs of all types of benchmarks and administrators

<ESMA\_QUESTION\_DP\_BMR\_7>

1. 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>

Yes. EMMI has a separate oversight committee to ensure an effective oversight function of all aspects of the benchmarks. The Euribor- Eonia Steering Committee is responsible for the oversight of the two benchmarks it provides: Euribor and Eonia.

EMMI reviewed the composition of the Euribor Steering Committee by reducing the number of members from panel banks to a minority and including other classes of stakeholders in order to further develop its independence and diversity. Therefore, the Steering Committee reflects a good balance of independent experts, benchmark users, market practitioners directly involved in market operations or who bear direct responsibility in their bank for these activities and other stakeholders. Moreover, all the members are appointed on a personal basis must be independent and not subject to instructions from the companies or organisations to which they belong.

**EMMI believes that the composition of this committee, publicly available at the website, is sufficiently diversified to establish and maintain an effective oversight function**.

<ESMA\_QUESTION\_DP\_BMR\_8>

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

<ESMA\_QUESTION\_DP\_BMR\_9>

EMMI believes that in order to ensure an effective oversight function, the oversight function must be composed of members that can provide with technical input and market expertise to ensure that the Steering Committee’s decision are in line with the market reality. To this end, EMMI believes that oversight functions should be adapted to the benchmarks’ characteristics in particular with regards to input data, methodology and the underlying market (i.e. secured, unsecured…) it seeks to measure.

As an example, Euribor and Eonia have the same oversight committee membership as they are both interest rate benchmarks from the short term unsecured money markets and composed of contributing banks, although the oversight of both benchmarks are discussed as separate items on the agenda. They have same regulatory requirements applicable in terms of a governance and control framework, as well as in terms of input data and control framework for its contributors. For benchmarks from the same family it may be appropriate to have a single oversight function as the expertise can be leveraged from one benchmark to the other.

However, this may not be the case for a benchmark measuring different underlying markets (e.g. secured vs unsecured), based on different submissions processing and different methodologies.

**To conclude, while EMMI agrees that benchmarks from the same family could have the same oversight committee; benchmarks with different characteristics should have different oversight bodies on the basis of nature of the respective benchmark and the market or economic reality it seeks to measure**.

<ESMA\_QUESTION\_DP\_BMR\_9>

1. 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>

EMMI believes that the appropriateness of the oversight function should be more related to the benchmark’s technical specifications rather than to the benchmark’s criticality (please refer to question 9).

<ESMA\_QUESTION\_DP\_BMR\_10>

1. 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>

Same response as question 10.

<ESMA\_QUESTION\_DP\_BMR\_11>

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

<ESMA\_QUESTION\_DP\_BMR\_12>

EMMI agrees that the composition of the oversight committee, as a governance decision making body, should have a good balance with independent experts, benchmark users and other stakeholders. However, even if representing a minority, EMMI believes that the participation of contributors in the oversight Committee level is key as some tasks related to the monitoring and maintenance of the benchmarks, and enhancements and developments to its calculation methodology may require the technical insight from experts which are more closely linked to the market in order to ensure that the oversight committee’s decisions are in line with the market reality and operationally viable for contributors.

While indeed contributors could be subject to conflict of interest situations, these conflicts should be disclosed and managed. As an example, the current Euribor Code of Conduct establishes that to mitigate any potential conflicts of interest, all members are appointed on a personal basis, must be independent and not subject to instructions from the companies or organisations to which they belong. Accordingly, each member of the Steering Committee must submit and sign a declaration of interests whereby Members shall declare any relevant interests.

<ESMA\_QUESTION\_DP\_BMR\_12>

1. 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>

EMMI has put in place governance arrangements that are in keeping with its business model and provide effective oversight. An administrator should be left the discretion to establish the most appropriate oversight function in keeping with, and proportional to, the benchmarks under management.

<ESMA\_QUESTION\_DP\_BMR\_13>

1. 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>

EMMI agrees that an oversight function should not be responsible for overseeing the business decisions of the management body. The oversight function should focus on exercising oversight over the benchmark(s) while the Board of Directors or a similar body should remain responsible for business decisions.

<ESMA\_QUESTION\_DP\_BMR\_14>

1. 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>

EMMI believes that the positioning of the oversight function of an administrator should remain sufficiently flexible to adapt to the administrator’s governing structure, as long as appropriate governance arrangements are implemented in line with regulatory requirements. In this context, we agree that the oversight body should operate as a consultative body, while remaining the responsible body for the oversight of the benchmark(s).

As an example, the Euribor Steering Committee is responsible, *inter alia*, for the monitoring of compliance with the Code of Conduct (and therefore has the right to impose sanctions for violations to the Code) and market developments, the adoption, review and update of the control framework for the benchmarks determination process and for the design and monitoring of the benchmark(s)’ methodology. They propose changes to the Code and the benchmark(s)’ methodology and related policies and procedures for recommendation to EMMI’s General Assembly.

In addition, in order to ensure an independent and transparent management of conflicts of interest, EMMI established an independent Conflict of Interests Oversight Committee that monitors potential conflicts of interest situations and plays a role in detecting and managing actual or perceived conflicts of interest. Finally, the Board of Directors, supported by the Audit Committee, is responsible for strategic & business decisions and risk oversight.

<ESMA\_QUESTION\_DP\_BMR\_15>

1. 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>

No additional comments.

<ESMA\_QUESTION\_DP\_BMR\_16>

1. 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>

EMMI agrees with the proposed procedures regarding the oversight function. These criteria are currently embedded in the Euribor Code of Conduct. In addition, the Euribor Code of Conduct specifies the voting procedures and establishes that the number of votes in favour, against and abstentions shall be systematically recorded in the minutes of the meetings.

EMMI believes that similar procedures should be applicable for different types of benchmarks.

<ESMA\_QUESTION\_DP\_BMR\_17>

1. 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>

EMMI considers that the participation of contributors and user representatives in the oversight committee represents an added value for the Administrator in the execution of the tasks mentioned in Art. 5a (3).

EMMI agrees with the approach proposed in the position paper where the disclosure through a declaration of conflict of interest plays a major role in ensuring transparency of decision-making processes (EMMI publishes the declarations of interest of the members of the oversight function on its website together with the minutes of the meetings and includes in these declarations a non-exhaustive list of the main potential conflicts of interest situations that might affect the members).

In order to mitigate potential conflicts of interest the composition of the oversight function must be diversified to ensure that contributor representatives are always a minority. In addition, EMMI established an independent Conflict of Interests Oversight Committee that monitors potential conflicts of interest situations and plays a role in detecting and managing actual or perceived conflicts of interest.

