



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>

- UBS would like to thank ESMA for the opportunity to comment on the Consultation Paper on the EU Benchmarks Regulation ("BMR").
- UBS endorses the IOSCO Principles for Financial Benchmarks (the "IOSCO Principles"). We have taken steps to ensure that our UBS indices (where an index is defined in line with the definition of benchmarks under the IOSCO Principles) are compliant with the same IOSCO Principles. In particular, we maintain an up-to-date inventory of UBS Indices, have updated our UBS index creation and maintenance policy and developed and implemented an enhanced control framework for the administration of UBS Indices. We have also rationalised existing Indices by means of divestment, transfer of administration functions or retirement and where appropriate, updated the related disclosure documentation.
- While we appreciate that ESMA has taken into account a number of concerns raised in our response to the discussion paper, we need further clarity on the scope of BMR. In our view, an index can be deemed to be made available to the public only if it is generally accessible by members of the public. In shaping the concept of "making available to the public", ESMA has proposed a two tier definition which in our view is difficult to implement in practice, as on one hand, the concept of "large/potentially indeterminate" requires further clarification and on the other hand the administrator may not always be aware of the usage of the index by third parties as a benchmark. The Level 1 text recognizes this possibility and provides a clear exemption where administrators are unaware and could not reasonably have been aware of the use of the index as a benchmark. We believe that the technical advice should set out a non-exhaustive list of cases which would not qualify as "made available to the public", as set out in our answer to Q1. Furthermore, the industry would also benefit from specifying the meaning of "published".
- Second, there is a range of business models currently used for the provision of benchmarks. Given the different outsourcing models, it is important for administrators, contributors and users to know who carries the obligations of the administrator under BMR. There should only be one administrator unless there is a specific agreement between two parties to split administrator duties, in which case they can be co-administrators. The key question is who retains control over the provision of the benchmark. If overall control of the benchmark methodology or determination process is given to a third party, it should be clear that this is not outsourcing but transfer of the administration function, even where intellectual property or branding rights are retained.



- Third, in relation to the reference data for benchmarks, we would encourage ESMA to take a coordinating role in creating and maintaining a central registry to keep information that is beyond the visibility of any particular administrator.
- Fourth, we are still concerned with the lack of a transitional provision for benchmarks issued between the date of entry into force of BMR and its date of application. This means that index providers would create new indices after the date of entry into force but anyone who used the index as a benchmark in the EU would have to cease using it from the date of application of the Regulation unless and until the index provider obtains authorisation/registration under the Regulation (or, for non-EU benchmarks, qualifies the benchmark for use in the EU under the third country regime). The authorization/registration process may take weeks or months after the date of application. In this respect, we would encourage ESMA to consider the drafting amendment in our answer to Q11.
- UBS is a global bank, with activities spanning investment banking, asset management, wealth management and commercial banking business across many different geographies and industry sectors. Given the scope and nature of UBS's activities, UBS utilizes and contributes to many different benchmarks and indices, which are used for a variety of different purposes in and many different contexts. Although not practical to address each of these in the context of this response (given the breadth of our operations) we would be pleased to engage further on this topic with the ESMA should this be required.

<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>
"Made available to the public"

