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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>

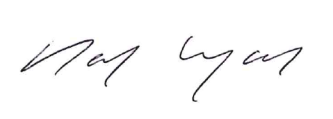
Dear Sir/Madam

**ESMA Consultation Paper: Draft technical advice under the Benchmarks Regulation**

The London Metal Exchange (“LME”) its clearing house, LME Clear (“LMEC”) and parent company, Hong Kong Exchanges and Clearing (**“HKEX”**) welcome this opportunity to respond to ESMA’s proposals relating to the draft technical advice under the Benchmarks Regulation.

If you would like to discuss any of the comments or ideas expressed in this response then please do not hesitate to contact me.

Yours faithfully,



Katy Hyams

Senior Regulatory Counsel

<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>

We broadly support the proposed advice relating to “making available to the public”. However, we believe that the meaning ESMA intends to assign to this phrase (as described in the body of the consultation paper) could be further clarified in its advice. In particular we believe that as drafted, 1(ii) could be interpreted more broadly than intended and therefore the intended scope should be clarified. The advice currently states that where a supervised entity uses a benchmark and “through this use the index becomes accessible to an indeterminate number of people” then that would be considered “making available to the public”. However, in view of the trade reporting obligations imposed on supervised entities under MiFID and MiFIR, an index could be made available to an indeterminate number of people through the requirement to make post-trade information publicly available after 15 minutes. We therefore believe that the advice should be clarified to include only indices that are “made accessible to an indeterminate number of people other than for the purposes of compliance with applicable law”.

<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>

We agree with the intention behind the advice but believe that the drafting of the advice itself raises many questions and could lead to avoidance tactics.

The draft advice states that administration is only deemed to take place where both the management of infrastructure and personnel are undertaken by the same entity which is also responsible for the setting of the methodology of the benchmark. This raises the question as to how an outsourcing arrangement or intra-group services agreement would affect the determination of the administrator. Is it the intention that an entity would only be identified as the administrator where it actively undertakes all the activities itself? Or is it the intention that an entity would be identified as the administrator where it bears the ultimate responsibility for each of the activities? The interpretation of the requirements could permit entities to avoid becoming an administrator by allocating each of the activities to different companies within the same group.

We also believe it would be appropriate for ESMA to clarify that there can only be one single administrator for each benchmark and provide advice on how the relevant entity can be identified where all three activities are undertaken by more than one entity .

<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>

We do not agree that the reliance on a price by a CCP for clearing purposes should be deemed to be “use” of a benchmark. Recital 19 of the Level 1 Regulation states that prices “produced by central counterparties should not be considered to be benchmarks because they are used to determine settlement, margins and risk management” and we fully support this carve-out. However the ESMA draft advice suggests that the use of CCPs of prices for the purposes of clearing would be caught by under the second point (b) of the definition of “use of a benchmark”.

There appears to be a direct policy conflict inherent in this advice: where a price is created by a CCP and used by that CCP for the purpose of risk management it will not be a benchmark. However where a price is created other than by a CCP but is nonetheless used for the identical purpose of risk management by a CCP, it would be deemed to be a benchmark and the CCP would be a user of that benchmark.

ESMA has not offered any explanation as to the policy objective that would be met through the differentiated application of the definition. We therefore believe that in order to align the application of the requirements and in order to avoid confusion and regulatory arbitrage CCPs should not be “users” when using any price for the purpose of clearing and risk management. Additionally any price which is used solely and exclusively for the purpose of clearing and risk management by a CCP should not be a benchmark, irrespective of the source of that price.

As a second matter we request clarification from ESMA in relation to the circumstances under which a party to a financial contract will be deemed to be a user of a benchmark. ESMA take the opportunity in the Consultation Paper to clarify that the “use of a benchmark” does not coincide with being a party to a contract. This is intended to further the confirm the carve-out provided under recital 13 of the Benchmarks Regulation which states that “[t]he holding of financial instruments referencing a certain benchmark is not considered to be use of the benchmark”.

However the definition of “use of a financial benchmark” under article 3(1)(7) of the Level I includes “being a party to a financial contract which references an index or a combination of indices”. We believe that it is important to have additional clarity on the circumstances under which a party to a financial contract would be deemed to fall within the definition of “user” and when it could benefit from the carve-out under recital 13.

<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>

We fully support ESMA’s proposal to refine their definition of “issuer” to include only the initial offering of financial instruments within paragraphs (1) to (3) within the list of Annex 1, Section C of MiFID. We believe that ESMA is correct to exercise caution in broadening the definition of issuer in this context and identify that it could affect concepts in other regulatory areas. We believe that this will result in a more targeted and relevant application of the relevant provisions.

