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| 1 June 2016 |

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| Reply form for the  Consultation Paper on Benchmarks Regulation |
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| Date: 1 June 2016 |

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](http://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](http://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>

Intercontinental Exchange (“ICE”) appreciates the opportunity to provide comments and recommendations on the ESMA Consultation Paper on the Benchmark Regulation (BMR). ICE operates the leading network of global futures, options and equity exchanges. ICE provides world class clearing, data across financial and commodity markets.

ICE Benchmark Administration (“IBA”), based in London, was established in 2013 for the purpose of administering benchmarks and is a wholly-owned, independently capitalised subsidiary of Intercontinental Exchange. It administers the following three systemically important benchmarks: ICE LIBOR, ICE Swap Rate and the LBMA Gold Price. In 2015, IBA successfully transitioned the LBMA Gold Price and ICE Swap Rate to new, transparent IOSCO-compliant calculation methodologies. Today, the LBMA Gold Price is based on an electronic auction process and ICE Swap Rate is derived from tradable quotes from regulated trading venues.

Since assuming the administration of LIBOR in 2014, IBA has implemented a number of improvements across governance, surveillance and technology to enhance the integrity of the benchmark. In March 2016, IBA published a Roadmap which outlines further changes to be implemented through 2016:

* Incorporating transaction data into the LIBOR methodology to the greatest extent possible
* Publishing a single, clear and comprehensive LIBOR definition
* Implementing a construct for ensuring that the rate can adapt to changing market conditions with appropriate consideration of the interests of all stakeholders, and
* Conducting a feasibility study on transitioning the calculation of LIBOR to IBA, using transaction data to deliver an even more robust and sustainable rate for the long term.

The UK already has a well-established regulatory regime for financial benchmarks. The legislative framework was introduced following the 2012 Wheatley Review of LIBOR. This regulatory regime subjects administrators of, and submitters to, specified benchmarks to a number of specific requirements including the implementation of effective governance and oversight measures, monitoring of benchmark submissions, identification of any breaches of the practice standards, and having arrangements in place to identify and manage conflicts of interest. Under the UK provisions, firms that either contribute to or administer any specified benchmark must be authorised by the FCA. Initially applied exclusively to LIBOR, the regulatory regime now covers eight benchmarks specified by HM Treasury in the secondary legislation, including the ICE Brent Index which is administered by ICE Futures Europe (IFEU).

Authorised and regulated by the Financial Conduct Authority (FCA), IBA (and IFEU in its capacity of the administrator of the ICE Brent Index) is required to comply with the FCA’s rules for benchmark administrators (MAR 8); IBA has also been formally assessed in respect of ICE LIBOR against the IOSCO Principles for Financial Benchmarks. In addition, based on the review of LIBOR, IBA has undertaken a self-assessment of its compliance with the IOSCO Principles in respect of ICE Swap Rate and the LBMA Gold Price

Based in multiple locations across the United States, ICE Data Services (IDS) is a relatively new benchmark index provider with a line of four indices known as the ICE U.S. Treasury Bond Index SeriesTM, which were launched in January, 2016. We envision an aggressive schedule over the following quarters to add significantly more index options for our clients globally.

In addition, ICE Data Services ETF & Index Services include data, operational outsourcing, design support and distribution of index valuation data, as well as delivery of intraday indicative valuations for various Exchange-Traded Products (“ETPs”). We estimate that ICE Data Services supplies valuations for approximately 80% of the Fixed Income ETP marketplace in the United States.

The NYSE Global Index Group has been providing proprietary indices for over 25 years, dating back to the roots of the business at the American Stock Exchange. The group primary produces equity-based indices, with a small subset of indices containing options, Treasury bonds, and futures.

Well-known indices within the NYSE Index Family include the NYSE Composite Index, NYSE Arca Gold Miners Index, NYSE Arca Gold BUGS Index, NYSE Arca Biotechnology Index, and Intellidex and StrataQuant Index Families. The NYSE Arca Gold Miners and Biotechnology Indices are widely tracked as one of the leading benchmarks for their respective industries. The Intellidex and StrataQuant Indices were innovations when launched, expanding indexing from traditional, market-cap weighted indices to fundamentally-weighted indices.

The indices within the NYSE family have been licensed out for numerous products, including ETPs, mutual funds, structured products, futures, options, and swaps. The vast majority of these products are issued and traded in the U.S. However, there are numerous structured products and swaps issued by European entities and several ETPs tracking NYSE indices that are listed and traded on exchanges in the U.K. and across continental Europe.

