



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>

CME Group owns and operates four derivatives exchanges in the U.S. that are registered as designated contract markets (“DCMs”) with the U.S. Commodity Futures Trading Commission (“CFTC”), including Chicago Mercantile Exchange Inc. (“CME”); Board of Trade of the City of Chicago, Inc. (“CBOT”); New York Mercantile Exchange, Inc. (“NYMEX”); and Commodity Exchange, Inc. (“COMEX”). CME also operates a clearing house registered with the CFTC as a Derivatives Clearing Organization. Our exchanges offer the widest range of global products across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, agricultural commodities, metals and alternative investment products.

In Europe, CME Group operates a London-based derivatives exchange, trade repository and a clearing house, as well as Technology and Support Centre in Belfast. CME Europe Ltd. is authorised by the U.K. Financial Conduct Authority (“FCA”) as a Recognised Investment Exchange. Its current product offering includes futures contracts for 30 currency pairs and a suite of commodity contracts. CME Clearing Europe is a recognised CCP by the Bank of England, and is also authorised under the European Market Infrastructure Regulation (“EMIR”) by the European Securities and Market Authority (“ESMA”). It provides clearing services for exchange-traded derivatives on CME Europe, as well as multi-asset class OTC transactions. CME European Trade Repository is ESMA-registered in accordance with EMIR requirements. It offers reporting solutions for all market participants and across all asset classes.

CME Benchmark Europe Limited (“CMEBEL”), which is a fully owned subsidiary of CME Group and FCA-authorized benchmark administrator, currently co-administers the LBMA Silver Price. As of 15 August 2014, the LBMA Silver Price replaced the former London Silver Fix, which had been in existence for 117 years. Unlike the London Silver Fix, which was submission based, the LBMA Silver Price is now calculated and published by CMEBEL and Thomson Reuters Benchmark Services using an electronic auction platform. CMEBEL provides the calculation services, via its electronic auction platform, and ensures surveillance. Thomson Reuters is responsible for the publication, the administration and governance of the benchmark.

<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>

CME Group welcomes the proposed draft technical advice.

In our response to the February 2016 Discussion Paper we have asked ESMA for clarification that Daily Settlement Prices (“DSPs”) and/or Final Settlement Prices (“FSPs”) that are calculated and published by exchanges that list derivative contracts should not be considered indices / benchmarks for the purpose of the BMR. We regret to note that ESMA has not provided any clear guidance to this end in the current Consultation Paper and/or draft technical advice. However, we would like to reiterate that it is crucial that such clarification is provided in order to ensure harmonised application of the BMR across Member States.

As discussed in our response to Discussion Paper, the process governing determination and publication of DSPs/FSPs of exchange-listed futures contracts has been subject to stringent regulatory requirements and rigorous oversight in the EU and other jurisdictions for decades. Relevant legislative and regulatory frameworks address every aspect of this process as part of exchanges’ broader compliance arrangements, and including contract listing and approval rules, operational and governance rules for market operators, anti-market abuse provisions and market surveillance functions, relevant pre and post-trade transparency requirements, conflict of interest policies and others. We are therefore of the opinion that submitting DSPs and FSPs to the BMR would lead to overlapping and potentially conflicting regulation.

We understand that technical advice may not be suitable vehicle to provide necessary clarification, but in such case we would strongly encourage ESMA to address this issue as soon as practicable in Level 3 guidance.

<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>

CME Group has supported ESMA’s approach expressed in the February 2016 Discussion Paper, which has suggested alignment of the notion of ‘*administering the arrangements for determining a benchmark*’ with the requirements of Principle 1 of the IOSCO Principles for Financial Benchmarks.

CME Group broadly agrees with the draft technical advice. We agree with ESMA’s observation that the elements of IOSCO Principle 1 pertaining to the establishment of governance arrangements can be interpreted as being captured under the definition of benchmark administrator under Article 3(1)(6) BMR (“*person that has control over the provision of a benchmark*”).

We agree with the proposed specification that the ongoing management of the infrastructure and of the personnel, as well as setting of a methodology should be considered as part of the notion of ‘*administering the arrangements for determining a benchmark*’ for the purpose of the definition of ‘*provision of benchmark*’.

However, CME Group would like to raise to ESMA’s attention the fact that the proposed draft technical advice does not address the situation when there are two administrators of a single benchmark. This is for example the case of LBMA Silver Price, which is one of the UK regulated benchmarks. LBMA Silver Price is being jointly administered by Thomson Reuters and CME Benchmarks Ltd., which is a wholly owned subsidiary of CME Group. Both CME Benchmarks Ltd. and Thomson Reuters are authorised by the UK Financial Conduct Authority (FCA) as administrators for this benchmark. We would welcome ESMA’s clarification on how the BMR provisions will apply in such circumstances as we would like to maintain the possibility of entering into similar arrangements in the future.