- We need greater clarity in the technical advice on the interpretation and acts that will constitute "making available to the public".¹ ESMA has proposed two conditions to define this concept: (i) An index shall be deemed to be made "available to the public" if it is accessible by a large or potentially indeterminate number of recipients; (ii) 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 becomes accessible to an indeterminate number of people. We would encourage ESMA to avoid a disproportionate application of the concept, which would bring tailored products that are not available on an unrestricted basis to the general public within scope.
- In order for the concept to be workable and given the analogy with the EU acquis on copyright, the technical advice should clarify the conditions for application. The decision of the Court of Justice of the European Union (CJEU) in *C More Entertainment AB v Linus Sandberg*, C-279/13 held that: *"it is apparent from Article 3(2) of that directive that, in order to be classified as an act of 'making available to the public' within the meaning of that article, an act must meet, cumulatively, both conditions set out in that provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them."*
- The technical advice should set out similar conditions of application in the context of benchmarks as it is unclear what is meant by "*a large or potentially indeterminate number of recipients*".
- In particular, the scope of the application of Condition (ii) is unclear and it will not be possible to have certainty on whether or not an index has been made available to the public as this will rely on the actions of third party entities. It would be preferable to state instead of Conditions (i) and (ii), the clear condition that "An index shall be deemed to be made available to the public if the index is generally accessible by members of the public."
- It is also better in our view to have a set of non-exhaustive exclusions in the technical advice to clarify what would not constitute making available to the public, including but not limited to:

¹ ESMA interprets the concept of made available to the public using two conditions: (i) An index shall be deemed to be made "available to the public" if it is accessible by a large or potentially indeterminate number of recipients; (ii) 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 becomes accessible to an indeterminate number of people

- where the index is provided to supervised entities in a password protected form with instructions that the index should not be distributed further, or
 - indices created under written advisory and discretionary mandates with investment management clients as well as bespoke indices used for funds for the sole proprietary use of clients; or
 - indices created for the sole purpose of determining the value of a financial instrument which is used for the proprietary use of clients and where the index value is only made available to investors and prospective investors of such financial instrument. Where information [on an index] is provided only to investors in certain financial instruments that reference the relevant index, we would highlight that such group is clearly limited by the outstanding number of units of such financial instruments, or
 - quotes provided by firms where the audience is not indeterminate, but determined by commercial considerations and relationships. In our view, such instances such as SI quotes published on a commercial basis (that are restricted to clients, which is a set known user group as opposed to a figure which is made indiscriminately available to the public), should not be deemed to be made available to the public under BMR.
- Furthermore, we do not agree with the statement in paragraph 18 that the publication of the price of a certain financial instrument (by incorporating the index into the coupons, strike prices, differentials and values) amounts to making that "index available to the public" on the basis that the investor can isolate the index value therefrom. The price of any financial instrument that references an index, is determined by a whole number of components, of which the index is only one. Other components include e.g. the current and expected volatility, current and expected interest or other market rates, current and expected prices for comparable financial instruments.
 - We believe that the definition of "made available to the public" should explicitly refer to Article 2.2 h of BMR which states that BMR does not apply to an index provider in respect of an index provided by the said provider where that index is unaware and could not reasonably have been aware that that index is used as a benchmark.
 - In paragraph 23 of the consultation, we agree with ESMA's statement that "where customized baskets of securities designed to a single client are not synthesized in one single value, and are merely used to asset allocation purposes with a view to physically or synthetically replication its position, it is dubious whether such baskets may fall in the definition of an index", especially as there are many cases where we would make the value only available to an individual or a small number of clients. We would therefore ask ESMA to clarify the treatment of customized baskets of securities in the technical advice.

"Published"

- We would encourage ESMA to provide technical advice on the meaning of published. Such interpretation will be important for understanding the application of BMR to the publication of quotes on request by systematic internalisers. For example, where a quote is sent to a closed user group electronically, would this fall under the definition of published? Or would the requirement be for such a quote to be made available in a manner openly accessible to the public?

<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>

- There should only be one administrator unless there is a specific agreement between two parties to split administrator duties, in which case they can be co-administrators. It would raise too much uncertainty if two parties could be seen as administrators in the normal course of business. Where an entity designs a methodology, and then transfers control over the ongoing maintenance of the methodology, determination, dissemination, operation and governance aspects to a third party administrator, that third party should be seen as the administrator. Overall, it is important that the Level II rules can accommodate a wide range of current and developing business models for the provision of a benchmark.
- We also suggest that the inclusion of the specific benchmark alongside the administrator in the ESMA register for activity in the Union (consistent with the approach for 3rd country benchmarks and administrators) will assist the market, both participants and competent authorities identify who is the administrator for a particular benchmark. This will provide clarity on who is the administrator in different outsourcing models and thereby confirm where regulatory accountability lies for a particular benchmark.