<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 advice does not offer sufficient clarity as to where such data is intended to be sourced. It simply refers to data provided by “alternative private providers” and each national regulator relying on any such advice must justify use of the data. This does not offer sufficient clarity or security as to the data being relied on. Whilst we do not oppose national regulators seeking data from private providers per se, we believe that there should be some further requirements in relation to the provider that can be relied upon and the quality of the data provided.

Given the onerous requirements that apply to critical and significant benchmarks, and the fact that reassessment can only take place every two years, it is of material importance that the assessment is undertaken correctly based on reliable and verifiable data. Only under such circumstances can ESMA be sure that the most stringent requirements of the Regulation are directed appropriately. Given that the policy objectives of the Benchmarks Regulation are to ensure the reliability and accuracy of data used for the creation of benchmarks, the requirements imposed on national regulators and the data that they source and use should reflect the robust approach being imposed on entities subject to their supervision.

<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>

No we do not agree. We believe that any “snapshot” measurement of a value of a financial instruments referencing a financial benchmark will ultimately be unrepresentative of the actual value and spread of use of that price. We note ESMA’s observation that a “critical” benchmark is likely to be sufficiently ubiquitous that its value would not be subject to fluctuations that would bring it within and outside of the relevant value range. However, this is far from certain and the application of the most onerous requirements of the Regulations based on a single valuation has potential to lead to errors and disproportionate application of the relevant requirements.

We therefore believe that the assessment of quantum should be done either over a period of time or through an average value based on several valuations done at regular intervals over a period of time (for example monthly assessments over the two year interval).

<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>

We agree that ESMA will need to introduce a workable regime which permits the identification of financial instruments referencing a particular benchmark. We note the limitations on the proposal to rely on licencing agreements and we agree that entering into licencing agreements would not provide the desired level of oversight and control. We also question its feasibility from a practical perspective and whether it would be appropriate for national regulators to devote the level of resource to manage and supervise such a programme.

Our preferred approach is, therefore, for instruments identifiers to be used. However we disagree with the use of ISINs and believe that there are a number of material concerns in using this identifier and the practicality of its application to derivative venues in particular.

For example, the Association of National Numbering Agencies (“ANNAs”) Quality Management Guidelines provides for ISINs to be allocated within twenty-four hours of request. This is not appropriate for derivative markets in which the creation of new financial instruments can occur intraday (e.g. if derivative instruments are defined as through to individual strike prices on options, intraday ISINs would be required at each new strike price during the day). As such, the process through which ISINs are allocated for derivatives must be amended to permit sufficient flexibility to support this demand. One suggested approach has been to permit exchanges themselves to assign ISINs for instruments traded on their platforms.

In addition to practical considerations, the proposed arrangements lead to certain issues around the intellectual property of the trade data which would be made available to the NNA. As noted European market operators, will need to obtain ISINs for their derivatives from the UK NNA. ANNA acknowledges that nothing in its articles of association shall have the effect of depriving any member of any intellectual property rights it may have in any ISIN. However, we remain concerned that the information the NNA will receive from trading venues, over time, will give it a comprehensive database of all derivatives traded on all of the markets to which it issues ISINs. This data could provide considerable commercial opportunities and an NNA could feasibly develop products based on this data or derived from it. This could create a competitive advantage for the NNA to the direct detriment of other regulated markets within its jurisdiction.

Regulated markets are global and therefore need to remain relevant and useable in all jurisdictions. We believe it would be appropriate for ESMA to reassess the relevance and use of the IOSCO global instrument identifiers considering in particular the risks that use of the ISIN could lead to marginalisation and trivialisation of the relevance of European markets within the broader global context.

<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>

We agree with the criteria proposed. We would support including as much criteria as relevant in the advice in order to ensure that decisions as to the benchmarks that should be classified as “critical” can be as consistent as possible across Member States and that national regulators can be confident in their decision making. However only criteria which are relevant and non-duplicative should be included. <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>

We support the concept of “significant share of” and believe that each market should be evaluated on its own characteristics. <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>

Yes, we support the suggested indicators for objective reasons for endorsement of third country benchmarks.

We note that ESMA highlights the criteria are non-exhaustive and believe that this advice is helpful. However the application of the advice could usefully be supplemented through additional comment ensuring that national regulators take into account the specific characteristics of different types of benchmarks and do not feel constrained when exercising their discretion in relation to this issue. For example two benchmarks originating from the same third country should not be compared to each other when considering whether or not to endorse them. Instead national regulators must be cognisant that the key factor determining any decision to endorse must be the nature of the actual benchmark itself including any underlying data on which the benchmarks are determined.

<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>

We believe that the advice leads to certain conflicts and competitive disadvantages to EU-based administrators compared to their non-EU peers. This is due to the drafting referring only to benchmarks existing on the date on which the Regulation comes into force and therefore applying the transitional provisions to these benchmarks. Instead we believe it would be appropriate to change the drafting to refer to benchmarks existing on the date of application in the Union. <ESMA\_QUESTION\_CP\_BMR\_11>