



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 Benchmarks Regulation, 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

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach us by **02 December 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>

Nasdaq welcomes that ESMA to a broader extent has recognised the usefulness of the already existing IOSCO Principles, and would encourage to stay close to the IOSCO Principles in the rulemaking and implementation of the EU Benchmark Regulation going forward.

Nasdaq has two further introductory comments.

The first concerns “entirely and directly”, which may benefit from clarification although it is not explicitly within ESMA’s mandate.

We consider that the provision requiring regulated data to be sourced “entirely and directly” should be further clarified as the Level 1 text does not specify the treatment of data sourced from Third Party vendors. There is currently legal uncertainty as to how data vendors should be considered with regard to the “entirely and directly” provision. Index Administrators usually do not take direct feeds from trading venues but use Data Vendors to access trading venues data, both from trading venues in the EU as well as outside of the EU. Not recognising this set up (regulated data sourced in through market data vendors) under the definition of “directly” would create additional unnecessary burden for the benchmark administrator. Trading Venue Data sourced from Data Vendors is usually used for trading decisions and thus should be seen as an unchanged display / transmission of data. Therefore, we strongly suggests to explicitly clarify that sourcing of raw data (meaning non-processed in a way generating derived data) from data vendors will not result in benchmarks falling outside of the scope of the definition for regulated data benchmarks. In this context, the data vendor should be considered as a technical means to source the data from trading venues, and not a separate entity acting in between units.

Secondly, we have a concern regarding the transitional requirements:

We understand that Article 51.1 allows index providers a transitional arrangement in respect of the application process and that this arrangement applies to index providers that provide a benchmark on 30 June 2016. However, it is unclear whether this transitional arrangement apply to all benchmarks we provide, including those created after 30 June 2016. We have read ESMA’s statement in its Consultation Paper (page 11, paragraph 214), stating that the application for authorisation or registration would be a one-off process, but would this transitional arrangement also apply to all benchmarks the entity in question is providing? We are concerned that, if this is not the case, many benchmark administrators, despite having provided benchmarks on 30 June 2016, will need to apply for registration or authorisation within 30 days following application of BMR. This would render the transitional requirements much less useful to the entire industry. Therefore, we would ask ESMA to address this within Level 2.

<ESMA_COMMENT_CP_BMR_1>



Q1: Do you consider the non-exhaustive list of governance arrangements to be sufficiently flexible? Are there any other structures which you would like to see included?

<ESMA_QUESTION_CP_BMR_1>

For regulated data benchmarks, we support including - as optional - external representatives as members of the oversight function as stated in Article 1 (5). We support this being optional and not mandatory, as inclusion of external representatives could introduce conflicts of interest to benchmark administration. For instance, parties could gain access to price sensitive information (such as planned index changes) before other market participants. The BMR Level 1 text does not require external parties to be included in the oversight and therefore requiring this in Level 2 would potentially go against the Level 1 text.

<ESMA_QUESTION_CP_BMR_1>

Q2: Do you support the option for the oversight function to be a natural person who is not otherwise employed by the administrator?

<ESMA_QUESTION_CP_BMR_2>

For regulated data benchmarks, we support including - as optional - external representatives as members of the oversight function as stated in Article 1 (5). We support this being optional and not mandatory, as inclusion of external representatives could introduce conflicts of interest to benchmark administration. For instance, parties could gain access to price sensitive information (such as planned index changes) before other market participants. The BMR Level 1 text does not require external parties to be included in the oversight and therefore requiring this in Level 2 would potentially go against the Level 1 text.

<ESMA_QUESTION_CP_BMR_2>

Q3: Do you support the concept of observers and their inclusion in the oversight function?

<ESMA_QUESTION_CP_BMR_3>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_BMR_3>

Q4: Do you think that the draft RTS allows for sufficient proportionality in the application of the requirements? If no, please explain why and provide proposals for introducing greater proportionality.

<ESMA_QUESTION_CP_BMR_4>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_BMR_4>

Q5: Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?

<ESMA_QUESTION_CP_BMR_5>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_BMR_5>

Q6: Do you agree with the appropriateness and verifiability of input data that the administrator must ensure are in place? Please elaborate.

<ESMA_QUESTION_CP_BMR_6>

Nasdaq broadly agrees with ESMA's proposal, including the simplified provisions regarding record keeping obligations and the exemption provided for regulated data benchmarks. We however question the applicability of the requirements in Article 3 (1) for regulated data benchmarks, given the real-time nature of the data. These requirements do not appear well suited for regulated data. Considering that regulated



data is already subject to extensive requirements for upholding market integrity, including the Market Abuse Regulation and MiFID II / MiFIR, further checks of the input data would appear ill-suited and unnecessary.<ESMA_QUESTION_CP_BMR_6>

Q7: Do you agree with the internal oversight and verification procedures that the administrator must ensure are in place where contributions are made from a front-office function in a contributor organisation? Please elaborate.

<ESMA_QUESTION_CP_BMR_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_7>

Q8: Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark's methodology is traceable and verifiable?

<ESMA_QUESTION_CP_BMR_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_8>

Q9: Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?

