|  |
| --- |
| 29 September 2016 |

|  |
| --- |
| Reply form for the Consultation Paper on Benchmarks Regulation |
|   |

|  |
| --- |
| Date: 29 September 2016 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the Benchmarks Regulation, 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

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

***Deadline***

Responses must reach us by **02 December 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>

Bolsas y Mercados Españoles (BME) integrates the companies that operate the securities markets and the financial market infrastructures in Spain. Amongst others, it brings together, under a single activity, decision-making and coordination unit, the Spanish equity, fixed income and derivatives markets and their clearing and settlement systems.

We welcome the ESMA Consultation Paper on Draft Technical Standards under the Benchmarks Regulation (ESMA/2016/1406) and thank the European Securities and Markets Authority for the opportunity to contribute with our views to this public consultation process.

<ESMA\_COMMENT\_ CP\_BMR\_1>

1. Do you consider the non-exhaustive list of governance arrangements to be sufficiently flexible? Are there any other structures which you would like to see included?

<ESMA\_QUESTION\_CP\_BMR\_1>

We support the proposal that the oversight function takes a separate form of a committee within the organisational structure of the administrator. BME, in principle, agrees with the non-exhaustive list of arrangements and considers them to be flexible enough. We welcome the fact that the structure and composition of the oversight function is determined by the administrator taking into consideration the nature, scale and complexity of the provision of the benchmarks.

In case of regulated data benchmarks, BME agrees that including external members and/or input data providers should be optional and not mandatory.

Staff of the administrator e.g. legal and compliance, should be included as external members of the oversight committee when they are not directly linked to the process of the determination of the benchmark as they can provide expertise and lack of conflicts of interest.

<ESMA\_QUESTION\_CP\_BMR\_1>

1. Do you support the option for the oversight function to be a natural person who is not otherwise employed by the administrator?

<ESMA\_QUESTION\_CP\_BMR\_2>

BME considers appropriate to include an option that allows a natural person to carry the oversight function. It is an option suitable for small administrators or for benchmarks with very limited number of users for example. In any case, should be an independent person with no conflicts of interest, still being an employee of the administrator

<ESMA\_QUESTION\_CP\_BMR\_2>

1. Do you support the concept of observers and their inclusion in the oversight function?

<ESMA\_QUESTION\_CP\_BMR\_3>

BME supports the inclusion of observers in the oversight function as described in ESMA proposal and considers interesting the inclusion of other stakeholders than public authorities, such as market participants.

<ESMA\_QUESTION\_CP\_BMR\_3>

1. Do you think that the draft RTS allows for sufficient proportionality in the application of the requirements? If no, please explain why and provide proposals for introducing greater proportionality.

<ESMA\_QUESTION\_CP\_BMR\_4>

BME believes the principle of proportionality has been met in ESMAs proposal regarding the application of the requirements

<ESMA\_QUESTION\_CP\_BMR\_4>

1. Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?

<ESMA\_QUESTION\_CP\_BMR\_5>

No further comments

<ESMA\_QUESTION\_CP\_BMR\_5>

1. Do you agree with the appropriateness and verifiability of input data that the administrator must ensure are in place? Please elaborate.

<ESMA\_QUESTION\_CP\_BMR\_6>

BME agrees with ESMA´s proposal, including the simplified provisions regarding record keeping obligations and the exemption provided for regulated data benchmarks.

<ESMA\_QUESTION\_CP\_BMR\_6>

1. Do you agree with the internal oversight and verification procedures that the administrator must ensure are in place where contributions are made from a front-office function in a contributor organisation? Please elaborate.

<ESMA\_QUESTION\_CP\_BMR\_7>

**Code of Conduct not suitable for input data provided by a regulated trading venue**

BME is concerned that Art. 3 (1) (24) (a) (i) of the Benchmarks Regulation, in combination with the current state of equivalence decisions in case of third country regulated markets versus the EU, will provide for significant unintended negative consequences for the provision of benchmarks within the EU based on non-EU underlyings. Besides significantly reducing choice for EU investors and their opportunities to invest into global economies, there is a risk of disruption if certain benchmarks are no longer provided after the application of the Benchmarks Regulation.

The alternative role of a contributor for a third country regulated trading venue – as indicated by ESMA during the open hearing in Paris – and the accompanying Code of Conduct is not suitable for input data provided by a regulated trading venue, whether it is a regulated trading venue located within or outside the EU. We would like to highlight the below areas of the Benchmarks Regulation for ESMA to further consider:

* Art. 11 (1) (e) Benchmark Regulation distinguishes between contributor data and representative publicly available data: “(e) the administrator shall not use input data from a contributor if the administrator has any indication that the contributor does not adhere to the code of conduct referred to in Art. 15, **and in such a case shall obtain representative publicly available data.”**
* Art. 3 (1) (9) Benchmark Regulation refers to the “contributor” as a natural or legal person contributing input data, while a “supervised contributor” according to **Art. 3 (1) (10) means a supervised entity that contributes input data to an administrator located in the Union.** According to Art. 3 (1) (8) of Benchmark Regulation, however, **“contribution of input data” means providing any “input data not readily available to an administrator”**, but instead provided for the purpose to determine a benchmark.

