



European Securities and
Markets Authority

Reply form for the Consultation Paper on Benchmarks Regulation



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the European Single Electronic Format (ESEF), published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_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_CP_BMR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_CP_BMR_XXXX_REPLYFORM or

ESMA_CP_BMR_XXXX_ANNEX1

Deadline

Responses must reach us by **30 June 2016**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_BMR_1>

London Stock Exchange Group (“LSEG”) and FTSE Russell support the work on the Level 2 of the Benchmarks Regulation (“BMR”), a key piece of legislation which will ensure the integrity and robustness of benchmarks. We appreciate that ESMA is following a tight schedule to produce the technical advice and technical standards envisaged in the Level 1. In this position paper, we offer our views, informed by our experience as a global index provider, on how we believe ESMA could calibrate the various provisions of the Level 2 draft text.

Aside from responding to the questions raised in the Consultation Paper, we would like to bring the following elements to ESMA’s attention:

- **Exemptions enshrined in Level 2** – we believe that various exemptions, mainly stemming out of the BMR Level 1 recitals need to be reflected in the Level 2 to avoid market / legal uncertainties.
- **Dependencies of the BMR on MiFID transposition and implementation timeline** – and the envisaged delay in particular. ESMA should recognize the delay as it is relevant for the elements of the regulation relying on MiFID reference data.
- **Core factors – methodology, outsourcing and ultimate decision-making power**, in particular, should be the main elements of administering the arrangements for determining a benchmark.
- **Clarification of issuance to include exemption** of practices such as novation of an original bilateral contract to a CCP.
- **Accessibility of information for the administrator** – we would like to reiterate that the required information (i.e. identification of financial instruments referencing benchmarks / outstanding product notional) is not being reported to the administrators, it is often subject to confidentiality and is not in the public domain. We encourage the regulators / NCAs to take an active role on this matter.
- **Third country regime** – The objective reasons for recognition should not be set unnecessarily high, and should recognise current investor demand as a possible supporting indicator for recognition.

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About FTSE Russell, a part of London Stock Exchange Group (LSEG)

FTSE Russell is a global index leader that provides innovative benchmarking, analytics and data solutions for investors worldwide. FTSE Russell calculates thousands of indexes that measure and benchmark markets and asset classes in more than 80 countries, covering 98% of the investable market globally.

FTSE Russell index expertise and products are used extensively by institutional and retail investors globally. Approximately \$10 trillion is currently benchmarked to the FTSE Russell indexes. For over 30 years, leading asset owners, asset managers, ETF providers and investment banks use FTSE Russell indexes to



benchmark their investment performance and create ETFs, structured products and index-based derivatives.

A core set of universal principles guides FTSE Russell index design and management: a transparent rules-based methodology is informed by independent committees of leading market participants.

FTSE Russell is focused on applying the highest industry standards in index design and governance, and embraces the IOSCO principles. FTSE Russell is also focused on index innovation and client collaboration as it seeks to enhance the breadth, depth and reach of its offering.

<ESMA_COMMENT_CP_BMR_1>

Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?

<ESMA_QUESTION_CP_BMR_1>

Whilst we do not have specific remarks to make on the wording of the Draft Technical Advice that refers to the principle of “making available to the public”, and whilst we understand that the intention of the BMR is to cover a broad range of benchmarks, we believe that it would be beneficial if ESMA:

- Explicitly clarified that prices, **single or averages – such as mid-price** (average between best bid and ask quotes) **published in trading venue auctions**, RFQ systems or similar will not be captured in the scope of the BMR, in line with Recital 18 of the BMR.
- Explicitly clarified that **transmission of data – such as CCP reference prices** (exempt from the BMR scope in line with Recital 19 of the BMR) – **by another entity to customers on a confidential / contractual basis does not constitute “made available to the public”**. Such data is normally already made available by the CCPs.
- Explicitly clarified that **combining of existing indices qualifies as “use” of a benchmark, not a creation of a new one**, in line with Recital 13 of the BMR, regardless of whether the combined index is “made available to the public”. For example, if a manager allocates 50% to X index and 50% to Y index and therefore creates the combined XY index to measure performance of the investment, the manager is effectively just using the XY index as s/he would use the X index and the Y index. Not clarifying this could lead to market uncertainty. As the NCAs are to assess this on a case-to-case basis, we encourage ESMA to **maintain a dialogue with the NCAs, to ensure a consistent approach across jurisdictions**.
- Finally, we suggest that, in order to remain consistent, the Draft Technical Advice which refers to “making available to the public” reads as follows:

“the index is provided or is accessible to one or more supervised entities to allow the use of the index in the meaning of Article 3(1)(5) of the [BMR] and through such use the index value becomes accessible to an indeterminate number of people.”

<ESMA_QUESTION_CP_BMR_1>

Q2: Do you agree with the proposed specification of what constitutes *administering the arrangements for determining a benchmark*?

<ESMA_QUESTION_CP_BMR_2>

- We agree with the second bullet, where administration of the arrangements for the determination of a benchmark means **the setting of a specific methodology for the determination of each benchmark or, with the necessary adaptations, each family of benchmarks provided, and its maintenance through periodic reviews**. We believe this to be the key differentiator – an element specific to a particular benchmark - therefore, worth mentioning in this context.
- However, we question the first bullet, which addresses the mechanics of determining a benchmark. We would like to emphasize that the process of administering a benchmark involves **several separate processes, which could be outsourced**. We encourage ESMA to recognise this in the draft Technical Advice, in line with Recital 24 BMR.