The NYSE is currently engaged in continuing to develop proprietary indices for clients across the globe. The Group also provides other index services such as calculations of iNAVs for ETP issuers and third party index calculation services for index providers around the world.

ICE supports any regulatory efforts by ESMA to bring additional investor protection and transparency to the market.

<ESMA\_COMMENT\_CP\_BMR\_1>

1. 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>

Yes, ICE agrees.

<ESMA\_QUESTION\_CP\_BMR\_1>

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

<ESMA\_QUESTION\_CP\_BMR\_2>

Yes, ICE agrees. Although, the intended scope of “the on-going management of the infrastructure” and “the determination process of a benchmark” is not entirely clear. It is our understanding that the reach of these arrangements covers the main processes for the production of benchmarks:

* designing the benchmark methodology and keeping it under review,
* carrying out the production of benchmarks: collection; pre-publication validation; calculation; dissemination; and post-publication validation,
* having processes and policies for handling, for example, the incidence of errors and business continuity arrangements.

Any pre-collection arrangements carried out for other purposes than merely the production of benchmarks are therefore excluded.

<ESMA\_QUESTION\_CP\_BMR\_2>

1. 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>

ICE welcomes and broadly agrees with the ESMA's statements in the BMR consultation paper on the definition of ‘Use of a benchmark’. In the consultation paper ESMA confirms that market operators and CCPs are covered by point (b) of the definition of ‘use of a benchmark’, i.e. “determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices”. ESMA explains that: *“When engineering the terms of a financial derivatives contract that makes reference to a benchmark, either for the purpose of its trading or of its clearing, that benchmark effectively determines the amount payable under the said instrument, not only at the time of its first creation or offering but whenever it is traded or cleared, including when the outstanding positions in such derivatives are margined."* ESMA furthermore confirmed that it is ordinary business practice for market operators and CCPs to pay license fees for the use of benchmarks.

The above statements by ESMA, however, have not been incorporated into the draft technical advice, perhaps because ESMA's mandate for the clarification of the definition of use of a benchmark was limited to the ‘issuance' principle (point (a) of the definition of use of a benchmark). ESMA statements that the usage of benchmarks by CCPs and market operators is already covered under a different section of the use of a benchmark definition (i.e. point (b)) are therefore of unclear legal status.

ICE believes that it would be appropriate for the clarification provided by ESMA regarding the scope of the definition of use of a benchmark to be included explicitly as part of the EU legislative framework governing the regulation of benchmarks in Europe. Without a clear legal framework, the protections relating to non-discriminatory pricing under Article 22 of the Regulation ("Mitigation of market power of critical benchmark administrators") would potentially not be afforded to all benchmark users and there may be some remaining uncertainties as to whether market operators require licences for the use of benchmarks or as to the status of ESMA's remarks. The BMR also needs to provide for the necessary legal certainty for both users as well as administrators of benchmarks and ensure consistency with other EU legislation, especially with regards to Article 37 of MiFIR ("Non-discriminatory access to and obligation to licence benchmarks"). With the aim of ensuring the harmonised application of the Regulation throughout the EU, and given the wide range of interpretations expressed throughout the ESMA consultation process by different stakeholders regarding the scope of the definition of use of a benchmark, such an approach would remove the possibility of future uncertainty.

In our view, this would best be achieved by introducing text reflecting ESMA's statements on the definition of use of a benchmark as an article or potentially a recital in the level 2 legislation for the BMR. It would therefore be helpful if ESMA could include these sections of the discussion paper in its technical advice for the Commission. At a minimum, we believe that ESMA statements on the scope of the definition of use of a benchmark in due course would need to be introduced in Level 3 guidance for the BMR.

<ESMA\_QUESTION\_CP\_BMR\_3>

1. Do you have any comments on the proposed specification of issuance of a financial instrument?

<ESMA\_QUESTION\_CP\_BMR\_4>

ICE agrees with the proposed specification by ESMA of the issuance of a financial instrument, on the basis of other statements about usage referred to in the response to Q3. However, ICE stresses that a similar specification in relation to point b. of the "use of a benchmark" definition is needed in order to provide the market with full clarity about the parties that are treated as users of benchmarks under the BMR. <ESMA\_QUESTION\_CP\_BMR\_4>

1. 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>

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<ESMA\_QUESTION\_CP\_BMR\_5>

1. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_6>

1. 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>

ICE suggests that in addition the following aspects should be taken into account:

1. **Variations in licensing models** – different benchmark administrators have different licensing models and policies, meaning that firms may require a licence for one benchmark and not for another benchmark, even for the same activity.
2. **Unlicensed firms** – assets across firms that are not appropriately licensed will not be recorded.
3. **Single/Double-counting** – there will be a need to identify where both counter-parties to a transaction are reporting the same volume. This may not be consistent across all transactions, i.e. a transaction between two licensed banks will be double-reported, whereas a transaction between a licensed bank and a non-bank client that does not require a licence will be single-reported.
4. **Use of delayed data** – delayed data may not require a licence, and therefore any transactions by firms using only delayed data will not be recorded.
5. **Data accuracy** – data gathered by ICE through non-obligatory client questionnaires suggests that firms do not always have comprehensive information available about the value of assets priced against the benchmark.