<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>

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<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 also very much welcome that ESMA limits the definition of the issuance of a financial instrument to transferable securities, money market instruments and collective investment undertakings. In our view, this is the only correct reading possible under the BMR.

<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>

- Our concern with the unavailability of data during the transitional period remains. We need more clarification. We also highlight that industry has no access to trade repository data. Only regulators have access to such data and previous requests made to TRs to make data available have been unsuccessful. While we commend ESMA's intention to consult on broadening the regime for making TR data publicly available later this year, this will not help in the short term. Written justification to be provided by administrator for use of alternative sources would be cumbersome.

<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>

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<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>

- This would entail NCAs requesting all benchmark administrators to send a list of firms for which a license has been granted. The relevant authority would then send a mandatory survey including relevant assets which will be reported back to the benchmark administrator. A limit of this approach is that the use of licensing agreements does not cover the overall use of a benchmark, and data to be exchanged could be subject to confidentiality.
- We would reiterate our view expressed in our previous response to the discussion paper that ESMA to take a coordinating role in creating and maintaining a central registry to keep information that is beyond the visibility of any particular administrator.

<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>

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<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>

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<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>

- We support the ISDA/FIA/GFMA joint response to this question

<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>

- As already acknowledged in the consultation paper, users of benchmarks need better access to information on the status of authorisations and registrations of benchmarks to know which benchmarks are compliant. We need a clear timeline from ESMA on the database, in particular when registrations can be made and when users can rely on the database.
- Second, we are very concerned that the Regulation provides no transitional provision covering new EU benchmarks created after the date of the Regulation comes into force (30 June 2016) and before the date of application of the Regulation (1 January 2018). As the text currently stands, an index provider providing a benchmark on the date of entry into force of the Regulation shall apply for authorization or registration by 42 months after date of entry into force of the Regulation. This means that index providers would create new indices after the date of entry into force but anyone who used the index as a benchmark in the EU would have to cease using it from the date of application of the Regulation unless and until the index provider obtains authorisation/registration under the Regulation (or, for non-EU benchmarks, qualifies the benchmark for use in the EU under the third country regime). The authorization/registration process may take weeks or months after the date of application.
- We therefore propose that ESMA modifies its technical advice as follows:

6.4 Draft Technical Advice on transitional provisions

Conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of the benchmarks Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark

1. Where a benchmark, existing on the application date ~~of entry into force of the EU Benchmarks Regulation~~, does not meet the requirements of the Benchmarks Regulation (“non-compliant benchmark”), the use of such benchmark after 42 months following the entry into force of the Benchmark Regulation is permitted only if the relevant competent authority of the Member State where the provider is located decides that ceasing or changing that benchmark to conform with the requirements of the Benchmarks Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark.

In line with the ISDA/FIA/GFMA joint response, we would support the following points:

- In addition to the above proposal we also note that ESMA’s proposal does not allow for any discussion between the National Competent Authority (NCA) of the administrator and the NCA of the users. We would support that this is introduced. Although the timing for the transitional period is to be decided on a case-by-case basis by the administrator’s NCA, it does not allow for discussion between relevant NCAs, and it suggests that a single timeframe be provided for all uses of the benchmark, whereas in reality different considerations may apply to different types of use. We suggest that both of these elements are addressed.
- Finally, we stress that what constitutes “use in the Union” is flawed if applied from the “entry into force date” because the OTF concept and the expanded form of SI concept will not be applicable before the full application of MiFID (i.e. 3rd January 2018). We assume that prior use in the Union should be determined on the basis that the financial instrument referencing the benchmark is traded on an OTF or SI post MiFID II implementation.

<ESMA_QUESTION_CP_BMR_11>