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European Securities and Markets Authority
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Dear Sir/ Madam,

Consultative Paper – Draft regulatory technical standards under the Benchmarks Regulation

Deutsche Bank (DB) welcomes the opportunity to respond to ESMA's consultation on the draft regulatory technical standards (RTS) for the Benchmarks Regulation (BMR). We appreciate ESMA's efforts in taking on board industry feedback from the earlier discussion paper, however there are a few areas where the draft RTS might be improved further through targeted amendments and additional guidance. In particular:

- It would be helpful for ESMA to provide guidance on the definition of 'input data', specifically, to clarify whether the definition should cover reference, terms and conditions and other security metadata or just price data. Using a broad definition including terms and conditions or other reference data would vastly increase the scope for index administrators;

- The requirement for benchmark administrators to ensure that the second line of defence verifies the reasonableness or accuracy of contributions should be adjusted, since it is unlikely that the individuals composing the second line of defence would not have the same level of expertise as front office staff and the regulation will already ensure there are sufficient controls in place;

- The recording of changes to significant exposures of traders or trading desks to benchmarks related instruments would significantly increase operational costs and may be duplicative since records of substantial exposures are already required to be recorded and should be sufficient to monitor suspicious transactions;

- ESMA should provide guidance to accommodate situations when a benchmarks administrator falls out of scope of the BMR (central banks, CCPS, public authorities) to clarify that administrators and users of benchmarks which fall out of scope of the BMR are also exempt from the BMR.

- It would be helpful for ESMA to provide further guidance on the third country regime to assist National Competent Authorities in their assessment of third country recognition applications.

Our detailed responses to the questions follow. We would be happy to discuss any of the points raised in more detail or to answer any further questions you may have.

Yours sincerely,

Matt Holmes
Head of Regulatory Policy
Deutsche Bank AG

Q1: Do you consider the non-exhaustive list of governance arrangements to be sufficiently flexible? Are there any other structures which you would like to see included?

We agree that it is sufficiently flexible.

Q2: Do you support the option for the oversight function to be a natural person who is not otherwise employed by the administrator?

Generally agree.

Q3: Do you support the concept of observers and their inclusion in the oversight function?

Generally agree.

Q4: Do you think that the draft RTS allows for sufficient proportionality in the application of the requirements? If no, please explain why and provide proposals for introducing greater proportionality.

We support ESMA's proportionate approach aimed at addressing the specific needs of different types of benchmarks.

Q5: Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?

We support ESMA's flexible approach for the administrator to decide on the most appropriate function of the oversight committee. However, this requirement should therefore reflect the variety of governance structures across the industry. Particular challenges arise within large organisations for instance, where an oversight committee might be composed of board members and Non-Executive Directors (NEDs). Oversight committees might also be a sub-committee of the board challenging a lower echelon of operational managers.

Q6: Do you agree with the appropriateness and verifiability of input data that the administrator must ensure are in place? Please elaborate.

We generally agree, but request clarification on the definition of 'input data'. In particular, whether the definition of input data should cover reference, terms and conditions and other security metadata or just price data. Using a broad definition including terms and conditions or other reference data would vastly increase the scope for index administrators. For example, the rules used to define a Euro High Grade bond index will typically reference between 10 and 20 different metadata fields to determine the membership list. Such an index will include approximately 3500 from a possible universe of 14,000,000. A strict interpretation of the rules could result in the review of 28 million data points. We do not believe this is ESMA's intent.

It would also be helpful for ESMA to provide further clarity on the requirement to maintain physical presence in the front office "where applicable". This is because separation might not be possible at all because in smaller teams there are not enough traders to separate out benchmark submission from trading desks regardless of the risks posed by the benchmark itself. In this instance, alternative measures to mitigate conflicts should be sufficient.

We would also like to have more clarity on procedures to prevent the exchange of information between front office staff and contributor staff (Article 6(3)(h)(vi)).

Q7: Do you agree with the internal oversight and verification procedures that the administrator must ensure are in place where contributions are made from a front-office function in a contributor organisation? Please elaborate.

DB suggests that the proposed fall-back to ensure the provision of input data in times of stress under Article 6.2(d) should also provide for the possibility for an administrator not to publish a benchmark due to lack of data or lack of adequate data. Failing to do so would potentially place administrators (and by extension contributors) in a position of publishing or providing misleading information, which could constitute a criminal offence.