With particular reference to the example described in section 52 of the position paper, different arrangements should also be considered (alternative to the exclusion from monitoring activities) e.g. the presence of members non-affiliated with contributors at the meetings of the oversight function shall always be higher than that of members directly or indirectly affiliated with contributors; possibility to exclude representatives of contributors (and individual responsibility to recuse from relevant decision-making) in case specific decisions and/or sanctions have to be deliberated with reference to the represented contributor.

<ESMA\_QUESTION\_DP\_BMR\_18>

1. 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>

While EMMI agrees there are records which need to be retained to ensure future verifiability of past contributions and the audibility of the determination process and that the administrator must be able to access the relevant information in the event of misconduct, we would like to stress that **the primary responsibility with regard to the verifiability and record-keeping of relevant aspects of a contributor’s submissions should rest with the contributor.**

We strongly believe that in order to reduce the operational complexity and data management burden for the administrators, it would be sufficient to require contributors to retain a subset of required records exclusively on their side which can be made available to administrators only upon request and to ensure through independent review that contributors comply with the respective record retention requirements defined in the respective administrator’s code of conduct.

In addition, we suggest differentiating required types of records based on whether the benchmark methodology allows for the exercise of discretion and expert judgment.

With respect to the actual types of records to be retained by the administrator, we recommend ESMA to take also into consideration whether the concrete information is commercially sensitive, requires extensive efforts with respect to communication or retention tools, cost burden on contributors and administrators, impact on the willingness or ability of contributors to participate, or degree to which it goes beyond IOSCO Principle 18 regarding audit trails.

<ESMA\_QUESTION\_DP\_BMR\_19>

1. 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>

Based on operational considerations, EMMI strongly believes that the proposed frequency of weekly transmission is too burdensome for both the administrators and contributors. The transmission should indeed be defined by the administrator taking operational capacity of the administrator and contributors, as well as the time criticality of the information into consideration.

For example, the information whether a contribution has been determined in accordance with the specified hierarchy of data inputs and if not, which alternative data type (e.g. expert judgment) has been applied, would be more time critical (given the administrator’s responsibility to validate contributions, but also in light of IOSCO Principle 9) than say “remedial actions taken in response to audit findings and progress in their implementation” or “deviations from procedures and practices governing contributions and the underlying data, as stipulated in the code of conduct”.

We would therefore consider it appropriate for administrators to define reporting schedules with different reporting elements and levels of aggregation (e.g. daily: information on what a given contribution is based on, for example expert judgment, monthly: deviations from procedures and practices governing contributions and the underlying data, as stipulated in the code of conduct).

<ESMA\_QUESTION\_DP\_BMR\_20>

1. Do you agree with the concept of appropriateness as elaborated in this section?

<ESMA\_QUESTION\_DP\_BMR\_21>

EMMI agrees with the concept of appropriateness and its link to the determination methodology: In a first instance, it is the administrator’s responsibility to ensure the determination methodology including type and details of the contribution data are appropriate to measure the Underlying Interest the benchmark seeks to measure, which is then specified in the respective code of conduct. Whether a contribution is appropriate therefore depends on the specification of the contribution data in the code of conduct.

However, EMMI does not believe “it is appropriate that an administrator keeps records of the analyses performed to ascertain the appropriateness of the input data, in order to be able to reconstruct the whole process before coming to a final judgment, as a basis for possible subsequent proof, which could be necessary and which could be conducted either by the administrator itself or by the competent authority”. The primary responsibility with regard to verifying the appropriateness of a contributor’s input data with respect to the methodology/Code of Conduct should rest with the contributor.

Furthermore, the concept of appropriateness for benchmarks allowing for contribution discretion and expert judgment may be less tangible or objective than for benchmarks without contribution discretion.

<ESMA\_QUESTION\_DP\_BMR\_21>

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

<ESMA\_QUESTION\_DP\_BMR\_22>

Again, while the appropriateness of the methodology is the responsibility of the Administrator, the appropriateness of the input data in line with the methodology is, in EMMI’s, the responsibility of the contributor.

While the checks listed in the consultation paper are justified, **it is important to stress that it is the administrator’s responsibility to specify what constitutes an appropriate contribution (giving guidance as to which validation measures should be applied) but that the primary responsibility to validate the appropriateness of the contribution itself needs to be with the contributor.**

Hence, the benchmark’s code of conduct should require contributors to develop and implement a control framework which ensures that adequate processes, procedures and rules are in place to warrant the appropriateness of their contributions, which needs to be verified through independent external review.

The administrator should then perform plausibility and sanity checks on received contributions (for example, absolute and relative movements of the contributions, adherence to contribution specifications, analysis of distributions etc.) which could trigger the administrator to conduct more in-depth analysis by for example by challenging a contributor to explain a contribution or by breaking down the contribution details in order to verify the contribution is based on appropriate inputs, assumptions, determination steps etc.

However, given that there are benchmarks with larger number of contributors, it would be operationally extremely burdensome to require administrators to conduct on a daily basis more complex validations that rely for example on qualitative information such as underlying assumptions, criteria underlying the exercise of expert judgment or more sophisticated analysis like “demonstrating its compatibility with the methodology and by proving a sufficiently high degree of comparability”. Validations on the administrator side should to the extent operationally feasible serve the purpose of raising a flag as to when further investigation or verification is required by the contributor.

<ESMA\_QUESTION\_DP\_BMR\_22>

1. 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>

Yes, according to the record-keeping requirements identified in the Euribor Code of Conduct, EMMI currently keeps record of the analyses performed by the administrator once submissions are collected from contributors. EMMI believes that the analyses and controls performed at contributors’ level before transmission of their submission should be maintained by the contributors, and be available at any time upon request by the administrator and the supervisory authorities.

ESMA is invited to consider that according to the Euribor Code of Conduct, contributors are required to commission an annual review of Euribor submission process by an independent third party authority. This review includes the compliance of contributor’s operational procedures (e.g. including hierarchy of data used to inform the daily submission) with the Code of Conduct. The administrator keeps record of the external audit reports.

<ESMA\_QUESTION\_DP\_BMR\_23>

1. Do you see other possible measures to ensure verifiability of input data?

<ESMA\_QUESTION\_DP\_BMR\_24>

EMMI agrees with the measures to ensure verifiability of input data as they relate to record keeping obligations for contributors or administrators (see our response to question 19).

On page 31 of the consultation, two verification techniques are proposed: comparison against data from related markets and back-testing. We would also consider “challenging” a contribution (thus requiring contributors to justify their contribution in detail) and “challenging” the reasoning (e.g. when expert judgment is involved) as other additional verification measures.