<ESMA_QUESTION_CP_BMR_9>
Nasdaq supports in particular ESMA's proposal to allow the administrator a certain level of discretion in determining the frequency of internal reviews as well as the proposal to limit disclosures to the publication of bodies or functions rather than names of persons.
<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the procedure for consultation on material changes to the methodology?

<ESMA_QUESTION_CP_BMR_10>
Nasdaq does not support ESMA's proposal not to allow for any exemptions in case of sudden market events. There may be events which require swift action from the benchmark administrator regarding methodology adaption. This type of event may make a deviation from usual processes necessary. We fully agree that this would be extraordinary circumstances only. Nevertheless, these should be considered by ESMA.

Neither do we support ESMA's decision not to allow for the publication of stakeholder comments in the form of summaries. We do not consider it necessary to publish stakeholders' comments in detail, but stakeholders should be able to rely on the administrator's summaries of consultation feedback. As publishing many sets of feedback could increase costs across the board, we consider it more efficient for the benchmark administrator to provide a summary of received feedback to the public. Especially for benchmarks not considered 'critical', we do not support the proposed approach. <ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with this approach? Please explain your response.

<ESMA_QUESTION_CP_BMR_11>
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<ESMA_QUESTION_CP_BMR_11>



Q12: Do you agree with this approach? What are the different characteristics of contributors that should be taken into consideration in this RTS? How should those characteristics be taken into account in the provisions suggested in this draft RTS? Please give examples.

<ESMA_QUESTION_CP_BMR_12>
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Q13: Should the substantial exposures of individual traders or trading desk to benchmark related instruments apply to all types of benchmarks for all contributors?

<ESMA_QUESTION_CP_BMR_13>
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Q14: Do you agree with the proposals for the reporting of suspicious transaction in this draft RTS? Please explain your answer.

<ESMA_QUESTION_CP_BMR_14>
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Q15: Are there any provisions that should be added to or amended in the draft RTS to take into consideration the different characteristics of benchmarks? Please give examples.

<ESMA_QUESTION_CP_BMR_15>
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Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

<ESMA_QUESTION_CP_BMR_16>
Nasdaq supports the changes made by ESMA with regard to the role of submitters. In particular, we supports ESMA's proposal whereby contributors appoint and evaluate submitters..<ESMA_QUESTION_CP_BMR_16>

Q17: Do you agree with the draft technical standards in relation to the governance and control arrangements for supervised contributors to benchmarks? Please provide reasons.

<ESMA_QUESTION_CP_BMR_17>
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Q18: In particular, can you identify specific aspects of the draft Regulation that should be applied differentially to different supervised contributors in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors?



<ESMA_QUESTION_CP_BMR_18>
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Q19: Do you agree with ESMA's specifications of the criteria?

<ESMA_QUESTION_CP_BMR_19>
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Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA_QUESTION_CP_BMR_20>
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Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA_QUESTION_CP_BMR_21>
Yes. In particular, Nasdaq supports the approach taken by ESMA on Article 1 (c), as the provisions clarify that reliable data must be available for the administrator to have to consider including it. We also support the fact that ESMA has taken into account the work of CPMI-IOSCO on UPI and that the RTS acknowledges the global nature of these identifiers. In principle, we supports the provisions for commodity benchmarks insofar as it is in line with the IOSCO Principles. Therefore, we are concerned with the proposal in Article 4 (f) and would question the added value this information would provide to regulators.
<ESMA_QUESTION_CP_BMR_21>

Q22: Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.

<ESMA_QUESTION_CP_BMR_22>
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<ESMA_QUESTION_CP_BMR_22>

Q23: Do you agree with the general approach to distinguish the contents of the application with reference to the cases of authorisation or registration?

<ESMA_QUESTION_CP_BMR_23>
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Q24: Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

<ESMA_QUESTION_CP_BMR_24>
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Q25: Are the requirements covering the information on the applicant's internal structure and functions appropriate?

<ESMA_QUESTION_CP_BMR_25>
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Q26: Are the requirements described dealing with the benchmarks provided appropriate? In particular, is the way in which the commodity benchmarks requirements are handled acceptable?

<ESMA_QUESTION_CP_BMR_26>
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Q27: Is the specific treatment for a natural person as applicant appropriate?

<ESMA_QUESTION_CP_BMR_27>
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Q28: Do you agree with the proposals outlined for requirements for other information?

<ESMA_QUESTION_CP_BMR_28>
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<ESMA_QUESTION_CP_BMR_28>

Q29: Do you agree with the approach followed in the draft RTS as regards the general information that a third-country applicant should provide to the competent authority of the Member State of reference?

<ESMA_QUESTION_CP_BMR_29>
Nasdaq supports ESMA's proposal to allow recognition through the demonstration of compliance with IOSCO principles certified by an independent external auditor. We also support that the application should be in one of the EU official languages and comply with the International Financial Reporting Standards or with Generally Accepted Accounting Principles. <ESMA_QUESTION_CP_BMR_29>

Q30: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should provide in order to explain how it has chosen a specific Member State of reference and which are the identity and role of the appointed legal representative in such State?

<ESMA_QUESTION_CP_BMR_30>
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Q31: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should give around the benchmarks it provides and that are already used or intended for use in the Union? In particular, do you agree with the proposals regarding the information to be provided on the types and the categories to which the benchmarks belong to?



<ESMA_QUESTION_CP_BMR_31>
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