In respect to investment firms, the biggest issue is likely to be the unlicensed firms.

<ESMA\_QUESTION\_CP\_BMR\_7>

1. 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>

The share of financial instruments, financial contracts and investment funds that reference the benchmark in the gross domestic product of the Member State must be assessed taking into account the custodial role of some asset holders within that Member State.

Some entities act as custodians for a disproportionate volume of assets relative to the size of their jurisdictions’ GDP. Therefore, within certain Member States, e.g. Luxembourg where many UCITs are domiciled, a greater concentration of holdings referencing the benchmark can be observed.

Similarly, there could be holdings referencing benchmarks held by EU residents domiciled in offshore jurisdictions. Their performance and continuity also has an impact on the real economy criteria.

Thus, ICE suggests that where a disproportionate volume of assets referencing the benchmark within a Member State is held by custodians, the ultimate beneficiaries of those assets must be taken into account.

<ESMA\_QUESTION\_CP\_BMR\_8>

1. 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>

No, percentages and ranges are hard to consider within an integrated economic area and may be subject to frequent change. <ESMA\_QUESTION\_CP\_BMR\_9>

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

<ESMA\_QUESTION\_CP\_BMR\_10>

ICE is concerned about potential unintended consequences of some of the proposed details around the objective reasons required for endorsement; in particular, with respect to the specific objective reasons described below.

The Consultation Paper explains that a strong objective reason would be if ‘*reliance on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to a reduction of costs and that this is directly and significantly advantageous to the benchmark users.*’ ICE believes that this wording does not account for strong physical EU presence that a non-EU benchmark provider may have, including the support staff dedicated to assisting its EU users.

For example, nearly 400 out of 1,350 employees of the US-based ICE Data Services are employed within the EU and carry out the client engagements with regard to benchmark users from the EU. However, based on ICE’s interpretation of the Consultation Paper, its global indices would still need third-country endorsement, given their administration components are handled from the U.S. headquarters.

Moreover, ICE would appreciate an explicit confirmation from ESMA that the avoidance of a significant increase of costs borne by benchmark users is an analogous advantage to the users as a reduction of costs. If endorsement in the EU required a transitioning of ICE’s global index business and operations to an EU entity, this would be a significant cost burden that would ultimately have to be passed down to the benchmark users.

Moreover, ICE suggests inclusion of the following additional objective reasons for endorsement.

* IOSCO Principles for Financial Benchmarks

According to the BMR Recital (34), the Regulation should take into account the IOSCO Principles for Financial Benchmarks which serve as a global standard for regulatory requirements for benchmarks. ICE believes it would be prudent for ESMA to consider adding to the exhaustive list of valid objective reasons one such that following the IOSCO Principles with formal policies and procedures, combined with an EU presence, would be a strong and valid objective reason for third-country benchmark endorsement.

* Historical presence in a third country

ICE furthermore believes that the endorsement provisions in the BMR were drafted with the specific aim to prevent regulatory arbitrage (i.e. preventing benchmarks currently provided in the EU from moving to third countries in order to benefit from a lighter regulatory regime). However, administrators of benchmarks historically provided from third countries (i.e. in advance of the development of the BMR) by definition have not based their decisions on the existence of the BMR. The addition of the criterion “historical presence in a third country” to the list of objective reasons should therefore allow benchmarks historically provided from third countries directly to qualify for endorsement.

<ESMA\_QUESTION\_CP\_BMR\_10>

1. 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>

ICE suggests including the following additional criteria in the list under section 2:

* “Where any change in the input data or to the methodology or to the administrator might carry the risk of legal frustration of outstanding contracts referencing the non-compliant benchmark.”
* “Whether a transition to another benchmark, where one exists, or to another administrator is necessary where a low number and/or volume of existing financial contracts, financial instruments and investment funds (or their accompanying documents) reference the non-compliant benchmark.”
* “whether the costs of transition are commensurate with the benefits of transition to another benchmark”.

<ESMA\_QUESTION\_CP\_BMR\_11>