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| 29 September 2016 |

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

European Securities and Markets Authority (“ESMA”)

Re: Consultation Response to ESMA’s Discussion Paper Benchmarks Regulation

The European Money Markets Institute (“EMMI”) welcomes the opportunity to provide further comments on ESMA’s Consultation Paper for draft Technical Standards under the Benchmarks Regulation (the “BMR”) and acknowledges that these have been developed on the basis of the responses to ESMA’s Discussion Paper published in February 2016, which EMMI had the occasion to review and comment.

As an administrator of critical benchmarks, EMMI supports the objectives of the BMR to improve the governance and control over the benchmark process, thereby ensuring its reliability and protecting users and the broad financial market.

* EMMI strongly believes that the responsibilities lying with the administrator and the responsibilities lying with the contributor should be clarified. While the administrators’ oversight should focus on obtaining sufficient assurance from contributors (e.g. through certification of compliance, results of periodic independent reviews) it should not have an investigation and/or internal monitoring role within the contributors’ respective entities. It is important that the supervised entities remain responsible for monitoring their compliance with their administrators’ code of conduct, the regulatory requirements, and their internal policies and procedures.
* Regarding the procedure of consultation on material changes, EMMI would like to stress that even if material changes have been consulted upon, given the impact it could have on stakeholders, it may be very challenging for the administrator to proceed with the material changes without a sign off or green light from supervisory authorities.
* EMMI would like to point out that assessing the size of an underlying market for a benchmark may prove a difficult exercise and can in some cases only be done to a certain extent.

Our response to ESMA’s Consultation Paper on the Benchmark Regulation is aimed at providing the perspective of an administrator of critical benchmark(s) with respect to certain questions set out in this discussion paper. EMMI’s response should be read taking into account both EMMI’s perspective as an administrator of critical benchmarks as well as our support for a proportional approach.

<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>

Yes. EMMI agrees that the non-exhaustive list of governance arrangements is sufficiently flexible and takes into account the ownership and control structure of administrators.

<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>

Yes. EMMI agrees with ESMA’s suggestion of having the oversight function composed of a natural person depending on the nature and scale of the benchmarks. As such, EMMI agrees that this setting should not be applicable for critical benchmarks.

<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>

EMMI agrees that observers could attend meetings without voting rights, but does not agree with limiting their attendance to “some meetings”. EMMI agrees that the purpose of observers is to allow the oversight function to benefit from additional expertise and therefore does not necessarily see observers’ roles as temporary. The administrator should have a level of discretion in deciding whether the observers are permanent or ad-hoc members of the oversight function.

<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>

Yes. EMMI believes that the draft RTS allow for sufficient proportionality in the application of 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. EMMI has no further comments on the composition, positioning and procedures embedded in the draft RTS.

<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>

EMMI agrees that the requirements that in input data must meet to be appropriate must be established by the administrator. These requirements have to be in line with the benchmark’s methodology so that they reflect the underlying interest that the benchmark seeks to represent. They must take into account the relevant type of input data as well. Next to that, the benchmark’s code of conduct should require contributors to develop and implement a control framework which ensures that adequate processes, procedures and rules are in place to warrant the appropriateness of their contributions, which needs to be verified through independent external review.

Regarding verifiability, EMMI also agrees that the administrator must ensure that it disposes of the necessary information in order to perform all applicable checks relating to evaluation and validation.

<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>

While EMMI generally agrees with the internal oversight and verification procedures to be put in place where contributions are made from a front-office function in a contributor organisation, EMMI strongly believes that the responsibilities lying with the administrator and the responsibilities lying with the contributor should be clarified.

**In this context, EMMI insists that the administrators’ oversight should focus on obtaining sufficient assurance from contributors (e.g. through certification of compliance, results of periodic independent reviews) but that the administrator should not have an investigation and/or internal monitoring role within the contributors’ respective entities. It is important that the supervised entities remain responsible for monitoring their compliance with their administrators’ code of conduct, the regulatory requirements, and their internal policies and procedures**.

More specifically, when proposed article 6 states that “*administrators shall ensure …*” with regard to oversight and verifications procedures at contributor level, EMMI believe that the administrator should “*require”* and *“obtain sufficient assurance from contributors”* whereas the contributor should “ensure that these procedures are in place. As stated above, the administrator should not have an internal control function at contributors’ level.

