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| 29 September 2017 |

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| Response form for the Consultation Paper on draft guidelines on non-significant benchmarks  |
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| Date: 29 September 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

1. respond to the question stated;
2. contain a clear rationale; and
3. describe any alternatives ESMA should consider.

ESMA will consider all responses received by 30 November 2017.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the form “Response form\_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper ([www.esma.europa.eu](http://www.esma.europa.eu) 🡪 ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).
2. Please do not remove tags of the type <ESMA\_QUESTION\_GBMR\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_ GBMR \_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_GBMR\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page 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. 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 not to disclose the response 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 heading ‘Data protection’.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to administrators of benchmarks, contributors to benchmarks and users of benchmarks as well as to any market participant who is affected by the Benchmarks Regulation.

# General information about respondent

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| Name of the company / organisation | Solactive AG |
| Activity | Other Financial service providers |
| Are you representing an association? |[ ]
| Country/Region | Germany |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_GBMR\_1>

Solactive AG welcomes the opportunity to respond to ESMA’s proposals on the envisaged level III measures. We have assessed the contents of the present Discussion Paper and decided to provide our feedback on a wide range of questions. Insofar as we have not been affected by certain provisions or are not suited to deliver any specific contributions we have opted to leave out the concerned parts.

Since its founding in 2007, Solactive has grown to be one of the important players in the indexing industry. The German index provider focuses on tailor-made indices across all asset classes, which are developed, calculated and distributed worldwide. The company’s fast service, flexibility and reasonable prices have made it one of the most rapidly growing index providers in recent years. Solactive now calculates indices for more than 350 clients in Europe, America and Asia. Approximately 100 billion USD are invested in products linked to 4,000 indices calculated by Solactive globally, primarily in the form of 250 ETFs. Managed by Steffen Scheuble, CEO, Christian Grabbe, COO, and Christian Vollmuth, CRO, Solactive is organized in two business units, Indexing and Research. The company employs 82 people in Frankfurt and is owned by its current management.

While we do calculate a variety of indices which are widely used throughout the global financial industry, all of them classify as non-significant benchmarks under the BMR. We therefore hope that our observations and views on the draft guidelines from the perspective of an administrator of non-significant benchmarks may assist ESMA in finalising these level III measures.

Once more, we would also like to use the opportunity to address one of our longer-standing concerns with regard to the regulatory framework in the index industry and the index industry as a whole: We are concerned about the emerging concentration on the financial data vendor market. A factual oligopoly of a small number of vendors and only very few sources of input data relating to fixed income securities, puts index providers in a weak position when it comes to implementing and enforcing our Codes of Conduct. This market concentration also affects regulated stock exchanges some of which have considerably increased their data fees recently. We are concerned about these competitive distortions as a result of an expanding monetarization of monopolies. We have experienced difficulties in this matter with regard to a leading global data provider.

<ESMA\_COMMENT\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_1>

Solactive fully agrees with ESMA’s initial observation (in para. 12) that notwithstanding the possibility for administrators of non-significant benchmarks not to apply Art. 5 (2), (3) and (4), the overarching obligation from Art. 5 (1) to “establish and maintain a *permanent* and *effective* oversight function” remains untouched.

The possibility not to apply Art. 5 (2), (3) and (4) is therefore somewhat theoretical, as a permanent and effective oversight function seems to necessitate robust procedures, a clear allocation of tasks as set out in Art. 5 (3) and an “appropriate governance arrangement”. Therefore Solactive perceives the relevant provisions essentially as indirectly obligatory.

Therefore, Solactive welcomes the issuance of the draft guidelines on the oversight function for administrators of non-significant benchmarks, as it would otherwise have seen itself compelled to adhere to the regulatory technical standards. In light of the above, Solactive is not surprised that the content of the draft guidelines is in large parts identical to the regulatory technical standards. Only the *Procedures governing the oversight function* seem to be slightly less comprehensive, e.g. not requiring minutes of the meeting to be taken.

One the one hand the above thoughts raise doubts on the appropriate implementation of the proportionality principle, on the other hand Solactive is aware of ESMA’s intention to avoid excessive burdens for administrators of non-significant benchmarks and to retain their flexibility in establishing their oversight function. We hope and expect that this will also be reflected by the supervisory practices of the NCAs.

In this regard, Solactive is would like to address a more practical question on the oversight function. Based on para. 1 of the guidelines („The BMR sets out the minimum responsibilities and characteristics of the oversight function to ensure oversight of all aspects of the provision of the administrator’s benchmarks.“), we assume that – if applying all provisions of Art. 5 – an administrator has established a sufficiently effective and permanent oversight function. A clarification in this regard would nevertheless be welcome.

<ESMA\_QUESTION\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_2>

Solactive has some fundamental reservations regarding the concept of input data as contained in the BMR and developed by ESMA. In particular, there are still uncertainties in the indexing industry as to which data amount to input data. One view states that only those data utilised for the ongoing calculation of the index values should be covered, while the other view also includes specific data for the adjustment or rebalancing of the indices, i.e. the selection of its constituents. The definitions in the BMR seems to permit both opinions and a final decision by ESMA in this regard – perhaps in the Q&As - would be highly appreciated.