We consider that no regulated trading venue across the globe provides regulated data solely for the purpose of determining a benchmark. Regulated trading venues generally publish data in order to provide transparency to the market and market participants across the globe and not for the sole purpose of determining benchmarks.

Recital 12 of the Benchmarks Regulation states that “All contributors of input data to benchmarks can exercise discretion and are potentially subject to conflicts of interest, and so risk being a source of manipulation.” This is not the case for regulated trading venues. Where clear exchange rules and strict market supervision leads to orderly trading and highly reliable and readily available data – both inside the EU as well as outside the EU. Furthermore, regulated trading venues do not face conflicts of interests as stated above.

While the above comments refer to Level 1, we must highlight the fact that there is no solution on offer which could be applied to Non-EU regulated trading venues data either.

FESE agrees with ESMA as regards their Art. 4 in the draft technical standard to input data. Art. 3 (2) which according to Art. 4 is not applicable to administrators of regulated data benchmarks is not suitable to data published by regulated trading venues inside or outside the EU. In particular, Art. 3 (2) (f) refers to such substantial additional requirements an administrator would need to obtain from Non-EU regulated trading venues that it is safe to assume that these requirements will never be achievable. Not only are the requirements not suitable due to the different nature of data generation, we do not expect that Non-EU regulated trading venues would accept the unsuitable contributor requirements in order to satisfy the administrators regulatory requirement in this respect.

<ESMA\_QUESTION\_CP\_BMR\_7>

1. Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark’s methodology is traceable and verifiable?

<ESMA\_QUESTION\_CP\_BMR\_8>

BME supports ESMA´s proposal related to the key elements of the methodology.

<ESMA\_QUESTION\_CP\_BMR\_8>

1. Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?

<ESMA\_QUESTION\_CP\_BMR\_9>

The disclosure of the procedure for internal review of the methodology is adequate from BME´s point of view, especially the disclosure of the roles, functions and bodies in charge of the review instead of the individual names of persons. Also, BME supports that the frequency of internal reviews of methodology it is upon administrator´s discretion, following mandatory reviews at least annually.

<ESMA\_QUESTION\_CP\_BMR\_9>

1. Do you agree with the procedure for consultation on material changes to the methodology?

<ESMA\_QUESTION\_CP\_BMR\_10>

BME cannot be supportive with the procedure for consultation on material changes mainly on two issues.

Firstly, ESMA´s proposal is not allowing an administrator to adapt its methodology in case of sudden market events. BME asks ESMA to consider this exemption to be permitted in exceptional circumstances in order to safeguard the index determination process.

Secondly, BME does not support ESMAs proposal not allowing publishing comments received to the consultation in form of summaries. ESMAs concerns are about the risk of selecting answers and biasing the consultation process, ESMA should rely on administrator’s ability to extract and summarize the whole comments made by the stakeholders at least for significant and non-significant benchmarks. This would derive in a better cost- benefit analysis for administrators in terms of time and resources reducing also the administrative burden.

<ESMA\_QUESTION\_CP\_BMR\_10>

1. Do you agree with this approach? Please explain your response.

<ESMA\_QUESTION\_CP\_BMR\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_11>

1. Do you agree with this approach? What are the different characteristics of contributors that should be taken into consideration in this RTS? How should those characteristics be taken into account in the provisions suggested in this draft RTS? Please give examples.

<ESMA\_QUESTION\_CP\_BMR\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_12>

1. Should the substantial exposures of individual traders or trading desk to benchmark related instruments apply to all types of benchmarks for all contributors?

<ESMA\_QUESTION\_CP\_BMR\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_13>

1. Do you agree with the proposals for the reporting of suspicious transaction in this draft RTS? Please explain your answer.

<ESMA\_QUESTION\_CP\_BMR\_14>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_14>

1. Are there any provisions that should be added to or amended in the draft RTS to take into consideration the different characteristics of benchmarks? Please give examples.

<ESMA\_QUESTION\_CP\_BMR\_15>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_15>

1. Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

<ESMA\_QUESTION\_CP\_BMR\_16>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_16>

1. Do you agree with the draft technical standards in relation to the governance and control arrangements for supervised contributors to benchmarks? Please provide reasons.

<ESMA\_QUESTION\_CP\_BMR\_17>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_17>

1. In particular, can you identify specific aspects of the draft Regulation that should be applied differentially to different supervised contributors in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors?

<ESMA\_QUESTION\_CP\_BMR\_18>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_18>

1. Do you agree with ESMA’s specifications of the criteria?

<ESMA\_QUESTION\_CP\_BMR\_19>

BMEs agree with ESMA´s specifications of the criteria according to article 25 where there are exceptions that allow the administrator not to follow all the requirements of the regulations. In particular administrators of significant benchmarks are permitted not to comply with some points related to conflicts of interest, control of input data or code of conduct for contributors if it is justified upon the application of the principle of proportionality. National authorities will have to make the assessment bearing in mind the vulnerability to manipulation, the nature of input data, the level of conflicts of interest, degree of discretion, and impact of the benchmarks in markets or financial stability.