In particular, the requirement of art. 6.1 that *“the administrators shall ensure that operations of internal oversight function are subject to regular reporting to senior management and that […] procedures are communicated to them upon request”* is an internal control matter that should be ensured by the contributors and for which the administrator should receive sufficient evidence from the contributors e.g. through audit reports. The same comment applies to art. 6.2, where the administrator should not control that “*[…] front office staff […] are aware of the procedure for input data contribution”*. It is in EMMI’s view the contributors’ responsibility to ensure that its staff is appropriately trained to undertake their tasks and comply with the regulatory requirements whereas the administrators should receive assurance that the contributor has put procedures in place in that regard. *Idem* for articles 6.3 and 6.4.

In addition to the fact that the responsibility of the contributors should be clearly established and that the administrator should not have an internal control role within the contributors’ entities, it would be very burdensome and, to some extent less efficient, to require the administrator to perform this evaluation for each and every contributor, as this would require a good knowledge of their respective organisational structures and their internal policies and procedures.

<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>

EMMI agrees with the proposed list of key elements of the methodology that should be disclosed. As stated in recital (2) of the draft technical standards, we agree that any list of minimum requirements should allow for its application only insofar as it is relevant to a particular benchmark methodology. We would like to point out, however, that the estimation of the size of the underlying market should be d ne “to the extent possible”, as this may be a very challenging exercise from the point of view of the administrator

<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>

EMMI agrees with the proposed elements of the internal review of methodology that needs to be disclosed.

In the context of critical benchmarks, EMMI publishes the membership of the respective oversight committee. The composition, biographies and declarations of interests of Steering Committee Members are currently available on the EMMI website as well. Further details on the appointment and removal procedures, as well as on the voting procedures are included in the Euribor Code of Conduct.

<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>

EMMI agrees with the procedure for consultation on material changes to the methodology. As per the EMMI Benchmark Consultation Policy, stakeholders must be consulted upon any changes to the benchmark methodology and the summary of the feedback received shall be publicly disclosed after the approval of EMMI’s governing bodies. The level of disclosure envisioned should however be applied proportionally depending on the significance of the benchmark and the publication of individual responses is subject to the confidentiality requested by the respondents.

However, EMMI would like to stress that even if material changes have been consulted upon, given the impact it could have on stakeholders, it may be very challenging for the administrator to proceed with the material changes without a sign off or green light from supervisory authorities.

<ESMA\_QUESTION\_CP\_BMR\_10>

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

<ESMA\_QUESTION\_CP\_BMR\_11>

EMMI agrees with the proposed approach. As BMR Article 15.2 (a) calls for *a clear description of the input data to be provided and the requirements necessary to ensure that input data is provided in accordance with Articles 11 […],* we consider it appropriate that the RTS relative to both Articles comprise a number of identical provisions in order to allow each of them to stand alone, knowing that each RTS could be waived separately.

<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>

EMMI believes that it is important to find a balance between a sufficiently robust and detailed code of conduct and the risk of it becoming too burdensome and demanding for contributors, which could jeopardize contributors’ participation. Article 16.5 of the Benchmark Regulation states that *“ESMA shall take into account the different characteristics of benchmarks and 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, and the developments in benchmarks and financial markets in light of international convergence of supervisory practices in relation to benchmarks.”* However, as an administrator of a critical benchmark, EMMI would like to stress that a Code of Conduct should set a high standard and should not be watered down to the detriment of the robustness of the benchmark.

<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>

EMMI has set a standard for record-keeping at the contributor level which includes daily position or risk reports for units which undertake dealing activity in instruments or derivatives referencing to the benchmark. We believe that record keeping on substantial exposures to benchmark-related instruments should be applicable to all contributors and all types of benchmarks, in order to monitor possible conflicts of interest and risks of market manipulation .

<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>

EMMI agrees with the proposals for the reporting of suspicious transaction in the draft RTS. In particular, EMMI welcomes ESMA’s proposal that contributors should report not only to their competent authority and the administrator but also to the competent authority of the administrator, thereby ensuring the latter is swiftly and fully aware of any actual or suspected infringements. EMMI also welcomes ESMA’s proposal that contributors shall maintain a conflict of interest register that shall be accessible by internal or external auditors.

<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>

EMMI is not of the opinion that the proposed RTS should be amended or extended further to take into account different characteristics of benchmarks when it come to the code of conduct for contributors.

<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>

EMMI would like to suggest that the proposed Article 4 on *“Consistency of the process of contribution of input data”* also makes reference in the first paragraph to the format of data input.

<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>

(art. 1.1) EMMI welcomes the possibility of sign-off by a natural person senior to the submitter or, when it is not proportionate, provide for effective checks by staff other than the submitter, after submission, where submissions are automated.

