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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 | European Money Markets Institute |
| Activity | Non-financial counterparty |
| Are you representing an association? |  |
| Country/Region | Belgium |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_GBMR\_1>

The European Money Markets Institute (“EMMI”) welcomes the opportunity to provide further comments on ESMA’s Consultation Paper for draft guidelines for non-significant benchmarks.

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.

Our response to ESMA’s Consultation Paper 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’s 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.

<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>

EMMI agrees that external stakeholders can provide valuable expertise to the oversight function and that its integrity and independence can be ensured by including independent members. EMMI believes that the principle of proportionality is guaranteed by the fact that it is not mandatory for non-significant benchmarks and that it is left it with the administrators to decide on the composition of the oversight function most fit for the benchmarks they produce, as long as any conflict of interest of external members of the oversight function is adequately mitigated.

Regarding the composition of the oversight function, while EMMI agrees that proportionality must be applied for non-significant benchmarks, EMMI believes that an oversight function exercised by one single person – even though the draft RTS provide for an alternate in order to guarantee continuity – may not be sufficient to adequately oversee and address decisions of the management when they are related to the provision of the relevant benchmarks. An oversight function of at least 3 voting members should be sufficient to guarantee an adequate level of challenge in discussions/decisions to be made.

While EMMI appreciates that staff members of the administrator may sit as voting members in the oversight function provided they are not directly involved in the provision of the respective benchmark, their positions must be carefully assessed in order to ensure that they can always be in a position to challenge the decision of the management body of the administrator and that they have sufficient skills and expertise to carry out their duty. If this is not possible, it would be advisable to include external stakeholders in the oversight function. The guidelines provided for in 4(d) partially address this question.

Overall, EMMI believes that the draft guidelines provide sufficient safeguards in terms of governance and mitigation of conflicts of interest, while offering an adequate level of proportionality.

<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>

While EMMI believes that points a) and b) of section one of the proposed guidelines are key controls to be applied by Benchmark administrators in general, it considers that the right level of proportionality is achieved through the following:

1. the right for administrators of non-significant benchmarks to choose not to apply point (b) of Article 11(1) of Regulation (EU) 2016/1011 (i.e. verifiability of input data);
2. the right for administrators of significant and non-significant benchmarks to perform the checks set out in points (a), (b), (c), and (d) of paragraph 1 only after the publication (as per Article 1 §3 of the draft RTS for BMR Article 11).

Furthermore, while in our view the exclusion of point (c) from the guidelines is justified for non-significant benchmarks, we would like to stress the importance of verifying that the input data is contributed in the required format to avoid any operational impact on the benchmark-setting process and potential delay or errors in the benchmark publication.

In EMMI’s view, the exclusion of point (e) from the guidelines for non-significant benchmarks is acceptable only when the interpretation of “reliable” is that contemplated by ESMA (i.e. regular dissemination of data). However, we note that “reliability” may also relate to the quality of the input data. In that context, EMMI believes that administrators of non-significant benchmarks should still ensure that the integrity of input data can be relied upon regardless of the periodicity of its dissemination.

Finally, EMMI agrees with the inclusion of Art. 1 (d) in the guidelines for non-significant benchmarks, in line with the requirements for critical and significant benchmarks.

<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>

On a general note, EMMI agrees that a three-level control system is the most adequate in order to identify and address any error or misconduct. Nevertheless, the financial/organizational burden associated with the establishment of three levels of control functions should not be underestimated for administrators of and contributors to non-significant benchmarks that cannot leverage on such an existing organizational structure.

Very importantly, it seems to us that the proposed guidelines make it unclear whether such three level of control functions is the responsibility of the administrator or the contributor or both. The responsibilities lying with the administrator and the responsibilities lying with the contributor should be clarified and this, for any category of benchmark.

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.

More specifically, when proposed guidelines state that “administrators shall ensure …” that the contributor has an internal oversight procedure in place, EMMI believes that the administrator should “require” and “obtain sufficient assurance from contributors” whereas the contributor should “ensure” that these procedures are in place.

This is of particular important in light of the above-mentioned comment related to the financial/organisational cost for an administrator of or a contributor to a non-significant benchmark: indeed, if the administrator is expected to obtain such level of assurance, the only efficient way of obtaining such independent assurance would be through external audits, which are particularly costly. It may prove difficult to maintain a panel of contributors to a non-significant benchmark if such a contributor entails financial/organisational burdens.

<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>

Articles 2 and 3 of the proposed GL recommend administrators of non-significant benchmarks to make public and available information regarding the internal review and approval of the methodology of a benchmark, in particular providing a description of the policies and procedures relating to the internal review, a description of events that may give rise to such internal review (under consultation), and the key elements of the methodology that will be impacted by a proposed material change.

Article 1 of the GL, however, eliminates requirement (k) from the list of key elements to be disclosed under Article 1 of the draft RTS, i.e. the requirements to make public the criteria used to determine the need for a change, among others. EMMI acknowledges that the same level of detail as that required from administrators of critical or significant benchmarks may not be necessary, but considers that for the information to be disclosed under Articles 2 and 3 of the proposed GL to be complete, it would be necessary for users to understand the criteria and rationale behind a change in the determination of the reference index. To this end, EMMI believes that, at a minimum, key element (k) (i) of the list of elements in Article 1 of the corresponding RTS should be included as a requirement for administrators of non-significant benchmarks under Article 1 of the GL.

<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>

As explained in our answer given to Question 4, EMMI considers it important for the understanding of users of a benchmark to disclose at a minimum the criteria and rationale behind a change in the determination of the reference index.

If, in this respect, at least key element (k) (i) of the methodology to be published or made available of Article 1 of the corresponding RTS is added to the list of key elements under Article 1 of the proposed GL, EMMI considers it neither appropriate nor proportionate to require from administrators of non-significant benchmarks the level of detail as proposed under Article 2 (b) of the draft GL.

<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>

EMMI agrees with the view that conformity of input data with the BMR and the relevant code of conduct, and their accuracy are qualities that are independent from the degree of use of the benchmarks which should always be met by contributors to all benchmarks. Hence, EMMI supports the corollary idea that, the contribution by supervised entities to non-significant benchmarks, (i) internal general control framework, (ii) whistleblowing, (iii) official submitters and alternates, (iv) conflicts of interest, (v) remuneration policies, (vi) record keeping, (vii) management of expert-judgement or exercise of discretion, should abide with the same principles as for significant benchmarks.

Proportionality is satisfactorily reached by the absence of obligation of (i) periodical external review, and (ii) four-eyes principle, on the process for contributing data, and through a lighter training duty.

Overall, EMMI believes that the draft guidelines provide sufficient safeguards in terms of governance and control requirements for supervised contributors.

<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>

EMMI considers that, similarly to the situation of supervised contributors to significant/critical benchmarks, the disparity among the types of supervised entities considered as supervised contributors does not allow for a strict obligation of physical separation.

Proportionality should be applied, and is actually reached by applying the same requirement as for supervised contributors to significant benchmarks. That is, leaving it to the supervised contributors if a physical separation is appropriated based on the elements enumerated in the guidelines.

<ESMA\_QUESTION\_GBMR\_7>