<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>

CME Group agrees with ESMA that for the purpose of the BMR and the definition of the ‘*use of benchmark*’ in derivatives traded on a trading venue and/or via systematic internalisers, the notion of ‘*determination of the amount payable under a financial instrument*’ is the most suitable concept applicable to market operators and CCPs.

In our submission to the February 2016 Discussion Paper we supported this option as a workable alternative to the term ‘*issuance*’ of financial instruments in the context of derivatives. We therefore welcome ESMA’s proposed technical advice that maintains applicability of the concept of ‘*issuance*’ of financial instruments to transferable securities, money market instruments and units in collective investment undertakings.

However, we would like to encourage ESMA to provide a clear guidance that the definition of “use of benchmark” does not apply to CCPs for the purpose of clearing and margining, which are already subject to stringent regulatory framework. This would be consistent with the existing Article 2(2)(c) of the BMR exemptions for reference and settlement prices produced by CCPs and used for risk-management purposes and settlement.

<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 have no comments on the proposed technical advice.

<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>

While CME Group generally welcomes ESMA’s proposal for a transitional regime based on the data available from trading venues, we note that there remain several difficulties with this proposal that would need to be resolved to make it work in practice:

- The principal issue remains that without instrument reference data to allow administrators to know which benchmarks are referenced by which instruments it remains an overly burdensome obligation on administrators to make the calculation.
- While we support limiting the data required to be included in the calculation to that which is published by trading venues, given that there are over 250 regulated markets and MTFs listed on ESMA’s website (not all of them active) as being authorised in the EU with potentially thousands of instruments being traded on them it remains a significant operational burden on administrators to identify the instruments that reference their benchmark. There are no EU level regulatory requirement on trading venues to make available either a) the notional amount of the instruments traded on their venue or open interest of such instruments or b) the identity of any benchmark that

their instruments reference. The administrative process of collecting the required data appears very challenging. The data available is unlikely to be presented in a consistent format and will require significant manual effort to understand and collate it. Further, the data may not be easily searchable in order to identify the benchmark that the instrument references.

- In any event, administrators will not have access to all of this data. ESMA's proposal is not clear as to the lengths administrators are expected to go to collect this data. For example, would an administrator be expected to pay for the data if not publicly available? CME Group believes that there must be reasonable limitations on the lengths administrators are required to go to get the data. In particular, the obligation should be limited to making reasonable efforts and based on information that is publicly, freely and readily accessible or within the administrator's possession.

CME Group would also like to make further comments about the data collection regime that is expected to operate after MiFIR applies and the relevant changes that are to be made to EMIR:

- In its response to the February 2016 DP, CME Group argued that it should be for ESMA, as the body with access to all of the required data, to provide the relevant data to administrators on which to base their calculations. In the May 2016 Consultation Paper, ESMA have rejected this idea. CME Group maintains that for ESMA to be the source of the data is the most sensible, efficient and proportionate solution to the difficulties in collecting data.
- We note that it is difficult to properly comment on the post-transitional regime when the proposed changes to EMIR have not been detailed.

While not directly in response to this question, CME Group would also like to reiterate a comment it made in the February 2016 Discussion Paper regarding territorial scope of the "critical" and "significant" calculations. The BMR is limited in its application to financial instruments traded on an EU trading venue or via a systematic internaliser. However, it is unclear whether the threshold calculation should apply to the notional value of such financial instruments where the trade has been conducted on a non-EU venue or between non-EU counterparties. It is our understanding that it would only be consistent with the scope and objectives of the BMR to capture transactions that are in fact conducted on an EU venue or with a systematic internaliser and request that ESMA clarify this.

<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>

CME Group does not believe that the calculation that the Commission undertakes in respect of critical benchmarks should be at a single point in time. As has been done for the calculation for administrators, the window over which the observations are made should be at least six months in order to take into account seasonal variability in the trading of relevant financial instruments and to ensure that the results obtained will be accurate. We suggest that the Commission analyses the data covering a prescribed six month period and uses the average to determine the value of the benchmark.

In addition, as CME Group mentioned in its response to the February 2016 Discussion Paper, it still remains unclear how frequently an administrator is expected to make the calculation as to whether a benchmark is significant and how soon after the observation period has ended the administrator is expected to have submitted its report to the NCA (if a benchmark has become significant or ceased to be significant).

<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>

CME Group agrees that licensing agreements could be used to identify financial instruments but provided that such arrangements are not mandatory and remain voluntary decision of the administrator. This approach has certain limitations, some of which ESMA have noted in this Consultation Paper. As ESMA also notes, the MiFID II/MiFIR database (reference data) will contain information that relates benchmarks to financial instruments.