However, it should be noted that we believe that these measures could also be interpreted as validation techniques and that the concepts of validation and verification require further clarification (see our response to question 25).

<ESMA\_QUESTION\_DP\_BMR\_24>

1. 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>

First and foremost EMMI would like to reiterate that the responsibility for evaluation and validation of input data should be ongoing obligations for both the contributors and the administrators (see schematic representation below).

Furthermore, while we do agree in principle with the input data scrutiny process and content, we believe that the used terminology and respective concepts can be confusing. Evaluation, validation and verification, in our view, all relate essentially to the assurance of the appropriateness of a given contribution, albeit differing in breadth and depth, focusing on different dimensions of appropriateness (e.g. conformity with transmission protocol or accuracy of the contribution) and conducted at different stages of the input data scrutiny process (i.e. before or after publication).

We would therefore understand ESMA’s “evaluation” as pre-calculation/publication validation (formal checks, simple checks of the correctness or accuracy of a contribution) and ESMA’s “validation” as more comprehensive, broader post-publication validation. Which tests are performed prior to publication and which after is a matter of operational feasibility, not a question of the nature of the individual validation measures themselves.

Lastly, we would understand “verification” as an in-depth validation of a contribution when there is suspicion or simply upon failure to pass the standard pre- and post-publication validation and not performed at every determination. Verification would entail challenging contributors to justify a given contribution, back-testing, or assuring the appropriateness of the underlying elements (data, assumptions, models etc.) and respective determination steps of a contribution through comparison, reasoning, fact checking etc. (yet ultimately with the goal to assure the appropriateness of the contribution itself).



<ESMA\_QUESTION\_DP\_BMR\_25>

1. 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>

EMMI agrees that contributors must ensure that all staff involved in data submissions, including submitters, approvers, and management and staff in the relevant control and audit functions, have the knowledge and expertise necessary for the discharge of their responsibilities. In particular, these staff should undergo appropriate training and development programs, including in the provisions of the code of conduct, associated internal controls, applicable regulations, the avoidance of conflicts of interest, the ethical standards that they are expected to observe in their respective roles. Such training programmes should be adapted to the function and level of participation of the staff in data submission activities. In particular, submitters should have significant experience in the relevant Euro money markets and receive specific training in relation to the analytic framework and input data.

<ESMA\_QUESTION\_DP\_BMR\_26>

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

<ESMA\_QUESTION\_DP\_BMR\_27>

EMMI agrees that the three lines of defence-principle is an effective type of internal oversight architecture, ensuring clarity of roles and responsibilities and independence of control functions, however EMMI would support other oversight arrangements that achieve the same goals, depending on the scale and nature of contributor’s organisation.

<ESMA\_QUESTION\_DP\_BMR\_27>

1. Do you identify other elements that could improve oversight at contributor level?

<ESMA\_QUESTION\_DP\_BMR\_28>

MiFID already requires that supervised entities have robust compliance, risk control and internal audit functions to ensure market integrity. EMMI supports reliance upon these functions as the primary oversight at the contributor level.

EMMI also supports periodic independent reviews of the input data contribution process by a contributor’s compliance or internal audit function or another external firm. Further, it is our view that the response to this question should align with the requirements of the IOSCO Principles, particularly in Principle 14 (and to a lesser extent, Principles 4 and 17). IOSCO Principle 14 calls for a code of conduct that requires contributors to adhere to a number of measures, including conflict of interest and recordkeeping policies, procedures for submitting inputs, and methodologies to determine eligible inputs.

In this context, EMMI insists that the administrators’ oversight should focus on obtaining sufficient assurance from contributors (e.g. through certification of compliance, results of periodic independent reviews) but that the administrator should not have an investigation and/or internal monitoring role within the contributors’ respective entities. It is important that the supervised entities remain responsible for monitoring their compliance with their administrators’ code of conduct, the regulatory requirements, and their internal policies and procedures.

<ESMA\_QUESTION\_DP\_BMR\_28>

1. 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>

EMMI agrees with the list of elements proposed in the position paper which is consistent with the guidelines already provided to Euribor contributors in the Euribor Code of Conduct. ESMA might consider the opportunity to further clarify the following aspects:

“*Disclosure of actual or potential conflicts of interest of benchmark contributors or individual staff members*” this disclosure should include:

* + the establishment of an internal escalation channel for all contributor’s staff to immediately report if they suspect any manipulation, attempt of manipulation, or collusion in actual or attempted manipulation of a quote submission or fixing,
	+ the procedure to disclose any actual or perceived conflict of interest or issues relating to potential conflicts of interest to the administrator.

“*Measures to prevent any person from exercising inappropriate influence over the way in which staff involved in input data submission carry out activities*” and “*contingency provisions in case of temporary inefficiency of the envisaged controls of the flow of information*”.

These measures could be clarified with some examples e.g. internal policies and procedures regarding organizational arrangements, processes and control environment; ethical standards; trainings, periodic reminders, refresh courses for the staff etc.

<ESMA\_QUESTION\_DP\_BMR\_29>

1. 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>

Given that verifiability has to be understood as the capacity to deconstruct a contribution into the elements, data points and determination steps in order validate their appropriateness and the correctness of the determined contribution, EMMI believes that there needs for distinction between benchmarks allowing discretion and those that do not require the use or discretion of expert judgment (regulated data benchmarks). Verifiability measures should be proportionate to the criticality and significance of the benchmark.

<ESMA\_QUESTION\_DP\_BMR\_30>

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

<ESMA\_QUESTION\_DP\_BMR\_31>

EMMI would like to point out that while the accuracy and integrity of contributions can be seen as functions of the elements “front office contributions”, “type of input data” and “supervised vs non-supervised entity”, the element “size of the contributor organization” does not allow the same inference. Meanwhile, EMMI acknowledges that the size of the contributor is a practical consideration that needs to be taken into account when assessing the efforts which a contributor can be reasonably expected to undertake. Having said this, EMMI agrees with the list of criteria but encourages that the requirements align with IOSCO Principles as much as possible.

Additionally, EMMI recommends ESMA to assess whether input data which constitutes a subset of a data set which is transmitted by a contributor to a public authority in the context of regulatory reporting could also be considered an element justifying differentiation.

<ESMA\_QUESTION\_DP\_BMR\_31>

1. 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>

Refer to Q 31

<ESMA\_QUESTION\_DP\_BMR\_32>

1. 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>

Refer to Q31.