The proposed requirement under Article 6.3(a) for the second line of defence to verify the reasonableness or accuracy of contributions would be difficult to meet, since it is unlikely the individuals composing that second line of defence will have the necessary expertise to do so. For example, DB has established a front office control group to verify the reasonableness or accuracy of contributions. We would also like ESMA to clarify what is meant by 'monitoring' under article 6.3(e) and (f), which could be interpreted as maintaining constant vigilance. We do not believe that this is ESMA's intent. We request clarification that spot checks are sufficient rather than requiring something more which we believe is implicit in the draft RTS but which should be explicitly clarified in the text.

Finally, we would like to highlight the difficulties for the audit function to complete the level of granular checks proposed under Articles 6(4)(a) to (c). Whilst we agree with ESMA's proposed approach that the third line of defence should perform independent checks on a regular basis on the controls exercised by the two lines of defence, the "four pairs of eyes principle" at the contributor level, as proposed by ESMA throughout the RTSs, should guarantee a sufficient level of control of input data.

Q8: Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark's methodology is traceable and verifiable?

We generally agree. However, it would be helpful if ESMA provided clarification on the key elements of the methodology, in particular how to estimate the size of the underlying market and what is considered a secured algorithm. This will ensure consistent interpretation.

Q9: Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?

We agree with ESMA's approach, but we would like to point out difficulties with some of the proposed elements. Whilst we agree with the need to disclose material changes in the benchmark's methodology, the requirement to "ensure" that stakeholders are informed of the changes should be clarified, to confirm that publishing the information will be sufficient to meet this requirement.

Further, we would like ESMA to clarify the length during which the comments received during the consultation process in relation to a material change (as well as the administrator's response to these comments) need to be accessible.

We note that the definition of publish/make available to the public in the recently published technical advice is limited to the extent such term is used in the definition of "index". We would welcome clarification of how "publish" should be interpreted where used elsewhere – for instance, in Article 2(1) of the proposed RTS on the information to be provided on, inter alia, the key elements of the methodology (the "Methodology RTS"). We would further welcome clarification of how "inform" (in Article 3(1)(b)) differs from the concept of publishing. We further note that Recital 9 appears to suggest that "make accessible" (in Article.4(1)) means publish, but would welcome ESMA's confirmation.

We would be grateful for clarification on whether the "key elements of the proposed future methodology" to be disclosed in Article 3(2) of the Methodology RTS should be (a) all key elements or just those affected by the material change, and (b) whether "key elements" should be interpreted by reference to the list in Article 1 thereof.

Q10: Do you agree with the procedure for consultation on material changes to the methodology?

Generally agree.

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

Generally agree.

Q12: Do you agree with this approach? What are the different characteristics of contributors that should be taken into consideration in this RTS? How should those characteristics be taken into account in the provisions suggested in this draft RTS? Please give examples.

Generally agree.

Q13: Should the substantial exposures of individual traders or trading desk to benchmark related instruments apply to all types of benchmarks for all contributors?

Not in all circumstances. We would like to highlight that whilst keeping records of substantial exposures can be done for certain critical benchmarks such as LIBOR, it would not be appropriate for all benchmarks (such as GEMMA or WM Reuters FX fixings). The requirement to record levels of substantial exposures and changes effectively results in the requirement to store all sensitivities because the move from a non-substantial negative level to a non-substantial positive level may be defined as a substantial change in an exposure.

Further, we believe the requirement to record "changes" in substantial exposures goes beyond monitoring for suspicious transactions. Recording of changes would significantly increase operational costs and may be duplicative since records of substantial exposures are already required to be recorded to monitor suspicious transactions (RTS Articles 6(1)(e), 8(1)(a)(vii)).

Q14: Do you agree with the proposals for the reporting of suspicious transaction in this draft RTS? Please explain your answer.

Yes, we agree.

Q15: Are there any provisions that should be added to or amended in the draft RTS to take into consideration the different characteristics of benchmarks? Please give examples.

No specific comments.

Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

The draft RTS should contain provisions to accommodate the situation when a benchmarks administrator falls out of scope for the BMR (e.g. Bank of England, New York Fed etc) but the contributor is a supervised entity under the BMR (SONIA, FedFund Effective Rate). Without this clarification, a situation may arise where a code of conduct does not exist or is not produced by the administrator.

We welcome ESMAs recognition that "input data that is readily available to an administrator is not considered a contribution". However, we request clarification of the definition of 'readily available input data'. This is because the definition will have a significant impact on how firms engage with data vendors and their ability to produce various indices. DB views 'readily available' to mean data that may be sourced from a data provider for a fee by any interested consumer. For example, consolidated bond pricing from providers such as Reuters, Markit and Interactive Data would be considered 'readily available'. This form of data is used in the majority of bond and other over-the-counter security indices. These data providers are also the main source for data for many financial institutions when valuing instruments including investment funds. Data providers already have in place codes of conduct and policies for staff. Compelling data providers to adopt index provider specific codes of conduct would constitute a significant burden and risk the discontinuation in relation to indices currently in use, ultimately reducing consumer choice.

