



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>
TYPE YOUR TEXT HERE
<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>

In principle, Nasdaq supports the broad definition suggested by ESMA for ‘making available to the public’. It is not in the best interest of investor protection if administrators could stop “publishing” as a way to get out of the BMR. An appropriate definition could read as follows: *“made available to the public” means the provision of any benchmark to another entity for the purposes of issuing or creating a financial instrument or financial contract or benchmarking the performance of an investment fund*”.

The mechanism of publishing should not matter, but the fact it is made available. The publication process should focus on any provision of a benchmark to another entity for the purposes of issuing or creating a financial instrument or financial contract or benchmarking the performance of an investment fund. Focusing on any such provision or dissemination ensures that the scope of Regulation is not unduly restricted in terms of the number of benchmarks covered.

<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>

Yes, ESMA’s proposal to align with the IOSCO Principles on the overall responsibility of the administrator is an appropriate and sound approach. The administrator should retain overall responsibility of all aspects of the benchmark determination process, including *“development, determination and dissemination, operation and governance”* as stated in paragraph 25. Further, essential to retaining overall responsibility is the concept that the administrator be responsible for *“the development of the methodology and the establishment of governance arrangements”* so that the administrator is responsible for those requirements set forth in the Regulation that pertain to methodology quality, in particular the characteristics of a methodology set forth under Article 13. To be clear, administrators have control to whom they license indices for use, but it does not mean they control the distribution of indices.

<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>

Nasdaq supports ESMA’s decision not to widen the concept of issuance to encompass derivatives. ESMA rightly recognises that trading venues do not issue financial contracts and should not be considered ‘issuers’.

However, Nasdaq is concerned by ESMA’s statement that market operators are “caught under the second point (b) of the definition of ‘use of a benchmark’”. When determining the contract values or final settlement prices for financial instruments (which could be seen as the amount payable under a financial instrument), exchanges and/ or clearing houses do not benefit at all economically from changes of the value (price) of an index, having therefore no inherent conflict of interest.



Nasdaq believes exchanges or clearinghouses do not belong to the “user definition” in the proposal, due to their neutral positioned services towards market participants and they are already highly regulated and supervised.

<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>

In general, Nasdaq is supportive of ESMA’s intention to clarify the definition of ‘use of a benchmark’ by capturing all different types of users of benchmarks. Nevertheless, in our view, regulated markets are not, and should not be considered to be issuers under the Benchmark Regulation.

<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>

There is insufficient detail on how the nominal amount of financial instruments is to be calculated. It is not clear how an administrator can access this information. How is it to be determined which instruments/contracts/investment funds reference a benchmark?

There may or may not be a license in place. When there is not a license, then it is not clear how the administrator can determine which instruments reference a benchmark.

<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>

Regarding statements under 79 and 80, Nasdaq agrees that only a very small number of commodity benchmarks will fall into the category of critical benchmarks. However, when it comes to the seasonal pattern of some commodity prices or consumption volume it is not a matter of size, liquidity of the market or usage of a Benchmarks but of the characteristics of the underlying commodity. Commodities that follow seasonal patterns because of physical characteristics (e.g. non-storability, weather-dependency or season-driven consumption) do so even in relatively liquid markets. For these commodity benchmarks a six-month average is not adequate from our view as the seasonality tends to be spread over the whole year. As a result, we still propose to choose a yearly average as seasonal patterns should be levelled out.

<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>

TYPE YOUR TEXT HERE

<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>
Nasdaq considers that it is unclear how the value of financial instruments etc. that reference a benchmark is to be sourced. This alternative method of determining the categorisation of benchmarks is still reliant on the value of financial instruments that reference a benchmark but there is no clarity as to how this value is to be sourced.
<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>
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<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>
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<ESMA_QUESTION_CP_BMR_11>