(...) “the ongoing management **and supervision** of the infrastructure, ~~and of the personnel~~ **and outsourcing arrangements** that are involved in the determination process of a benchmark, and” (...)

<ESMA_QUESTION_CP_BMR_2>

Q3: Do you agree that the ‘use of a benchmark’ in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, ...)?

<ESMA_QUESTION_CP_BMR_3>

- We encourage ESMA to clarify the term “determining an amount payable” by specifically **excluding the data used to determine settlement, margins and risk management**. This would promote greater regulatory convergence with EMIR where, **for example, a (supervised) non-CCP entity** engages in clearing and/or margining, in line with the non-cleared margin rules (see ESMA Final draft RTS on margin requirements for non-centrally cleared derivatives), as such entity would: (i) use the data to **determine settlement, margins and risk management**; and (ii) transmit the data to its customers on a confidential basis (i.e. using the the data in the same manner as a CCP). Parallel to Recital 19 of the BMR, such

“(...) reference prices or settlement prices should not be considered to be benchmarks because they are used to determine settlement, margins and risk management and thus do not determine the amount payable under a financial instrument or the value of a financial instrument.”

- Further, we believe that it would be beneficial for ESMA to more explicitly clarify that a CCP which **registers a contract does not give rise to the use of benchmark**. For example, a swap referencing a benchmark for its floating leg payments is due to run from a point in time in the future (e.g. 1yr forward) for 5yrs, but is registered today. We do not need to “use” the benchmark to fix any payments until next year, so we are suggesting focusing on **“setting contractual payments”** as the test for when we do and do not use a benchmark.

<ESMA_QUESTION_CP_BMR_3>

Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?

<ESMA_QUESTION_CP_BMR_4>

- We **appreciate ESMA’s intention not to widen the common concept of “issuance of a financial instrument”** – in particular, we support the fact that including the reference to a benchmark in the standardised terms of a financial instrument is considered “use” of a benchmark rather than “issuance” of a financial instrument. Limiting the definition to the MiFID instruments (1) to (3) will also bring further clarity to these provisions.
- However, we believe that ESMA could further clarify certain reference to CCPs’ activities. For example, ESMA could **clarify that the novation of an original bilateral contract at a CCP does not constitute issuance**.

<ESMA_QUESTION_CP_BMR_4>

Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in the case where the regulatory data is not available or sufficient?

<ESMA_QUESTION_CP_BMR_5>

- We would like to reiterate that the **information required is not being reported to the administrators, it is often subject to confidentiality and is not in the public domain** – we appreciate that ESMA is aware of this.
- If an administrator were to determine the outstanding product notional, we would need more guidance from ESMA on specific steps.

<ESMA_QUESTION_CP_BMR_5>

Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?

<ESMA_QUESTION_CP_BMR_6>

- We **generally support the measurement** performed at a specific point in time in order to assess whether a benchmark hits the thresholds.

<ESMA_QUESTION_CP_BMR_6>

Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?

<ESMA_QUESTION_CP_BMR_7>

- In principle, we agree that licensing agreements could help provide the necessary information in relation to financial instruments referencing a benchmark. **However, we question the practical arrangements, as it is not always feasible for the administrator to obtain the data.** From ESMA's drafting, it is unclear how far the administrator would need to go to obtain such data – what would constitute reasonable "best effort". To our understanding, the **regulators / NCAs could follow this approach, as they have access to the consolidated data coming from trade repositories.**
- We have no particular view on the net asset value of investment funds, as long as ESMA is basing this on existing rules for investment funds and does not create additional regulatory burden.

<ESMA_QUESTION_CP_BMR_7>

Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?

<ESMA_QUESTION_CP_BMR_8>

- We **do not see the need to include any additional criteria**; the criteria proposed by ESMA are sufficiently comprehensive.

<ESMA_QUESTION_CP_BMR_8>

Q9: Do you think that the concept of "significant share of" should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?

<ESMA_QUESTION_CP_BMR_9>

- We do not think that the concept of "significant share of" needs further development. We wonder about the **consistency in the application of qualitative criteria across jurisdictions.** We are aware that in some jurisdictions, smaller Member States in particular, a relatively small benchmark

could be deemed critical – which would not be the case if a “Pan-European” qualitative test was applied instead.

<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?

<ESMA_QUESTION_CP_BMR_10>

- LSEG is in favour of robust and competitive benchmarks and, therefore, the **requirement to provide objective criteria should not be set unnecessarily high.**
- We encourage ESMA to **clarify how the criteria listed in the Draft Technical Advice on Article 33 will apply.** We understand that some of the criteria are of systemic nature and others are purely commercial. We believe **it would not be realistic to satisfy all of them** in order for the competent authority of the administrator to establish an objective reason for endorsement.
- In particular, we recommend **adding current investor demand as a supporting indicator.** We are particularly pleased that commercial reasons (such as joint venture), efficiency and cost saving are being considered as a supporting indicator.

<ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?

<ESMA_QUESTION_CP_BMR_11>

- We support ESMA setting the 42 months’ time **limit for how long non-compliant benchmarks are being used.**
- We suggest that ESMA addresses the **benchmarks that are to be created in the time period between the date of entry into force and the application date.** We encourage ESMA to clarify the timing for “the use of existing benchmarks”– by specifically linking it to the application date; this should avoid legal and market uncertainties.
- We recognise that ESMA is on **standby in relation to the advice on how users might become aware of non-compliant benchmarks** (before the 42-month period has expired).

<ESMA_QUESTION_CP_BMR_11>