<ESMA\_QUESTION\_DP\_BMR\_33>

1. 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>

The key elements listed by ESMA under paragraph 122 of the DP are, in EMMI’s opinion, sufficiently granular to allow users to assess the appropriateness of the benchmark they reference in financial instruments and contracts.

<ESMA\_QUESTION\_DP\_BMR\_34>

1. 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>

In line with the IOSCO Principles for Financial Benchmarks, and so that users can understand and further assess the suitability of the benchmark as a reference index in their instruments and contracts, EMMI believes that the benchmark methodology may also identify and make reference to potential limitations of the benchmark, in particular, to its operation in illiquid or fragmented markets, as well as the possibility concentration of inputs.

<ESMA\_QUESTION\_DP\_BMR\_35>

1. 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>

EMMI generally agrees with disclosing the proposed key elements of the methodology to allow stakeholders to understand how the benchmark is derived and assess whether it’s the most appropriate benchmark for its intended use. However, it would like to stress that there may be challenges for stakeholders to be able to fully replicate the benchmark.

EMMI would like to have further clarification from ESMA on the exact meaning of “minimum quantity input data required” ( i.e. volume threshold, threshold in terms of contributors or other).

While EMMI agrees that verification procedures on input data may be disclosed, the disclosure of these should be a high level description of the category of checks performed. Specific aspects of the procedures such as the exact calculation formulas used, or the results of the periodic analyses, should not be disclosed given the sensitivity of such data.

<ESMA\_QUESTION\_DP\_BMR\_36>

1. 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>

EMMI agrees that the administrator shall review the benchmark methodology periodically to ensure that the benchmark continues to be representative of the underlying market it seeks to measure. As per article 5(a) of the BMR the administrator’s oversight function shall review the benchmark’s definition and methodology at least annually, oversee any changes to the benchmark methodology and be able to request the administrator to consult on these changes.

In the context of critical benchmarks, EMMI agrees with the proposed annual revision by the oversight committee and with the publication of the membership of the respective oversight committee. The composition, biographies and declarations of interests of Steering Committee Members are currently available on the EMMI website. Further details on the appointment and removal procedures, as well as on the voting procedures are included in the Euribor Code of Conduct.

Moreover, as per the EMMI Benchmark Consultation Policy, stakeholders must be consulted upon any changes to the benchmark methodology and the summary of the feedback received shall be publicly disclosed after the approval of EMMI’s governing bodies. The level of disclosure envisioned should however be applied proportionally depending on the significance of the benchmark.

<ESMA\_QUESTION\_DP\_BMR\_37>

1. 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>

EMMI agrees with ESMA’s proposals on consulting stakeholders on any material changes to the benchmark methodology on a timely manner to enable them to adapt to the methodological changes if need be. Moreover, EMMI has aligned its consultation policy with such requirements and consults all stakeholders accordingly.

However, EMMI would like to stress that even if material changes have been consulted upon, given the impact it could have on stakeholders, it may be very challenging for the administrator to proceed with the material changes without a sign off or green light from supervisory authorities.

<ESMA\_QUESTION\_DP\_BMR\_38>

1. 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>

EMMI agrees with publishing individual responses to consultation as long as the confidentiality of respondees, if so requested, can be respected.

<ESMA\_QUESTION\_DP\_BMR\_39>

1. 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>

EMMI agrees with ESMA’s views that disclosing key elements of the methodology is to allow users to understand the provision of the benchmark and its appropriateness as a reference for financial instruments and contracts. In this context, EMMI agrees with the publication requirements for key methodological elements regardless of the benchmark typology.

<ESMA\_QUESTION\_DP\_BMR\_40>

1. 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>

EMMI agrees that the same publication requirements for the internal review of the methodology should be applicable regardless of the benchmark sector and publication requirements should be proportional to the benchmark as provided in the level 1 text of the BMR.

<ESMA\_QUESTION\_DP\_BMR\_41>

1. 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>

EMMI agrees that the BMR already establishes a sufficient level of proportionality.

<ESMA\_QUESTION\_DP\_BMR\_42>

1. 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>

While indeed, a standard code of conduct could be useful for benchmarks with similar characteristics, a standard code of conduct may not be applicable for all types of benchmarks that an administrator provides.

The administrator should be able to apply the principle of proportionality depending on the criticality or significance of the benchmark as requirements for contributors may have to be calibrated in the code on the basis of the benchmark’s typology.

Furthermore, EMMI believes that the benchmark characteristics in particular with regard to input data, methodology and its underlying market (e.g. secured vs unsecured) should also be considered for the purpose of the code of conduct. Moreover, the types of contributors or sources of data (i.e. panel banks, trade venues etc.) should also be taken into account as these could have different regulatory requirements which should be taken into account in the code of conduct.

In this context, while EMMI agrees that benchmarks from the same family could well share the same code of conduct, benchmarks with different characteristics should have different codes of conduct adapted to the nature of the respective benchmark and the market or economic reality it seeks to measure.

Finally, EMMI would like to underline that as pointed out in the discussion paper, it is crucial to find a balance between a sufficiently robust and detailed code of conduct and the risk of it becoming too burdensome and demanding for contributors, which could jeopardise contributors’ participation.

<ESMA\_QUESTION\_DP\_BMR\_43>

1. 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 refer to question 43.

<ESMA\_QUESTION\_DP\_BMR\_44>

1. 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>

EMMI generally agrees with the proposed requirements for a contributors’ process. Nevertheless, we would like to comment on:

1. “Guidelines on the contributor’s procedures for internal oversight and verification in the case that data is contributed form a front office function. Such guidelines should conform to what required under RTS [pursuant to Article 7 BMR].”

We believe that for contributions not based on a front office function, similar guidelines can be expected with respect to internal oversight as well as a contributor’s responsibility to ensure the accuracy and integrity of its contributions through adequate validation and verification processes.

1. “The procedures to ensure that any actual or suspected infringements of this Regulation are reported without undue delay to the administrator, which may then act in accordance with Article 8.”

The administrator should be informed of any actual or suspected infringements of the regulation to ensure the integrity of its benchmarks, any infringements, however, should be reported by the contributor directly to their respective Regulatory Authority who has the primary role to investigate breaches with the support of the administrator, as needed.

<ESMA\_QUESTION\_DP\_BMR\_45>

1. 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>

EMMI generally agrees with the details of the code of conduct as specified by ESMA. Administrators however need the latitude to tailor the details of their codes of conduct with respect to their specific benchmarks, provided IOSCO Principles are preserved.