Given the limitations of the licensing agreements approach, we suggest that the licensing agreements approach is only used where the MiFID II/ MiFID database and the relevant data on the notional value of instruments (e.g. from the EMIR database) is not readily available. While the data derived from the notional value of financial instruments is probably one of the most practical approaches, it is not going to be sufficient on its own to accurately measure the value of benchmarks. Such data will not be applicable to the measurement of the value of benchmarks in investment funds. In practice, this should mean that the licensing agreements approach is most relevant in the case of investment funds. However, the use of licensing agreements should only be proposed as a non-mandatory alternative.

We re-iterate that Daily Settlement Prices (“DSP”) and/or Final Settlement Prices (“FSP”) that are calculated and published by exchanges that list derivative contracts should not be considered to be benchmarks under the BMR. Licence arrangements in respect of DSPs and FSPs should not therefore be included in any data collection exercise based on licensing agreements.

Finally, we would like to raise the following points for further ESMA consideration in the context of prospective use of licensing arrangements for data gathering:

- There could still be a significant amount of benchmark usage that the administrator was unaware of either because such use was unauthorised or because the administrator does not require a user to have a formal agreement with it in order to use the benchmark.
- The licensee may not be the user of the benchmark – for example if there were sub-licence arrangements.
- Confidentiality concerns or commercial sensitivities that licensees may have with the relevant authority sharing the data with the administrator (as noted by ESMA).
- Use of licensing agreements for the purpose of measuring the value of benchmarks should be used only in relation to the licences operational in the EU and in relation to financial instruments traded on EU trading venues or via EU systematic internalisers. This will be consistent with the scope and the objectives of the BMR.

<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 have no comments on the proposed technical advice

<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 have no comments on the proposed technical advice



<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>

CME Group agrees with the use of a non-exhaustive list of considerations. However, while the factors and indicators listed are not determinative, we feel that some of the indicators imply an expectation that is not consistent with our understanding of the Level 1 text and may lead to an overly restrictive interpretation of “objective reasons”. In particular:

- CME Group agrees that a strong indicator for permitting endorsement is that the third country administrator is not likely to apply for recognition. However, the words “particularly if the benchmark provision is only an ancillary activity to its core business” may lead to an interpretation that the indicator does not exist where a third country administrator whose main business is benchmark administration is unlikely to apply for recognition based on the geographical factors listed. The indicator in our view is just as valid in this situation in our view.
- The indicator referring to legal restraints should not refer only to restraints in relation to obtaining input data but to any legal restraints that either prevents recognition or from the administrator providing the benchmark from the EU. The “objective reasons” should recognise that where equivalence and recognition are not possible due to the legal environment of the third country administrator’s home country, endorsement may be the only viable option. If endorsement is not possible then the benchmark may be withdrawn from use or not made available in the EU. The legal environment of the third country administrator’s home country is not something within that third country administrator’s direct power to change so their access to the EU and the access of EU persons to their benchmarks should not be restricted on this basis. Therefore an objective reason for allowing endorsement (or indicator that such reason exists) should be that either endorsement or recognition are not likely to be possible due to the legal environment of the third country administrators home country.

CME Group agrees with the principal behind the “effects on benchmark users in the Union” indicator in paragraph 2(a) of the technical advice. However, the further indicators in (i) and (ii) may lead to an interpretation that this only relates to existing benchmarks that are in significant use and may be withdrawn if not endorsed. As stated in our response to the February 2016 Discussion Paper, CME Group believes that a strong indicator that there is an effect on benchmark users in the Union is that it is used or may be used in the Union (i.e. at any level of use). ESMA’s current drafting would not allow smaller or new benchmarks to use the endorsement procedure which, could have detrimental effect on choice, competition and innovation in the Union.

<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>

CME Group broadly agrees with draft technical advice. In our response to February 2016 Discussion Paper we advocated adoption of a practical solution in respect of transitional provisions and we welcome the fact that ESMA has decided not to prescribe fixed time limits until the non-compliant benchmark may be used or quantitative threshold above which the non-compliant benchmark may be used.

We agree with the proposed non-exhaustive list of criteria on which the assessment should be based and at this stage we have no additional suggestions regarding potential expansion of this list. We are of the opinion that the criteria that the NCAs will have to analyse when considering application of Article 51(4)



BMR transitional provisions need to be sufficiently broad to allow smooth implementation of these provisions in order to avoid potential market disruption.

With regards to time limits, while we would prefer that the technical advice provide for a possibility of open-ended transitional provision, we welcome ESMA's proposal that NCAs should set the time limits on case-by-case basis and taking into account the maturity periods of financial instruments referencing non-compliant benchmark. We would like to caution that when setting relevant time-limits, the NCAs should also take into account the time needed to review and potentially change rules of exchange-traded financial instruments referencing a benchmark, including time needed to get regulatory approvals.

<ESMA_QUESTION_CP_BMR_11>