We also welcome ESMAs proposal that a senior manager may not be necessary for sign-off and the "four-eye" control may be substituted for alternate processes.

We would like ESMA to clarify which software updates are necessary before contributing input data (Article 5(5)). We suggest that the requirement should only apply to software updates which directly impact the calculation of a benchmark or could otherwise compromise the data integrity of a benchmark rather than routine software updates that will not otherwise affect the data directly.

The disclosure of conflicts of interests by the administrator should be limited to effective conflicts of interests, not "potential" conflicts of interest which would be challenging to determine.

The requirement that contributors should report suspicious input data could be clarified (Article 7.2(a)). At present, it appears to mean contributors will review all input data, including that of other contributors where it is published. In many cases it will be impossible for contributors to police their peers, because they will not know the detail and possibly confidential drivers behind other contributors' submissions. This requirement should be clarified so that a contributor only has to self-report suspicious data from its own submitters.

We request clarification that pre-submission checks are required 'where practicable'. This is because pre-submission checks may not be relevant or even feasible for certain benchmarks (e.g. those where transaction data has a time-sensitive window to be reflected in the "fix").

Q17: Do you agree with the draft technical standards in relation to the governance and control arrangements for supervised contributors to benchmarks? Please provide reasons.

We generally agree. However, we would like ESMA to clarify the requirements around the physical and operational separation between submitters and other staff where 'reasonably practicable' (Article 2(2)(a)).

Further clarity would also be welcome with regards to the information that must not be taken into account when identifying the information that could be used to support the use of expert judgement (Article 3(b)).

The record keeping requirements (Article 4(2)) do not acknowledge that it is difficult to map whether the holding of the instrument is part of the core activity of the contributor or is the result of treasury financing activity.

The requirement to test all submitters knowledge once a year is burdensome (Article 2), and would add little value where the contributor is already required to ensure the submitter has adequate knowledge, for example, Article 1 requires this on a continual basis but leaves it open to the contributor how they will assess it.

Article 3 addresses use of expert judgment. We suggest adding a new "(d)" identification of circumstances in which expert judgment should not be used. This is because the use of expert judgment may have limits. Without acknowledging this contributors and submitters may feel required to use expert judgment in circumstances where it may constitute a criminal offence.

Q18: In particular, can you identify specific aspects of the draft Regulation that should be applied differentially to different supervised contributors in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors?

No specific comments.

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

Generally agree.

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

We welcome ESMA's confirmation that administrators can use one compliance statement for a family of benchmarks.

We would like ESMA to amend the requirement to 'immediately' amend the compliance statement whenever any of the information included within it is no longer up to date to clarify that it should be understood as 'as soon as practicable'. We would also like ESMA to clarify what 'publishing' the updated compliance statement means in practice. We interpret this to mean updated on a website, where a website is available, or made available upon request.

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

Generally agree.

Q22: Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.

Generally agree.

Q23: Do you agree with the general approach to distinguish the contents of the application with reference to the cases of authorisation or registration?

We support ESMA's view that registration and authorisation applications are made for an entity and not for a benchmark and that the application process is a one off process and not subject to updates except where required by the BMR.

Q24: Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

Generally agree.

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

Generally agree.

Q26: Are the requirements described dealing with the benchmarks provided appropriate? In particular, is the way in which the commodity benchmarks requirements are handled acceptable?

Generally agree.

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

Generally agree.

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

Generally agree.

Q29: Do you agree with the approach followed in the draft RTS as regards the general information that a third-country applicant should provide to the competent authority of the Member State of reference?

Generally agree. Although not considered as part of this consultation, it would be helpful for ESMA to provide further guidance on the third country regime to ensure consistent interpretation by National Competent Authorities when assessing third country recognition applications. DB would support a principle based approach in assessing whether a third country is equivalent.

Q30: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should provide in order to explain how it has

chosen a specific Member State of reference and which are the identity and role of the appointed legal representative in such State?

Generally agree.

Q31: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should give around the benchmarks it provides and that are already used or intended for use in the Union? In particular, do you agree with the proposals regarding the information to be provided on the types and the categories to which the benchmarks belong to?

We suggest that existing market standards for auditor certification to be sufficient. If some other standard is to be applied then guidance should be included in the draft RTS to ensure a measure of consistency for National competent Authorities when assessing applications for recognition.