<ESMA\_QUESTION\_DP\_BMR\_46>

1. 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>

 a) Identification of contributors and submitters (including submitter authorization)

EMMI agrees that a code of conduct should establish clear guidelines with regards to the roles and responsibilities of contributors. Moreover, the current Euribor Code of Conduct sets up organizational guidelines and requires policies and procedures at contributor level to manage conflicts of interest. In addition, EMMI agrees that should ensure that the staff involved should have appropriate trainings and qualifications to ensure that they have the necessary skills, knowledge and expertise for the discharge of their responsibilities. EMMI agrees that only authorized contributors should be allowed to contribute input data and the contributing bank should submit the list of names appointed as authorized contributors to the administrator to enable its oversight function. Notwithstanding, EMMI would like to stress that it should remain the responsibility of the contributor to appoint and evaluate the submitters they appoint and is not administrator’s responsibility as outlined in points 159 and 160 of the discussion paper.

**While indeed the Code of Conduct should set up governance and control guidelines at contributor level, it should remain the contributors’ responsibility to establish and maintain effective organizational, internal oversight and staff resourcing arrangements for their benchmark related activities.**

1. Description of input data and requirements for contribution

EMMI agrees that a hierarchy of data inputs shall be established in a code of conduct, in particular for submission based benchmarks.

In addition, EMMI concurs that expert judgement shall be framed and generally agrees with the proposed hierarchy of data inputs to be included in a code. However, we believe that a greater degree of discretion should be granted to the administrator in defining such priorities depending on the nuances inherent to the nature of the benchmark or to the underlying market it seeks to measure.

<ESMA\_QUESTION\_DP\_BMR\_47>

1. 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>

Contributors should manage possible conflicts of interest at the level of submitters according to their own conflict of interest policy whose main elements are described in point 97 of the discussion paper. A mapping of potential conflicts of interest and of the preventive controls put in place by the contributor to prevent actual conflicts to occur might be helpful. The comprehensiveness of the mapping and the suitability of associated preventive controls should be assessed by internal/external auditors during the annual review.

The administrator should be informed of actual or perceived conflicts of interest or issues, including the mitigating actions/resolutions already taken by the contributor, to the extent such conflicts affect the integrity of the benchmarks.

<ESMA\_QUESTION\_DP\_BMR\_48>

1. 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>

EMMI agrees with ESMA’s interpretation that the administrator should expect that submitters have the necessary skills, knowledge and expertise to perform their duties (157) and would not be subject to undue influence or conflicts of interests (158).

**Nevertheless, EMMI believes that it is crucial that contributors remains responsible for evaluating the authorisation of submitters according to the code of conduct and their respective internal policies and procedures.** It would be very burdensome and, to some extent less efficient, to require the administrator to perform this evaluation for each and every contributor, as this would require a good knowledge of their respective organisational structures and their internal policies and procedures.

<ESMA\_QUESTION\_DP\_BMR\_49>

1. 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>

Depending on the nature or significance of the benchmark, EMMI agrees that if exclusions of input data are permissible, clear rules should be established as to when these exceptions could be applicable. Administrators should agree with contributors on protocols for confirming adherence regarding input data and specification for completeness, including the code of conduct.

<ESMA\_QUESTION\_DP\_BMR\_50>

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

<ESMA\_QUESTION\_DP\_BMR\_51>

EMMI generally agrees with the listed procedures for submitting input data, recognizing that EMMI is managing benchmarks of critical importance and that some of the standards could be tailored to the significance of the benchmark in line with principle of proportionality. In addition, for critically important benchmarks, ESMA is invited to consider including procedures/protocols for correcting contributions prior to the benchmark determination as well as for the reporting of erroneous contributions post benchmark determination. If applicable, procedures/protocols for contributions within a re-determination/re-fixing window should be included.

Procedures should also include confidentiality requirements and data protection in order to ensure that contributor’s submissions are not exposed to unauthorized parties before such information is publicly available. Data protection should also include IT security standards avoiding unwanted and/or uncontrolled changes in the submissions.

<ESMA\_QUESTION\_DP\_BMR\_51>

1. 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>

EMMI agrees that rules are necessary to provide consistency of contributor’s behaviour over the time. In particular, EMMI believes that these rules should be set up in the code of conduct with a view to set uniform standards for contributors with respect to their activities in submitting data for the determination of the benchmark. These rules should cover at least the standards for the conduct of submissions by contributors and specific obligations of contributors with respect to the governance, methodologies, control environment and independent review related to input data (including validation, record-keeping, reporting of suspicious behaviour and conflicts of interest management requirements).

<ESMA\_QUESTION\_DP\_BMR\_52>

1. 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>

EMMI believes that policies, in addition to those set out in the methodology, should be in place at the level of the contributors regarding the use of discretion in providing input data.

The establishment, adherence to, and maintenance of these contributor-level policies are critical components which allow the administrator to exercise its oversight responsibilities and facilitate the periodic reviews undertaken by the administrator of contributors’ activities and processes.

<ESMA\_QUESTION\_DP\_BMR\_53>

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

<ESMA\_QUESTION\_DP\_BMR\_54>

Page 54 of the consultation states with respect to validation:

“Contributions should be checked for correctness. Validation could include, for example, a “four eye” process, senior manager signature, and automatic checks by the system or pre-set thresholds, that the administrator may impose – via the code of conduct - as a pre-requisite for acceptance of contributors.”

In the context of critical benchmarks, EMMI believes that correctness may be broken down further into the following dimensions:

**Completeness**: A contributor must ensure that all eligible input data have been considered in the determination the contribution.

**Conformity**: A contributor must ensure that the format of the transmission and the contribution itself are consistent with the required contribution and transmission format (e.g data type/format).

**Accuracy**: A contributor must ensure that the data inputs going into the contribution determination and the contribution itself are precise.

**Consistency:** A contributor must ensure that the contribution does not contain or is not based on conflicting or contradictory information.

**Timeliness:** A contributor must ensure that the contribution is provided to the Administrator on a timely manner.

EMMI recommends specifying that “contributions should be checked for completeness, conformity, accuracy, consistency, and timeliness”.

In addition, the system or pre-set thresholds that the administrator may determine. As an administrator, EMMI would expect contributors to develop adequate measures to validate their contributions as part of their obligation under their control frameworks.

<ESMA\_QUESTION\_DP\_BMR\_54>

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

<ESMA\_QUESTION\_DP\_BMR\_55>

EMMI is administering critically important benchmarks and as such we would envision a broad set of records to be kept by contributors. Nevertheless, such information should be specified in the administrator’s code of conduct and be tailored proportionally, to the circumstances of the particular benchmark and its significance.