<ESMA\_QUESTION\_CP\_BMR\_19>

1. Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA\_QUESTION\_CP\_BMR\_20>

Yes, BME agrees with the content and structure of the two compliance statements according to the differences between significant and non-significant benchmarks. We welcome the possibility of making one compliance statement with a general section and a core section: differentiated parts in case of different levels of compliance for different benchmarks, instead of providing several compliance statements.

<ESMA\_QUESTION\_CP\_BMR\_20>

1. Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA\_QUESTION\_CP\_BMR\_21>

BME considers appropriate for the correct understanding of the benchmarks the specifications proposed by ESMA for the benchmark statement. In particular that reliable data must be available to the administrator to have to consider including it. BME would like to comment on one hand, on the need of avoiding an excessive administrative burden for administrators providing repetitive information already provided under another articles of this Regulation, and on the other hand, making it as simple and as clear as possible for benchmarks users for an easy understanding of the benchmark.

<ESMA\_QUESTION\_CP\_BMR\_21>

1. Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.

<ESMA\_QUESTION\_CP\_BMR\_22>

BME supports ESMA s proposal.

<ESMA\_QUESTION\_CP\_BMR\_22>

1. Do you agree with the general approach to distinguish the contents of the application with reference to the cases of authorisation or registration?

<ESMA\_QUESTION\_CP\_BMR\_23>

BME supports the approach taken by ESMA on different contents with the application of the principle of proportionality. Supervised entities are up to that time providing information to the national competent authority, and the level of requirements for these entities and for the ones that are not being supervised should not be the same.

<ESMA\_QUESTION\_CP\_BMR\_23>

1. Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

<ESMA\_QUESTION\_CP\_BMR\_24>

BME agrees with paragraphs 1.- general information and 2.- financial information and with the main differences between information to be provided for authorisation or registration. Nevertheless in case of administrators that are supervised entities by the NCA, double sending the info has to be avoided. Financial statements or capital requirements are information that competent authorities may have been receiving periodically from the administrator.

<ESMA\_QUESTION\_CP\_BMR\_24>

1. Are the requirements covering the information on the applicant’s internal structure and functions appropriate?

<ESMA\_QUESTION\_CP\_BMR\_25>

BME agrees with paragraphs 3.- organisational structure and governance, 4.- conflicts of interest and 5.- internal control structure. However in case of administrators that are supervised entities by the NCA, double sending the info has to be avoided. Senior Management, conflicts of interest procedures and internal framework are information that competent authorities may have been receiving periodically from the administrator.

<ESMA\_QUESTION\_CP\_BMR\_25>

1. Are the requirements described dealing with the benchmarks provided appropriate? In particular, is the way in which the commodity benchmarks requirements are handled acceptable?

<ESMA\_QUESTION\_CP\_BMR\_26>

BME supports the information to be submitted with regards to the nature of the benchmarks. In particular welcomes the possibility of not submitting information in the benchmark statement already contained in another documents such as the methodology or the compliance statement, in order to avoid duplication.

<ESMA\_QUESTION\_CP\_BMR\_26>

1. Is the specific treatment for a natural person as applicant appropriate?

<ESMA\_QUESTION\_CP\_BMR\_27>

BME agrees with ESMAs proposal.

<ESMA\_QUESTION\_CP\_BMR\_27>

1. Do you agree with the proposals outlined for requirements for other information?

<ESMA\_QUESTION\_CP\_BMR\_28>

BME agrees with ESMAs proposal. BME is aligned to a strong standard of transparency and collaboration but ESMA should avoid using discretion when competent authorities request new requirements in the form of the application for authorisation or registration.

<ESMA\_QUESTION\_CP\_BMR\_28>

1. Do you agree with the approach followed in the draft RTS as regards the general information that a third-country applicant should provide to the competent authority of the Member State of reference?

<ESMA\_QUESTION\_CP\_BMR\_29>

BME supports ESMAs proposal to allow recognition through the demonstration of compliance with IOSCO principles certified by an independent external auditor. BME also supports that the application should be in one of the EU official languages and comply with the International Financial Reporting Standards or with Generally Accepted Accounting Principles.

<ESMA\_QUESTION\_CP\_BMR\_29>

1. Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should provide in order to explain how it has chosen a specific Member State of reference and which are the identity and role of the appointed legal representative in such State?

<ESMA\_QUESTION\_CP\_BMR\_30>

BME supports the approach in relation with the information required for the Member State selection process. The legal representative should have a broad recognition, the necessary skills and additional expertise in relation to benchmarks.

<ESMA\_QUESTION\_CP\_BMR\_30>

1. Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should give around the benchmarks it provides and that are already used or intended for use in the Union? In particular, do you agree with the proposals regarding the information to be provided on the types and the categories to which the benchmarks belong to?

<ESMA\_QUESTION\_CP\_BMR\_31>

BME agrees with ESMAs proposal.

<ESMA\_QUESTION\_CP\_BMR\_31>