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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>

***About the IIA***

*Many of the leading independent index providers in the world are members of the IIA, including Barclays, the Chicago Booth Center for Research in Security Prices (CRSP), FTSE Russell, Markit, Morningstar, MSCI Inc., NASDAQ OMX, S&P Dow Jones Indices LLC, SGX and STOXX Limited. IIA members calculate millions of indices for their clients, covering a number of different asset classes, including equities, fixed income, and commodities. Part of the IIA’s mission is to consider ways to promote best practices for index providers, which makes it a natural supporter of appropriate and proportionate industry standards. (The IIA’s Best Practices can be found at* [*www.indexindustry.org*](http://www.indexindustry.org)*). Our members are dedicated to promoting transparency, sound operational practices, intellectual property rights, education, and effective index management practices. Moreover, our members publicly make available methodologies, explain how their indices are created, calculated, or maintained. For more information:* [*http://www.indexindustry.org/*](http://www.indexindustry.org/)

<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>

IIA believes the intent of the Benchmarks Regulation (‘the Regulation’) is to ensure investor protection. Therefore, *“made available to the public*” should be interpreted as broadly as possible in order to ensure investor protection; IIA believes that is the only consistent interpretation under Recital 8 of the Regulation. We also support the comparisons made to the IOSCO Principles.

IIA is concerned, however, that the language in Section 1(ii) of the Consultation Paper may create loopholes in certain circumstances, to the detriment of investor protection. Having a standard of *“an indeterminate number of people”* provides an incentive for product providers to restrict the number of investors and/or the availability of data to circumvent regulation. Any index used in a financial instrument within the EU should be included to be consistent with Recital 9 of the Regulation.

IIA generally agrees with ESMA’s approach to *“customized basket of securities”* solely used for asset allocation, but suggests that when a basket of securities includes a more formal methodology than just holding securities that be included in the definition of an index because it begins to act as an index. This again could be used as a loophole to circumvent the Regulation.

<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>

IIA agrees with the fact that ESMA’s proposed specifications are in line with the IOSCO Principles. We would like to suggest that the initial development of the methodology is not what is crucial, but rather the “control” of the methodology should the important criterion. For example, the original developer of the methodology may have sold the IP to another entity who has full control over it and the original developer may not even be in the business of developing benchmarks anymore. This could easily be remedied by changing the proposed language from *“The* ***setting*** *of a specific methodology…”* into *“The* ***control*** *of a specific methodology…”*

<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>

TYPE YOUR TEXT HERE

<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>

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<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>

The only way to ensure a workable process in practice would be to use data that is transparent and equally available to regulators and administrators. If not we would end up with a system not based on the same or even inaccurate data. IIA suggests that ESMA includes under the proposal, a standard of reasonable efforts based on the available data. If the regulator has access to some data which is not available to the administrator, the two will never match unless there is malice on the intent of the administrator. It may be the case the administrator just does not have access to the data. ESMA should recognize as proposed, the data will be based on a number of different data bases which may not have the same reporting dates, formats, and content potentially making this a very expensive process for ESMA, NCA’s, and administrators to develop and use on an ongoing basis.

For structured products, IIA would also suggest that the concept of *“funded amounts”* be the standard. A structured product could be issued with a face value much higher than is actually invested in the product. For example, a structured product may be issued with a face value of 10 million euro and only 1 million is ever invested (funded) in it.

<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>

The shortcomings in available data and common reporting will require some flexibility in measurement. IIA agrees a point in time is needed for reporting, but in case the relevant data is not available on that date, IIA suggests that the nearest date of data availability be used.

<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>

While initially it may look like an easy solution to use licensing agreements to identify financial instruments referencing benchmarks, it is neither practical nor enforceable for the administrator.

There are numerous types of business arrangements incorporated in licensing agreements. Some licensing arrangements include the product type or notional amounts invested while others do not give that specification. There is also no uniformity of disclosure of date and period and the benchmark administrator does not have the regulatory authority to compel the product provider to disclose the information. In fact, this is most difficult for completely independent administrators who do not issue products and do not know the end investors or the exact type of product structure they invest

<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>

In principle we agree with the criteria.

<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>

IIA understands and agrees that flexibility is needed in the *“significant share”* concept. However, IIA is concerned that an un-level playing field could result across the different EU NCAs? We would suggest some level of consistency across EU NCA regulators.

<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>

Given the interconnectedness of the world and the fact that most benchmarks are provided by global administrators, the concept of where an administrator is headquartered seems out of date, but we do appreciate ESMA’s acknowledgement expertise may exist elsewhere. Most of the benchmarks in existence are created by global benchmark providers because investors require consistency in administration across the world. IIA is concerned that ESMA may be creating a hierarchy of options preferencing recognition over endorsement. We do not find this interpretation in the reading of the level 1 text and in fact, Recital 44 of the Regulation supports our view. In ESMA’s discussion paper, paragraph 309 also supports the concept of *“parallel regimes”.* We believe endorsement is a valuable option and best serves the interests of EU investors.

<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>

In principle we agree and do not suggest any additional criteria. We realize that an exhaustive list of criteria is probably not possible for all possible situations. However, we do not agree with ESMA on the current wording regarding transitioning of a benchmark to another benchmark administrator. The current wording could mean the non-compliant benchmark administrators would submit its IP rights to another administrator. This is neither reasonable nor appropriate because it may still be used outside the EU. The IP may have value outside of the EU and would be viewed as de facto disappropriation.

One way of handling this would be to amend draft Technical Advise on transitional provisions, where bullet points 2 to 5 should read: *“whether the transitioning of assets referencing the benchmark in question to a similar but compliant benchmark provided by another administrator would lead to substantial change in the benchmark.”*

<ESMA\_QUESTION\_CP\_BMR\_11>