In the case of EMMI, we have set a standard for record-keeping at the contributor level which includes:

* regular monitoring reports (including any analysis performed on input data) and reports of internal and external auditors. Subsequent reports on actions taken and progress in implementing remedial actions should also be retained;
* records of submission queries and complaints, and their respective outcomes;
* listing of the Submitters and Approvers (if applicable), including their names and general roles, with the dates when submission-related roles were authorized or exited;
* record of disciplinary actions taken against any contributor’s staff in respect of benchmark-related activities;
* daily records of the daily application of the 4-eyes principle;
* daily position or risk reports for units which undertake dealing activity in instruments or derivatives referencing to the benchmark;
* communications among contributor’s staff, between contributor’s staff and internal and external third parties and between the staff of the contributor dealing with instruments referencing to the benchmark and any other internal or external third party.

**EMMI wishes to underline that such records must be retained at contributors’ level and be made available to the administrator and the supervisory authorities upon request.**

<ESMA\_QUESTION\_DP\_BMR\_55>

1. 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>

EMMI agrees that the use of expert judgment and discretion should be recorded together with underlying assumptions, supporting data, models etc. to ensure the verifiability of contributions.

EMMI would find it sensible if the detailed record retention requirements would be adapted to data type of the contribution and the nature of the benchmark.

Finally, as commented in our response to Q19, ESMA should also into consideration whether the concrete information is commercially sensitive, requires extensive efforts with respect to communication or retention tools, cost burden on contributors and administrators, impact on the willingness or ability of contributors to participate.

<ESMA\_QUESTION\_DP\_BMR\_56>

1. 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>

EMMI believes that contributors should establish escalation channels that should be used by any staff, if they suspect that any person is manipulating, attempting to manipulate, or colluding in an actual or attempted manipulation of a benchmark, either currently or in the past.

As an example, this is a requirement established by EMMI for contributors in the Euribor Code of Obligations for Panel Banks.

<ESMA\_QUESTION\_DP\_BMR\_57>

1. 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>

Conflict of interest policies and procedures adopted by the contributor should be evaluated in terms of effectiveness, and by the benchmark’s code of conduct, in line with procedures for a benchmark for independent review and proportional to the benchmark. Findings should be communicated to the administrator.

<ESMA\_QUESTION\_DP\_BMR\_58>

1. 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>

EMMI believes that contributors should have effective systems and controls in place to ensure the integrity and reliability of all contributions of input data to the administrator under at all times particularly for those benchmarks of critical importance. Code of conducts should also ensure that contributors have contingencies in place in the event of disruptions.

<ESMA\_QUESTION\_DP\_BMR\_59>

1. 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>

EMMI agrees with the proposed list of requirements for supervised contributors. Similar requirements are already established in the Euribor Code of Conduct.

<ESMA\_QUESTION\_DP\_BMR\_60>

1. 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>

EMMI agrees that the information regarding breaches to the BMR or to the code of conduct should also be made available to the Benchmark Administrator.

EMMI believes that the responsibility to control that the Regulation is implemented by contributors should rest with the contributors and the public/supervisory authorities. Meanwhile, the administrator should establish sufficient control and whistleblowing mechanisms to detect inappropriate submissions and report any irregularity to the relevant authorities.

Any non-compliance to the code of conduct should be notified to the administrator and immediately, if it is a breach. As an example, the Euribor Code of Conduct stipulates that Panel Banks should confirm compliance with the Code of Obligations of Panel Banks (COPB) to EMMI, as part of their annual acknowledgement of compliance with the overall Euribor Code of Conduct. If recent changes have been introduced to the COPB and a Panel Bank is not yet in compliance at the time of the annual acknowledgement, the Panel Bank should specify a reasonable timeframe by when full compliance will be achieved. A Panel Bank experiencing difficulty in complying with a standard in the COPB should notify EMMI, detailing the reasons for non-compliance and providing relevant mitigating organizational controls or processes.

Finally, EMMI encourages Panel Banks to report to the Administrator through the whistleblowing portal should they have any suspicion of breaches to the BMR or to the Code of Conduct.

<ESMA\_QUESTION\_DP\_BMR\_61>

1. 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>

EMMI believes that external audit reports covering benchmark contribution activity should not only be made available to the National Competent Authority, but also to the administrator. The external audit report provided to the administrator should at minimum include an executive summary, an overall opinion of the independent auditors regarding Panel Bank’s compliance with the code of conduct, and a summary of any issues highlighted by the independent auditors that impede compliance with the code of conduct.

EMMI believes that, in order to mitigate additional costs and organisational burden for the contributors, this review may be conducted as part of the contributors regular external audit or equivalent, but should ensure that the review is appropriately focused on the detailed submissions processes. In EMMI’s view, such review may be conducted by the contributors’ appointed external auditor or other party with expert knowledge of benchmark-related and audit processes.

Finally, EMMI believes that, in case the administrator have reasonable grounds to believe that the integrity of the benchmark is being compromised as a result of a contributor’s activities, the administrator should have the right to commission an external review of the contributor’s benchmark submission activities.

<ESMA\_QUESTION\_DP\_BMR\_62>

1. 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>

EMMI agrees with the proposed criteria for the specific elements of systems and controls as listed in art. 11(2)(a) to (c) and the additional specifications proposed by ESMA.

In particular, as pertains to EMMI and the Euribor Code of Conduct, contributors should establish and maintain effective organizational, internal oversight and staff resourcing arrangements for their activities, which should include:

(a) an effective organisation structure for the oversight, operation and control of quote submissions following three-lines of defence model,

(b) the documentation of the roles and responsibilities,

(c) the roles of submitters and approvers (if applicable, the rationale being to ensure a 4-eye principle),

(d) authorisation of submission staff,

(e) staff training and qualifications and

(f) management of conflicts of interest (including ethical standards, segregation of duties, remuneration policy and communications).

With regard to ESMA’s considerations in §179 and 180, EMMI agrees that contributors should ensure that the staff involved in benchmark submissions have the knowledge and expertise necessary for the discharge of their responsibilities. In particular, submitters should have significant experience in the relevant underlying market. A senior person to the submitter, as described in art. 11(2)(a) of the BMR, should possess sufficient expertise and seniority so as to challenge the rates proposed by the submitter. Submitters should also receive specific training in relation to the analytic framework and data to be used in developing the quote submissions.

Submitters appointed by the contributors should acknowledge their appointments to these roles and confirm that they understand and will comply with their responsibilities with respect to the submissions process as set out in this code of conduct and any associated internal policies and procedures. Appointments and acknowledgements should be re-confirmed at least annually. **EMMI wishes to stress that it should remain the responsibility of the contributors to verify monitor appointment procedures and review compliance statements signed by submitters.**

While the identity of authorised submitters (and, if applicable, approvers), should be provided to the administrator, the contributor should be responsible for applying appropriate controls on appointed submitters and keep record of the names of the submitters (and, if applicable, the approvers) for daily submissions.

