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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>

 The Consultation Paper (CP) published on the 27th of May 2016, as a follow-up of the DP with respect to ESMA’s technical advice to the Commission on the Benchmarks Regulation, **did not clarified sufficiently, the definition** **of "use of a benchmark"**, since it is still not clear whether Pension Funds when acting as “users of a benchmark”, are within the scope of this Regulation.

For instance, Recital (8)[[1]](#footnote-2)[2] states that the scope of this Regulation should be as broad as necessary to create a preventive regulatory framework (…). However, neither the object established in Art.1, or the definition for “use of a benchmark” (Art.3.1.7) covers, in any of the actions mentioned, the use of a benchmark by pension funds. **Pension funds do not have the nature of financial instruments (art.3.1.16) or Investment Funds, which only includes explicitly: UCITS or AIF, as defined under BMR**.

Furthermore, among the obligations arising from the use of a benchmark, the Regulation states that:

·        **Supervised entities** may only use registered benchmarks (Article 30.1)

·        **Supervised entities** must have written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided (Article 29.2.)

Regarding "**supervised entities**", BMR foresees, among others: Investment Funds UCITS (Article 3.1.17.e), AIF ​​Managers (3.1.17.f) and Institutions for Occupational Retirement Provisions as defined in Article 6(a) of Directive 2003/41/EC (Article 3.1.17.g).

And so, the combination of all these provisions raises some issues of legal consistency:

a)    First of all, whether or not the use of a benchmark by Institutions for Occupational Retirement Provisions is subject to this Regulation.

b)    If so, whether or not, other Pension Funds would also be subject to this regulation (e.g. other institutions authorized and supervised operating at national level, provided that they are recognized under national law and their primary purpose is to provide retirement benefits, in line with the provisions of Article 2(10) of EMIR Regulation).

**PensionsEurope calls on ESMA to ensure that pension funds fall outside of the scope of the definition of “use of a benchmark” in the regulation.**

Moreover, pension funds are institutions that are covered by the IORP directive. Pension funds calculate the performance of their pension plan assets for internal comparison purposes. These performance calculations cannot and must not be used to construct financial instruments to track or trade occupational pension schemes.

PensionsEurope want to make sure that pension funds are not regarded as “financial instruments”, as it is recognised in the IOSCO Principles for Financial Benchmarks of 8 of July 2013, and are not covered by the Benchmarks Regulation as long as they only calculate (or give order to calculate) the performance of the assets of the occupational pension schemes and any further use is not allowed.

**Consequently, PensionsEurope’s Members call on ESMA to add a paragraph as follows:**

**“Institutions covered by the IORP directive are not covered by the Benchmarks Regulation as long as they only calculate (or give orders to calculate) the performance of the assets of the occupational pension schemes.**

**About PensionsEurope**

**PensionsEurope** represents national associations of pension funds and similar institutions for workplace pensions. Some members operate purely individual pension schemes. PensionsEurope Members are large institutional investors representing the **buy-side** on the financial markets.

PensionsEurope has **24 member associations** in EU Member States and other European countries with significant – in size and relevance – workplace pension systems[[2]](#footnote-3).

PensionsEurope member organisations cover the workplace pensions of about **70 million European citizens.** Through its Member Associations PensionsEurope represents more than **€ 3.5 trillion of assets** managed for future pension payments.

PensionsEurope also has **27 Corporate and Supporter Members** which are various service providers and stakeholders that work with IORPs.

PensionsEurope has established a **Central & Eastern European Countries Forum (CEEC Forum)** to discuss issues common to pension systems in that region.

PensionsEurope has established a **Multinational Advisory Group (MAG)** which delivers advice on pension issues to PensionsEurope. It provides a collective voice and information sharing for the expertise and opinions of multinationals.

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<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>

Although we appreciate the fact that ESMA has endeavored to provide further clarification on what may be considered “made available to the public”, we believe the current proposal is still ambiguous. For instance, ESMA proposes that an index is accessible by a large or potentially indeterminate number of recipients. Without further clarification we fear all of these elements will become the subject of much debate as far as interpretation is concerned. This, in turn, can potentially have a harming effect on the principle of legal certainty. In our view, there should be no discussion on what can be considered a large number of recipients. The same applies to the condition of accessibility, which should focus much more on available content, rather than solely on means of distribution as mentioned under par. 2 of the Draft Technical Advice.

To that end, we propose that ESMA revisits this section and unambiguously establishes the variables that will determine the scope of public availability.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

PensionsEurope does not agree with the reference to the use of benchmark by pension funds in page 43 of the CP in the section of the criteria proposed to be used for the assessment of a critical benchmark.

Regarding the text on “*The use of the benchmark by pension funds*”, PensionsEurope understands that pension funds do not, and considers that they should not, fall under the scope of the definition of “use of a benchmark” in the regulation.

While we agree that the inclusion of pension funds in this provision can help avoiding possible indirect effect on the index used by pension funds from the benchmark regulation, pension funds do not fall within the scope of the definition of “use of a benchmark” in the regulation. We therefore recommend ESMA to clarify the rules for supervised entities that make use of a benchmark in the sense of the regulation and that are at the same time excluded from the scope of the definition of the “use of a benchmark”.

PensionsEurope calls on ESMA to ensure that pension funds fall outside of the scope of the definition of “use of a benchmark” in the regulation.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_11>

1. [2] Articles make reference to the text of the Benchmarks Regulation as approved by the European Parliament. [↑](#footnote-ref-2)
2. EU Member States: Austria, Belgium, Croatia, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg,

Netherlands, Portugal, Romania, Spain, Sweden, UK. Non-EU Member States: Iceland, Norway, Switzerland. [↑](#footnote-ref-3)