esma European Securities and Markets Authority

# Reply form for the Consultation Paper on Benchmarks Regulation

1 June 2016

European Securities and Markets Authority

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 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>
Standard Chartered welcomes the opportunity to comment on ESMA's Consultation Paper on Technical Advice under the Benchmarks Regulation (BMR).

As an EU-headquartered bank with operations across seventy countries, we believe we are in a unique position to contribute to the debate on the extraterritorial implications of the EU Benchmarks Regulation, and its impact on European financial services providers and both EU and non-EU end users. Whilst we support the joint submission made by the Global Financial Markets Association (GFMA), the International Swaps and Derivatives Association (ISDA), the Association of Financial Markets in Europe (AFME) and the Futures Industry Association (FIA), our response includes a number of observations mostly focused on how the EU BMR interacts with foreign regimes, whilst also identifying measures to mitigate some of the arising challenges.

We agree with ESMA on the need to align the BMR with the internationally agreed IOSCO Principles on Benchmarks. However, we would like to point out the limited application of such standards in jurisdictions other than the EU, as noted in the Second Review of the Implementation of IOSCO's Principles for Financial Benchmarks. Therefore, we kindly urge ESMA to remain mindful about the limited applicability of these principles while developing the Level 2 measures as this, together with the significant extraterritorial reach of the BMR, would potentially introduce significant challenges for firms operating on a cross-border basis.

Furthermore, in order to facilitate the transition to the new Regime and ensure a level playing field, we urge ESMA to recommend clarification that the transitional provisions as included in the Level 1 framework also apply to non-EU administrated Benchmarks.

We appreciate the opportunity to submit our views on the consultation paper. Please do not hesitate to contact us should you have questions or if we can provide any more detail.

**Vasuki Shastry**
**Global Head of Public Affairs and Sustainability**
**Standard Chartered Bank**
<ESMA_COMMENT_CP_BMR_1>

**Q1: 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>
While we support the proposed conditions for considering an index as 'made available to the public' to the extent that these provide a measure of clarity as to the classification of indices, we would welcome further detail on the conditions and highlight that these may in combination with the MIFIR Article 37 obligation for open access to benchmarks result in even very minor and bespoke indices being drawn into scope. We are concerned that such a potential increase in scope would be materially disproportionate and as may impact the availability of indices to investors that rely on them.

ESMA makes reference to the legal certainty need for a clear definition of 'available to the public'. We consider the proposed conditions for determining an index as 'made available to the public' as helpful as they provide [some] clarity as to classification of indices. Nevertheless, we would welcome further guidance on the threshold for 'large' or the degree of uncertainty required with respect to recipient numbers.

Also, while ESMA appears to acknowledge that indices produced to accommodate specific client needs should not fall in scope, such bespoke or minor indices may in fact be brought in scope by the proposed conditions and by the application of the MiFIR Article 37 obligation on benchmark owners to provide requesting venues and CCPs with access to those benchmarks.

While we acknowledge the need to consider prior ECJ judgements on the broad definition of "communication to the public", we do not believe that communication of an underlying index through transmission of product values based on that index value can be equated with distribution of a television signal through provision of television equipment intended to receive and interpret that signal (per CJEU 7 December 2006, Case C-306/05, (SGAE v. Rafael Hoteles)). The purpose of a television set is entirely and exclusively to receive a signal and relay the resulting information to the viewer in intelligible format. Conversely, irrespective of the ability for some users of financial products to extrapolate the value of the underlying index from the price or performance of a product based on that index, provision of the underlying index data is not the intended purpose of the product information. Extrapolating the underlying index from product information is not equivalent to watching the television but to taking it apart to determine how patented technology operates.

On this basis, we recommend that the definition of 'made available to the public' be limited to indices that are made available to the general public in an open manner.
<ESMA_QUESTION_CP_BMR_1>

**Q2: 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>

**Q3: 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 agree that 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...
<ESMA_QUESTION_CP_BMR_3>

**Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?**

<ESMA_QUESTION_CP_BMR_4>
We welcome the clarification from ESMA that derivative transactions do not fall within the scope of issuance.
<ESMA_QUESTION_CP_BMR_4>

**Q5: 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>

**Q6: 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>
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<ESMA_QUESTION_CP_BMR_6>

**Q7: 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>

**Q8: 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>
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<ESMA_QUESTION_CP_BMR_8>

**Q9: 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>
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<ESMA_QUESTION_CP_BMR_9>

**Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?**

<ESMA_QUESTION_CP_BMR_10>

Referring to the need for competition and user choice, we do not consider it appropriate or necessary in principle to establish 'objective reasons' for the endorsement of third-country benchmarks beyond the desire of financial institutions in the EU to use these benchmarks and the third country administrator's compliance with the mandated supervisory requirements. If ESMA nevertheless elects to propose the criteria set out in the CP and moreover apply these restrictively, then a number of otherwise adequately administered and supervised third country benchmarks may become unavailable to EU users. We therefore recommend that any endorsement criteria be limited to an assessment of whether: the benchmark existed prior to the entry into force of the BMR; there are existing contracts priced against the benchmark; or there is demand for the benchmark as a basis for future contracts.

The purpose of the BMR is to ensure the accuracy, robustness and integrity of benchmarks within the EU. In this sense, we do not believe that the BMR should limit access to third country benchmarks on any grounds other than concerns over the appropriate administration, oversight and contribution to particular benchmarks. Therefore we do not believe that it is necessary in principle to establish an "objective reason" for the endorsement of third-country benchmarks beyond the desire of financial institutions in the EU to use these benchmarks and the willingness of the third country administrator to comply with the mandated supervisory requirements.

The proposal to support endorsement of third country benchmarks which reference regionally specific underlying data implies that a benchmark which references global data may be ineligible for endorsement merely on the grounds that it is based in a third country rather than the EU. The proposed criteria include (as a strong indicator for an objective reason for the provision of the third country benchmark, the applicant's demonstration that '...the benchmark may not be provided by an administrator in the Union including for technical reasons...' The implication is that a non-EEA benchmark could fail to achieve endorsement purely based on the existence, or potential existence of a similar EU benchmark. The need for adequate administration and supervision notwithstanding, prohibiting the use of any benchmark which predates entry into force of the BMR would be anti competitive while prohibiting the use within the Union of a benchmark against which instruments are already priced, or for which there is a desire to price instruments would be disadvantageous to business within the Union.

If ESMA nevertheless elects to propose objective reasons for NCAs to endorse the provision of a benchmark or families thereof in a third country and for the use such benchmark(s) in the EU, we are concerned that a number of third country benchmarks may not satisfy the proposed criteria, especially given the high compliance threshold suggested by ESMA in the CP text.

On this basis, and consistent with the general intent of the BMR and the specific requirements of Article 21b, we recommend that the assessment of objective criteria be limited to the following factors:

1. Whether the third country benchmark existed prior to the entry into force of the BMR
2. Whether there are existing contracts priced against the benchmark, either currently traded in the Union or traded outside the Union but for which there is interest following registration of the third-country administrator.
3. Whether there is demand for the benchmark as a basis for future contracts.

Any one of these factors should be considered objective grounds for eligibility.
<ESMA_QUESTION_CP_BMR_10>

**Q11: 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>
Referring to our response to the DP (Q104), we remain concerned that third country benchmarks do not appear to benefit from the proposed transitional provisions. In order to facilitate the orderly transition to the new regime, and to avoid further cross-border issues, we urge ESMA to clarify that the transitional provisions available to EU-administrated benchmarks are also available to non-EEA benchmarks.

The proposed Technical Advice addresses transitional arrangements for NCAs (providing a non-exhaustive list of criteria on which basis they can permit the continued use of non-compliant benchmarks following the end of the transitional period) but appears limited to EU administered benchmarks. This would create an unlevel playing field and would further exacerbate the issues arising from the extraterritorial reach of the BMR.

In this context, we would highlight NDF benchmarks as an example of a third country benchmark, where the apparent absence of transitional arrangements would have a material and detrimental impact.

In conjunction with other industry participants, we further note that the proposed transitional provisions, as interpreted by ESMA, do not apply to benchmarks launched between the date of entry into force and the date of application. This creates the possibility of an eighteen month window during which the creation and use of new indices will be impaired. While it is reasonable to assume that the administrators of new benchmarks used after the date of entry into force will take the Regulation into account and so be suitable for swift authorisation, practical delays around review and authorisation could still face delays. As such, a firm pricing a product against the benchmark will have to cease acting as calculation agent unless and until the benchmark provider obtains authorisation/registration under the Regulation (or, for non-EU benchmarks, qualifies the benchmark for use in the EU under the third country regime). This may take several weeks or even months after the Regulation begins to apply, creating the risk that there is a period in which it will not be possible to calculate payments under the product in accordance with its terms.
<ESMA_QUESTION_CP_BMR_11>