<ESMA\_QUESTION\_DP\_BMR\_63>

1. 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>

EMMI agrees contributors should establish remuneration policies for submitters (and, if applicable, approvers). Specifically, EMMI believes that any direct link should be removed between the remuneration of submitters (and, if applicable, approvers), on the one hand, and the performance or compensation of units engaged in other activities from which a conflict of interest might arise.

<ESMA\_QUESTION\_DP\_BMR\_64>

1. 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>

In the Euribor Code of Conduct, EMMI requires that contributors operate a Submitter-Approver process. Submitters are responsible for proposing the submissions, based on the processes outlined in the Code. Approvers are responsible for checking the quotes for reasonableness prior to submission and overseeing the daily submissions process. Approvers shall also be available before the calculation of the benchmark to re-confirm the contributors’ submission to the Calculation Agent if necessary. The detailed roles and responsibilities of the Submitters and Approvers should be well-defined and properly documented in the Panel Bank’s policies and procedures.

For benchmarks where submissions are automated, alternative control arrangements could be applied.

In addition, EMMI agrees that a contribution with a sign-off at a later stage should, if at all, only be admitted under exceptional circumstances. In many cases EMMI would expect that transmission protocols or Calculation Agent systems would reject a contribution without sign-off.

<ESMA\_QUESTION\_DP\_BMR\_65>

1. 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>

EMMI agrees that 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>

1. 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>

EMMI believes that the level of required seniority should be proportional to the significance of the benchmark, i.e the seniority level for non-significant benchmarks could be lower than for significant and critical benchmarks respectively.

<ESMA\_QUESTION\_DP\_BMR\_67>

1. 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>

EMMI agrees with the list of policies to be established at the contributor’s level when expert judgement is used, in accordance with the requirements set out in the benchmark(s)’ code of conduct.

<ESMA\_QUESTION\_DP\_BMR\_68>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_69>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_70>

1. 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>

EMMI wishes to underline that it is extremely difficult for administrators to source and collect this “benchmark usage” data. EMMI would welcome ESMA taking a coordinating role to gather such information, considering the data that will be available to it and national regulators under MiFID.

<ESMA\_QUESTION\_DP\_BMR\_71>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_72>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_73>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_74>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_75>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_76>

1. 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>

Please refer to Q71.

<ESMA\_QUESTION\_DP\_BMR\_77>

1. 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>

Two factors should be emphasized: (1) EMMI’s recognition of the systemic importance of their benchmarks in monetary policy transmission in the EU; and (2) the importance of EMMI’s benchmarks to consumers, given the heavy use of Euribor in mortgage contracts throughout the EU.

We also believe that a relative rather than absolute measure may be the better approach as it may reveal material dependencies within a specific member state that may not be apparent if a benchmark is considered on an absolute basis.

<ESMA\_QUESTION\_DP\_BMR\_78>

1. 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>

Please refer to Q78.

<ESMA\_QUESTION\_DP\_BMR\_79>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_80>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_81>

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

<ESMA\_QUESTION\_DP\_BMR\_82>

<ESMA\_QUESTION\_DP\_BMR\_82>

1. 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>

EMMI, as the administrator of the Euribor and Eonia benchmarks, would like to stress the difficulties that could be encountered in the assessment of the indicators mentioned in paragraph 265 of the DP.

This paragraph makes reference to the *general environment that allows executing a transaction of a reasonable size in a timely manner*. EMMI would like to emphasize that, for a benchmark administrator, in particular of Interest Rate benchmarks, it is extremely challenging to obtain a clear and reliable picture of the overall liquidity levels of the market the benchmark seeks to represent. While studies and surveys published by Central Banks allow for an understanding in trends, the data available in these cases is also limited. EMMI would like to note that it can be a challenge to obtain a clear and relevant picture of the overall liquidity level.

Paragraph 265 further describes the need for *a minimum number of participants below which the market would lack sufficient information to determine the benchmark according to the methodology*. EMMI would like to add that participation thresholds should be established also, for example, with the intention of avoiding the determination of the benchmark to be the responsibility of one single data contributor and/or to ensure geographic representativeness.

In spite of these challenges, EMMI agrees that the aspects suggested in Paragraph 265 of the discussion paper can be considered indicators of a potential unreliability of a benchmark.

<ESMA\_QUESTION\_DP\_BMR\_83>

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

<ESMA\_QUESTION\_DP\_BMR\_84>

EMMI believes that it is important to provide benchmark users with details regarding the applicability of discretion and also a clear indication of the reason for allowing discretion.

<ESMA\_QUESTION\_DP\_BMR\_84>

1. 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>

1. 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>

EMMI agrees that a concise description of the additional requirements, provided that it contains appropriate references to other sources of information (e.g. administrator website) and that such information may be easily obtained, would be sufficient for the information purpose of the benchmark statement.

Generally, EMMI believes that the format and content of the benchmark statement should be aligned with the compliance statement required in IOSCO Principles.

<ESMA\_QUESTION\_DP\_BMR\_86>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_87>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_88>

1. 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>

EMMI generally agrees with the suggested additional content required for statements regarding critical benchmarks, in particular with regard to the qualification as a critical benchmark, the nature of contributors and their location and, to the extent available, the most relevant types of instruments, financial contracts and/or investments funds that reference the benchmark. EMMI also agrees that the benchmark statement for critical benchmarks should also contain an indication of increased oversight mechanisms in force for this benchmark, in line with ESMA’s proposal with regard to interest rate benchmarks in section 11.4.1 of the DP. Nevertheless, EMMI wishes to underline the difficulty to provide information about the degree of utilisation of benchmark.

As indicated in the response to Q86, EMMI believes that the format and content of the benchmark statement should be aligned with the compliance statement required in IOSCO Principles.

<ESMA\_QUESTION\_DP\_BMR\_89>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_90>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_91>

1. 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>

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<ESMA\_QUESTION\_DP\_BMR\_92>

1. 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>

EMMI agrees with the ESMA’s approach regarding information of a general nature and financial information to be provided by administrators as part of the authorisation process for new administrators. For established administrations, authorisation/ registration should be tailored to the information specific to the new benchmarks offered, namely the benchmark statements, methodologies and the particular calculation and publication process associated with these benchmarks.

<ESMA\_QUESTION\_DP\_BMR\_93>

1. 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>

EMMI generally agrees with ESMA’s approach with regard to points c) to e) described in the discussion paper.

