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| 29 September 2017 |

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| Response form for the Consultation Paper on  draft guidelines on non-significant benchmarks |
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| Date: 29 September 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

* respond to the question stated;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all responses received by 30 November 2017.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in the form “Response form\_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper ([www.esma.europa.eu](http://www.esma.europa.eu) 🡪 ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).
* Please do not remove tags of the type <ESMA\_QUESTION\_GBMR\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
* When you have drafted your response, name your response form according to the following convention: ESMA\_ GBMR \_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_GBMR\_ABCD\_RESPONSEFORM.
* Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page 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. 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 not to disclose the response 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 heading ‘Data protection’.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to administrators of benchmarks, contributors to benchmarks and users of benchmarks as well as to any market participant who is affected by the Benchmarks Regulation.

# General information about respondent

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| Name of the company / organisation | Foxberry Ltd |
| Activity | Benchmark provider |
| Are you representing an association? |  |
| Country/Region | United Kingdom |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_GBMR\_1>

Companies that are offering benchmark falling into the non-significant categorisation can take many shapes and forms, and in our view the implementation of the regulation should allow for different business models and not cause unnecessary restrictions, provided other important criterias regarding conflicts of interest and governance are met.

For instance, our company focuses on two parts of the benchmark value chain: 1) R&D; and 2) the ongoing governance; but not on the ongoing calculation of the benchmarks. For the benchmark calculcation we use third-party companies. This means that most of our employees are subject-matter experts, and potentially "directly involved in the provision" of the benchmarks, depending on the interpretation of this term.

We feel that some proposals in the consultations have made certain assumptions on the business models of benchmark providers and will, for certain business models, be counter productive in its aim of protecting benchmark users.

<ESMA\_COMMENT\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_1>

Firstly, the term "directly involved in the provision" would benefit from clarification. For instance, if the oversight function is also involved making decisions relating to administering the arrangements for determining a benchmark, would not each member of such oversight function be directly involved in the provision of the benchmark, in which case the suggestion of disallowing such employees to be members of the oversight function becomes a logical fallacy? We would therefore suggest that ESMA adds an answer to their Q&A document regarding on how to determine whether someone is directly involved in the provision.

Secondly, we strongly oppose the requirement to not allow members that are directly involved in the provision of a benchmark to be voting members of the oversight function, due to following reasons:

a) Competence: the staff directly involved in the provision of a benchmark tend to be the subject-matter experts

b) Complexity: The segment of non-significant benchmarks contains benchmarks that are highly complex, for instance based on derivative instruments, that may require a high level of competence and expertise

c) Proportionality: we do not believe this requirement is proportionate for non-significant benchmarks. The non-significant categorisation should allow for a wide range of company setups and benchmark uses.

d) Restrictive of competition: We believe that the proposal has been made based on a number of assumptions on the existing business model of benchmark provision firms. We do not believe that the suggestion of disallowing members that are directly involved in the provision of benchmarks takes into account the variety of firms offering non-significant benchmarks. For instance, for firms that are focused on activities such as the R&D of benchmarks as well as the ongoing governance of benchmarks, but are using third-parties for the ongoing calculation, most staff members are likely to be directly involved in the provision of the benchmark (albeit subject to the interpretation of this term).

e) Inconsistent: In our view, allowing a single person to act as the oversight function whilst at the same time not allowing subject-matter experts to be full members of the oversight function is an inconsistency.

f) Accountability: In our view, it is not beneficial to benchmark users to restrict staff who are directly involved in the provision of benchmarks from the oversight function as it would limit direct accountability.

With regard to the point that for regulated-data benchmarks, firms should consider including, as members of the oversight function, representatives from the entities listed in the definition of 3(1)(24):

a) Although we understand that the proposal is not to make this a requirement, we believe that in most cases this is not a realistic suggestion, and we struggle to see what value it would add to the oversight, as the data is already regulated-data.

b) In addition, we believe it is likely that this would potentially introduce new conflicts of interests, as benchmarks typically allocate to securities on a wide range of venues.

<ESMA\_QUESTION\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_2>

We believe that, if input data does not, for whatever reason, meet the criteria used in the methodology then we believe by definition an error has occurred and it should be treated by the administrator accordingly. Therefore,

with regard to point 1c), to check that input data is contributed from the sources as defined in BMR 3(1)(24), we would question a) what is actually meant here as in our opinion such data is regularly available and hence not contributed; and b) the purpose of this paragraph.

with regard to point 1d), we agree with the overall statement that the input data shall meet the requirements of the methodology, but we believe that many of the items listed in i) to iv) may not be relevant for a number of benchmarks (including but not limited to tenor).

<ESMA\_QUESTION\_GBMR\_2>

1. : Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_3>

Our understanding is that the three level of control functions only apply to where input data is contributed from a front office function. If so, we agree with the proposal, as the potential conflict of interests are substantial.

<ESMA\_QUESTION\_GBMR\_3>

1. : Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_4>

Yes, we agree. No further comments.

<ESMA\_QUESTION\_GBMR\_4>

1. : Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_5>

The question here mentions “public”, but as the exact details may vary between benchmarks, we believe it should be made available to users/licensees of the benchmark and not publicly. This is because certain benchmarks may be tailor made for a specific user.

Furthermore, the term “traceable and verifiable” would benefit from ESMA clarification.

<ESMA\_QUESTION\_GBMR\_5>

1. : Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_6>

No comments/not applicable

<ESMA\_QUESTION\_GBMR\_6>

1. : Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_7>

No comments/not applicable

<ESMA\_QUESTION\_GBMR\_7>