

S&P Global welcomes the opportunity to provide comments to ESMA's Consultation Paper on Draft Technical Advice under the Benchmarks Regulation (CP).

S&P Global is the parent company of S&P Dow Jones Indices (S&P DJI) and S&P Global Platts (Platts), which both produce and distribute benchmarks for the financial and commodity markets. Formed in 2012 by combining the S&P Indices business and the Dow Jones Indexes, S&P DJI is a leading provider of financial market indices which include the Dow Jones Industrial Average®, established in 1896, and the S&P 500®, established in 1957. Platts is the leading independent provider of information and benchmark prices for the commodities and energy markets. Platts' coverage includes oil and gas, power, petrochemicals, metals, agriculture and shipping.

Both Platts and S&P DJI are independent and separate from market participants, product providers and government entities. They do not participate in the markets they measure and have no vested interest in the value of any indices or price assessments they produce.

We hope that our comments and suggestions on ESMA's CP are helpful.

If you have any questions on the issues raised, or if you would like to discuss any points further please contact: Joe DePaolo, Associate General Counsel, S&P Global, Chief Legal Officer, S&PDJI, at [joseph.depaolo@spglobal.com](mailto:joseph.depaolo@spglobal.com) or 001 212-438-3651; or, Pierre Davis, Associate General Counsel, S&P Global, Chief Legal Officer, S&P Global Platts at [pierre.davis@spglobal.com](mailto:pierre.davis@spglobal.com).

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

We are concerned that a restrictive interpretation of what the word "accessible" may unduly and substantially limit the scope of the Regulation against the clear intentions of the Level 1 text. "Made available to the public" should be defined in an open manner and as broadly as possible so as to not unduly restrict the number of benchmarks in scope of the Regulation. This is in line with Recital 8 of the Benchmarks Regulation which provides that "*The Scope of the Regulation should be as broad as necessary to create a preventive regulatory framework...*".

In light of the above, S&P DJI and Platts agree with ESMA's statement set forth in Paragraph 18 of the CP:

"Making available of index values to the investors "*whatever technique is used*" should include the dissemination of such index values to (a wider) public through their incorporation into the coupons, strike prices, differentials, and values of financial instruments and investment funds referencing it, as the investor can isolate the index value therefrom."

Thus, any provision of an index for the purposes of issuing or creating a financial instrument or financial contract or benchmarking the performance of an investment should be deemed to be making such index available to the public if such provision would cause end-users and/or investors to be exposed to the index through such activity. Such an interpretation ensures an appropriate scope for the Regulation, aligns with Recital 9 of the Regulation which provides that "*The critical determinant of the scope of this Regulation should be whether the output value of the benchmark determines the value of a financial instrument or a financial contract, or measures the performance of an investment fund ..*" and does not unduly restrict the number of benchmarks covered.

However, as currently drafted, ESMA's proposal on the Draft Technical Advice found under Section 1(ii) of the CP 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 an indeterminate number of people”. This creates a potentially significant loophole in the scope of the Regulation which would be contrary to the aforementioned objectives of the Regulation and the intent set forth in Recital 6 of the Level 1 text that the Regulation should “ensure a high level of consumer and investor protection”. In this regard, we agree with ESMA’s statement in paragraph 22 of the CP that it would be a “paradoxical situation” if:

“an index is referenced in a financial instrument traded on a trading venue and potentially accessible to a huge number of retail investors, but because it is not made available otherwise but privately to a limited number of supervised entities, the index is considered out of the scope of the BMR.”

To ensure ESMA’s draft technical advice is clear and reflects these aforementioned intentions and this concept we suggest the Draft Technical Advice found under Section 1(ii) of the CP be amended as follows:

“the index is provided by 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 an indeterminate number of people are exposed directly or indirectly to the index.”

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

S&P DJI and Platts generally agree with ESMA’s proposed specification that “administering the arrangements for determining a benchmark” includes both “the ongoing management of the infrastructure and of the personnel that are involved in the determination process of a benchmark” and “the setting of a specific methodology ... and its maintenance through periodic reviews”. However, it should be clear that the primary factor to determine the administrator of a given benchmark or family of benchmarks should be control over the methodology, regardless of the entity responsible for the initial development of the methodology. In this context, the entity responsible for the continued maintenance and periodic review of the methodology should be the entity considered as administering the arrangements for determining a benchmark.

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, ...)?

“Use of a benchmark” determines the scope of the Regulation and the scope should be broad enough to include indices used for all types of investment products, including: launching a fund; creating an exchange traded option or future; offering an index-linked debt instrument or product; or entering into an OTC option or swap. Derivatives, whether or not exchange traded, should be included in the scope. If parties to a bilateral contract decide to reference an index, this too should be considered “use of a benchmark.”