More specifically:

Regarding point d), ESMA may also consider, depending on the ownership of the administrator and the criticality of the benchmark and associated proportionality, a description of preventive measures established by the administrator to avoid conflicts of interest and a mapping of conflicts of interests and the associated measures.

Regarding point e), ESMA may also consider requiring specific information on outsourced activities directly linked with the benchmark determination, such as SLAs, explanation on how the administrator applies oversight and monitoring of the outsourced activity.

As outlined in our response to Q93, we note that much of this information requested may already be well known by national competent authorities for supervised entities. For these institutions, authorisation/ registration should be tailored to the specific additional requirements relating to benchmarks, namely focus on the benchmark statements and methodologies and the particular governance and control framework supporting benchmark administration.

<ESMA\_QUESTION\_DP\_BMR\_94>

1. 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>

EMMI generally agrees with ESMA’s approach with regard to points f) and g) described in the discussion paper.

More specifically:

Regarding point f), the requirement to provide information with regard to the category of the benchmark (critical, significant, non-significant) should take into account the procedures described in Chapter 3 of the BMR according to which the Commission shall establish a list of critical benchmarks and describing the assessment of the criticality of a benchmark by NCAs and, where relevant, ESMA.

We also note per our response to Q71 and Q83 that it is very difficult to gather information on relationships between benchmarks and the associated financial instruments (per paragraph 296) in order to categorize a benchmark in terms of significance. ESMA may wish to instead rely on qualitative factors.

<ESMA\_QUESTION\_DP\_BMR\_95>

1. 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>

EMMI agrees that the benchmark statement should could include various type of information, e.g. information on outsourced activities. EMMI suggested in the response to Q94 that information on oversight and control over outsourced activities could be included under point e).

<ESMA\_QUESTION\_DP\_BMR\_96>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_97>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_98>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_99>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_100>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_101>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_102>

1. 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>

 EMMI also interprets article 39 in the sense that it will only apply in the circumstances described in the DP, namely where a benchmark provider has not applied for authorisation or where such application for such authorisation is refused.

Article 39.3 provides a “grandfathering clause” in the situation where a benchmark administrator has decided that a benchmark cannot be changed to conform to the BMR as this would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark (collectively “Contract Frustration”).  However, article 39.3 does not specify how the decision to not change the benchmark to conform with the BMR must be made. EMMI strongly believes that article 39.3 should be interpreted in such a way that when deciding whether to change a benchmark to conform with the BMR, the benchmark administrator should balance the risk of Contract Frustration caused by implementing the changes with the risks of not implementing the changes (as this means that the benchmark cannot be used in new financial agreements/financial instruments). The changes should be implemented if the benefits of conforming with the BMR outweigh the risk of Contract Frustration.

EMMI agrees that in the situations identified in paragraphs 338-340 of the DP present situations in which there may be Contract Frustration if the benchmark is changed to conform with the BMR. However, the mere existence of a risk of Contract Frustration does not suffice to decide that a benchmark should not be brought in line with the BMR. A balancing test needs to be performed to decide whether that risk of Contract Frustration outweighs the benefits of adapting the benchmark to the BMR. If the risk of Contract Frustration only applies to a relatively small number/value of agreements that reference the benchmark, the risk cannot justify a decision to not change the benchmark.  In other words, article 39.3 gives a benchmark administrator the option to not implement changes to the benchmark if the benchmark administrator believes that the disadvantages of such changes outweigh their benefits, but it does not contain an obligation to not bring a benchmark in conformity with the BMR as soon as there exists a risk of Contract Frustration.

A benchmark can be used in a wide variety of financial contracts or financial instruments and a change to a benchmark will not have the same impact on every type of financial contract or financial instrument. As indicated in paragraph 357 of the DP, a benchmark administrator is not necessarily aware of the specific terms of all financial contracts or financial instruments that reference its benchmark. A benchmark administrator thus does not possess sufficient information to determine whether the proposed changes may cause Contract Frustration, only the users of the benchmark possess that information. Therefore EMMI also believes that it is up to the users of the benchmark to prove that there exists a risk of Contract Frustration in case changes are made and what types of financial contracts and financial instruments are at risk. This information should be provided by the users during the consultation period on the proposed changes. Otherwise a benchmark administrator will not have the information necessary to determine whether the risk of Contract Frustration outweighs the risk of not implementing the changes.

More generally, EMMI would welcome a general mechanism to support benchmark administrators that make material changes to the methodology of benchmarks, in particular when such changes could result in Contract Frustration. Contract Frustration may not only arise during the transitional period when changes are made to ensure that the benchmark conforms to the BMR. Contract Frustration may for example also arise as a result of a change in methodology to respond to shifts in the underlying market. EMMI believes that the balancing test set out above should apply to all decisions of benchmark administrators to make changes to the methodology of the benchmark.

<ESMA\_QUESTION\_DP\_BMR\_103>

1. 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>

Please refer to Q103

<ESMA\_QUESTION\_DP\_BMR\_104>

1. 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>

Please refer to Q103

<ESMA\_QUESTION\_DP\_BMR\_105>

1. 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>

In the context of critical benchmarks in the EU, ESMA may wish to consider additional grandfathering provisions, rather than time or quantitative limits.

<ESMA\_QUESTION\_DP\_BMR\_106>

1. 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>

Please refer to Q106

<ESMA\_QUESTION\_DP\_BMR\_107>

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

<ESMA\_QUESTION\_DP\_BMR\_108>

<ESMA\_QUESTION\_DP\_BMR\_108>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_109>

1. 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>

<ESMA\_QUESTION\_DP\_BMR\_110>

1. 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>

EMMI believes that contributors should continue to liaise with their national competent authorities, in the first instance, in line with current supervision practices.

<ESMA\_QUESTION\_DP\_BMR\_111>

1. 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>

 As outlined in Q95, it is very difficult to gather information on associated financial contracts and instruments, and thus the potential impact of a force majeure event.

<ESMA\_QUESTION\_DP\_BMR\_112>

1. 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>

 Refer to Q112.

<ESMA\_QUESTION\_DP\_BMR\_113>

1. IOSCO Principles for Financial Benchmarks, <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf> [↑](#footnote-ref-2)
2. The licensing principles that must be Fair, Reasonable and Non-Discriminatory (FRAND or FRAND licensing) arose from the ICT industry when discussing the balance between the need to reward the owners of Standard Essential Patents and the need to make standards available to all for public use.

Source: <http://is.jrc.ec.europa.eu/pages/ISG/EURIPIDIS/documents/05.FRANDreport.pdf> [↑](#footnote-ref-3)