The concept of input data is one of the foundations of the framework of the BMR and also has obvious implication on what has to be regarded as contributions. It thus plays an important role in the implementation of the BMR on the administrator’s level, i.e. for which parties Solactive will have to implement codes of conduct.

On a more granular level, Regarding 1. b) of the draft guidelines, Solactive suggest deleting the second part of the sentence, “(…) or is selected from a source specified by the administrator within a time-period prescribed by the administrator”. In many instances, transaction data or related data can be obtained from a variety of sources – it should not be necessary to designate an individual source in these cases.

Also 1. c) seems to imply that all input data need to be selected from a source as defined in point 24 of Art.3 (1), i.e. that all input data need to be regulated data. We would suggest changing the wording from “input data is contributed from the input data sources (…)” to “input data should be sourced from the input data sources (…) where applicable”. This would clarify that this requirement is only relevant if the input data are regulated data and would avoid the word “contribute” which seems to be misplaced here, as not all input data are necessarily contributions.

Furthermore, number iii of 1. d) should read: “the priority of use of different types of input data, where relevant”. Especially for regulated data, a hierarchy or priority of input data is not sensible, as each type of input data is necessary for the determination of such indices. This is also reflected in our suggestion for the corresponding requirement under Art. 13.

<ESMA\_QUESTION\_GBMR\_2>

1. : Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_3>

As administrators of non-significant benchmarks may choose not to apply Art. 11 (3) in any case, Solactive has no objections to the three levels of control functions as such. The requirement for administrators to ensure that these measures have been implemented on a contributor level are grossly disproportionate. Effective assurance would necessitate ongoing supervision at the contributor’s premises.

<ESMA\_QUESTION\_GBMR\_3>

1. : Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_4>

We acknowledge ESMA’s observation that “the general principles of transparency of the methodology (..) apply to all benchmarks” regardless of their classification as critical, significant or non-significant (para. 66). Solactive also understands that ESMA intends to ease the compliance burden for administrators of non-significant benchmarks and welcomes the visible efforts in this regard. The less granular draft guidelines are better suited for non-significant indices and will be considerably less burdensome while maintaining an appropriate level of transparency.

While Solactive thus essentially agrees with the content of the draft guidelines, we suggest the following modifications:

* Letter c) of point 1 should read: “types of input data used and the priority to each type, **where relevant**”. Especially for regulated data, a hierarchy or priority of input data is not sensible, as each type of input data is necessary for the determination of such indices.
* Letter e) of point 1 should be deleted. Regulated data and other transaction-based data are already subject to specific rules ensuring a minimum quality. Specifying a “minimum quantity” for input data is often not necessary – what rather matters is the frequency of their publication (e.g. real-time or end-of-day)

Furthermore we would like to ask for clarification what is precisely meant by “description of the constituent elements” in 1. d). It is our understanding that this indeed refers to an abstract description of the potential components of the index as part of the general selection process. As this composition usually changes over time at set dates, administrators should not be required to include a *list* of the index constituents as part of the methodology but rather make it available via other means.

<ESMA\_QUESTION\_GBMR\_4>

1. : Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_5>

While we have no material objections to this proposal, we consider the wording of 2. b) – which is already contained in the draft RTS – to be misleading. The obligation to review the methodology of a benchmark can be found in Art. 13 (1) b) and Art. 5 (3) a) on the one hand. The requirement for using a methodology which is “traceable and verifiable” – pursuant to Art. 12 (1) e) – relates to something entirely different and should not be mixed up.

In Solactive’s view the “traceability and verifiabilty” relates to the ability of the user of a benchmark or any other interested third party to understand the benchmark’s methodology and to independently verify the correctness of the benchmark determination and to assess a benchmark’s suitability for their personal use.Therefore, this obligation should be equated with principle 9 (Transparency of Benchmark Determinations) of the IOSCO Principles for Financial Benchmarks.

Solactive follows a standard approach to ensure the traceability and verifiability of its indices by transparently publishing the index methodology as well as continuously updating and publishing the relevant index metrics, especially the constituents and their respective weights of each index. This is particularly important when indices are adjusted, i.e. the constituents of an index are selected according to the criteria contained in the methodology.

As this is a generic approach which is deemed suitable for any type of index, Solactive does not see the need to cover this mechanism in the regular reviews of the index methodology. Point 2. b) should therefore be deleted. Solactive would also welcome further clarification side on whether its understanding of a transparent and verifiable methodology is in line with ESMA’s expectations.

<ESMA\_QUESTION\_GBMR\_5>

1. : Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_6>

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<ESMA\_QUESTION\_GBMR\_6>

1. : Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_7>

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<ESMA\_QUESTION\_GBMR\_7>