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

See our answer to Q3 above.

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?

The calculation of any thresholds should be based on ESMA prescribed, publically available data. It is fundamentally inequitable and unsound to require administrators to categorize their benchmarks using incomplete or inaccurate data. Due to the challenges in calculating such thresholds, S&P DJI and Platts believe that there needs to be an iterative process with the supervising National Competent Authority (NCA) to ensure that benchmark administrators are not penalized for any inaccurate calculation made in good faith. If the relevant NCA determines there has been an inaccurate calculation of notional amounts, nominal amounts or net asset values, it should notify the benchmark administrator explaining how it determined the calculation was inaccurate and identifying any data the NCA believes the benchmark administrator failed to include in its calculation, and provide the benchmark administrator with an opportunity to resubmit using that data or provide why it would be inappropriate to include the data. In order to reflect the latter, we suggest ESMA to amend the Draft Technical Standard as follows: “The following measures, expressed in EUR (..), should be taken into account **to the best of the administrator’s ability based on the available data**, when assessing benchmarks under the thresholds ...”

In addition, we believe it is unclear whether the nominal value of financial instruments other than derivatives is intended to be the face value of the instrument or the value collected. For example, a structured note may be issued with a €100 million face value but which only collected €25 million. In that instance, only €25 million should be factored into the calculation if available.

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?

Due to the challenges associated with availability of the relevant data needed to perform the measurement, a specific point in time approach should include some flexibility. The point in time approach should include both the prescribed date and, in the event that the relevant data is not available on the prescribed date, the date nearest to the prescribed date where the relevant data are available.

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?

It is important to underscore that administrators utilize a variety of licensing and fee arrangements. Some of these arrangements require reporting of underlying assets/notional amounts and some do not. In addition, reporting requirements can produce inconsistent and limited insight into the amount/size of the underlying assets/notional amount utilizing their benchmarks. It would promote better transparency and consistency if ESMA were to implement a system whereby the NCA or other regulatory authority issues a mandatory survey to report the value of financial instruments, financial contracts and investment funds leveraging the benchmarks.

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

We generally agree with the criteria and do not think that it is necessary to include additional criteria in the technical advice.

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?

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

ESMA appears to suggest in the draft technical advice that a strong indicator for an objective reason for endorsement would be that “the provider of the third country benchmark is not likely to apply for recognition” (5.5, page 52). We believe it is important to ensure that the ability of third country administrators to avail themselves of the endorsement regime is not unduly restricted in this way. The Level 1 text does not provide that endorsement may only be pursued if recognition is not likely to be pursued. Recital 44, for example, states that the Regulation “also provides for certain other mechanisms (namely, recognition and endorsement) under which third-country benchmarks can be used by supervised entities located in the Union.” and nowhere in the Level 1 text is it suggested that these are a hierarchy of options. Indeed, as ESMA stated in paragraph 309 of its February Discussion Paper, the third country access regimes are “parallel regimes.” We agree, and believe it is important to clarify that both the recognition and endorsement options be viewed as parallel, and therefore equal, regimes, rather than one being contingent on the ability to invoke the other.

We would also stress that the criteria contained in ESMA’s draft technical advice under points 1(a), (b) and (c) of section 5.5. should not be considered as cumulative. Meeting one of the proposed criteria should be considered as an objective reason to use the endorsement regime for the provision of a benchmark in a third country.

Furthermore, we believe that Section 5.5, Paragraph 2, a. (i) should be amended and the wording “**and that there are no substitutes available in the Union**” should be deleted. Indeed, the large majority of benchmarks could be substituted and thus, most third country administrators would not be able to demonstrate that criterion and their requests for endorsement could therefore be refused, which is contrary to the sole purpose of providing for endorsement in the first place in the Regulation.

Finally, we believe that given technological advancements, any attempt to ascribe a logical rationale for where an administrator is headquartered seems out of date. Many firms have built significant centers of excellence in a variety of countries and, in line with the overarching intention of the Regulation, what is of primary importance is whether they are equipped to deliver robust and quality benchmarks in the EU market from their current geographic location outside of the EU. In this context, we welcome ESMA’s acknowledgement in the draft technical advice that the location of specific skills and expertise of individuals or firms based on experience and/or personal skills associated with employees of a third-country benchmark provider or third country contributors is an important and objective reason for endorsement.

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?

We generally agree with the criteria and do not think that it is necessary to include additional criteria in the technical advice.