Nevertheless, when input data is based on expert judgement, EMMI believes that a Submitter-Approver process should be in place. Submitters are responsible for proposing the submissions, based on the processes outlined in the Code. Approvers are responsible for checking the quotes for reasonableness prior to submission and overseeing the daily submissions process. Approvers shall also be available before the calculation of the benchmark to re-confirm the contributors’ submission to the Calculation Agent if necessary. The detailed roles and responsibilities of the Submitters and Approvers should be well-defined and properly documented in the Panel Bank’s policies and procedures. The staff reviewing or signing-off the submission should possess sufficient expertise and seniority so as to challenge the rates proposed by the submitter. Submitters should also receive specific training in relation to the analytic framework and data to be used in developing the quote submissions.

(art. 1.3) While EMMI understands the rationale developed by ESMA in §134, ESMA might reconsider mentioning explicitly the reporting of breaches of the BMR and of the code of conduct, as envisaged originally in the discussion paper. Any non-compliance to the BMR or code of conduct should be notified to the competent authority and to administrator and immediately, if it is a breach.

Similarly, EMMI believes that the transmission of external audit reports covering benchmark contribution activity should be stated explicitly, as envisaged originally in the discussion paper. In this context, EMMI wishes to reiterate that external audit reports covering benchmark contribution activity should not only be made available to the National Competent Authority, but also to the administrator. In addition, EMMI believes that, in case the administrator have reasonable grounds to believe that the integrity of the benchmark is being compromised as a result of a contributor’s activities, the administrator should have the right to commission an external review of the contributor’s benchmark submission activities.

EMMI believes that the reporting of breaches and the transmission of external audit reports are key elements to enable the administrator to monitor panel banks’ compliance with the BMR and the code of conduct and thereby the integrity of the benchmark and should therefore be made explicit.

EMMI generally agrees with the other proposals regarding the governance and control arrangements for supervised contributors.

<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>

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<ESMA\_QUESTION\_CP\_BMR\_18>

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

<ESMA\_QUESTION\_CP\_BMR\_19>

EMMI generally agrees with ESMA’s specifications of the criteria for significant benchmarks.

<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>

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<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>

EMMI generally agrees with the proposed specifications of the contents of a benchmark statement.

EMMI acknowledges the rationale in §180 for keeping the benchmark statement and the methodology to be published or made available (art.13 BMR) as two separate documents. Nevertheless, as long as the methodology is displayed in a publicly available document, ESMA might reconsider its approach and allow for a reference/link to the methodology in the benchmark statement.

<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>

EMMI generally agrees with the proposed specifications for updates of the benchmarks statement. However, EMMI wishes to underline that the concept of “significant change” may lead to different interpretations. ESMA might consider, for consistency reasons, align this terminology with the concept of “material change” in use in the BMR, in particular in art. 13 (transparency of methodology).

Generally, EMMI believes that the format and content of the benchmark statement should be aligned with the compliance statement required in IOSCO Principles. For transparency reasons and easy access to information, ESMA might consider developing a template for benchmarks statements, similar to the proposed compliance statement templates in the consultation paper.

<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>

EMMI agrees with the general approach to distinguish the contents of the application. EMMI welcomes the clarification that authorisation and registration are adopted at the level of the application administrator and would be a “one-off” process. EMMI understands that, in the event that a benchmark administrator provides, at the moment of the authorisation request, critical and other categories of benchmarks, the level of details with regard to the description of the benchmark provided and the input data and methodology will be applied proportionally depending on the category (critical, significant, non-significant) on the basis of the RTS requirements, while the information regarding the administrator itself should be provided along with the requirements for authorisation. Should this not be the right interpretation, EMMI would welcome further clarifications.

<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>

EMMI agrees with the general and financial information requirements.

<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>

EMMI agrees with the requirements covering the information on the applicant’s internal structure and functions.

<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>

EMMI agrees that the requirements for dealing with benchmarks provided are appropriate. We welcome ESMA’s approach that the assessment of the category is to be done to the best of knowledge of the applicant administrator. As pointed out in our response to the discussion paper, it is extremely difficult for administrators to source and collect benchmark usage data.

<ESMA\_QUESTION\_CP\_BMR\_26>

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

<ESMA\_QUESTION\_CP\_BMR\_27>

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<ESMA\_QUESTION\_CP\_BMR\_27>

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

<ESMA\_QUESTION\_CP\_BMR\_28>

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<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>

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<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>

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<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>

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<ESMA\_QUESTION\_CP\_BMR\_31>