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| Response Form to the Consultation Paper |
| Draft Regulatory Technical Standards under the Benchmarks Regulation |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **9 May 2020.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**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:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_CP\_BRTS\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. 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.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_BRTS\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_BRTS\_ABCD\_RESPONSEFORM.
5. 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 MiFIR report on Systematic Internalisers in non-equity instruments”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically 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 [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

This paper may be specifically of interest to administrators of benchmarks, contributors to benchmarks and to any investor dealing with financial instruments and financial contracts whose value is determined by a benchmark or with investment funds whose performances are measured by means of a benchmark.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | ICE Benchmark Administration Limited |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | UK |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_CP\_BRTS\_1>

ICE Benchmark Administration Limited (IBA) is grateful for the opportunity to respond to the draft Regulatory Technical Standards (RTS) under the Benchmarks Regulation (BMR) in ESMA’s Consultation Paper 70-156-1464.

IBA would be pleased to discuss or expand upon any of the responses below if that would be helpful to ESMA.

<ESMA\_COMMENT\_CP\_BRTS\_1>

**Questions**

1. : Do you agree with the governance arrangements set above? Do you have any additional suggestions? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_1>

We agree in principle with the proposals and only suggest a change to proposed Article 1(5) which may be problematic for benchmark administrators which are part of a wide corporate group which sets remuneration policies centrally. We suggest a modification as follows:

“5. Administrators shall ~~establish a remuneration framework to~~ ensure that the remuneration of the persons involved in the provision of the benchmark is appropriately set and is not subject to conflicts of interest.”

<ESMA\_QUESTION\_CP\_BRTS\_1>

1. : Do you agree that administrators should have in place a remuneration framework?

<ESMA\_QUESTION\_CP\_BRTS\_2>

Again, we agree in principle.

However, Article 2(1)(d) requires that administrators’ governance arrangements clearly state “the persons involved in the identification and reporting of any circumstances which may give rise to conflicts of interest”.

We consider that all and any staff of an administrator should be expected to identify and declare any potential conflict of interest that arises in the course of their work or from external factors (such as outside or family associations).

We therefore suggest that Article 2(1)(d) be reworded as follows:

“the persons to whom potential conflicts of interest should be reported, who will then be responsible for the ~~involved in the identification and~~ reporting of any circumstances which may give rise to conflicts of interest”.

<ESMA\_QUESTION\_CP\_BRTS\_2>

1. : Do you agree that the same requirements should apply to an administrator that is a natural person? Please elaborate.

<ESMA\_QUESTION\_CP\_BRTS\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_3>

1. : Do you think that other conditions should be taken into account to ensure that the methodology complies with the requirements of the BMR? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_4>

1. : Do you consider that additional requirements are needed to ensure that the methodology is traceable and verifiable? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_5>

1. : Do you think that the back-testing requirements are appropriate? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_6>

1. : Do you agree with the requirements set out above? Do you have any additional suggestions? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_7>

We have concerns relating to the proposed requirements for the reporting of infringements.

Where the benchmark oversight is conducted by a committee, and particularly one which has members who are external to the benchmark administrator, it could be inappropriate for the administrator to communicate or escalate to that oversight function details of any conduct potentially linked to manipulative behaviours.

Similarly, it may not be appropriate for a communication to be made to such an oversight function describing any potential manipulation which occurred or any measures taken or proposed to be taken to limit the effects of the manipulation. It is even possible that in some cases this constitute ‘tipping off’ in contravention of market abuse legislation.

Even just as a matter of practicality, it would not always be possible for the oversight function to make a report to the relevant competent authority. In the case of the UK’s FCA, for example, reports of suspected manipulation must be submitted online by the benchmark administrator.

Therefore, we suggest that the reporting of potentially manipulative behaviour should be required to be made to an individual or department of the administrator who or which is specifically made responsible for receiving such reports and taking appropriate action.

This could entail the following changes to draft Article 5 (Reporting to oversight function):

“1. In the case of a reasonable suspicion that a benchmark manipulation has occurred, the staff involved in the protection of data integrity shall, without undue delay, notify the potential breach to the person in charge of the administrator’s internal oversight function competent in accordance with the administrator policy to receive such notification. Where the notification to the oversight function is not made as soon as a reasonable suspicion that a benchmark manipulation has occurred, it shall be accompanied by reasons for the delay.”

It should be noted that, depending on the circumstances, an oversight committee should be informed in general terms of suspected manipulative behaviour in order for the committee to consider whether there are any aspects of the benchmark methodology or processes which could render the benchmark vulnerable to such behaviour.

<ESMA\_QUESTION\_CP\_BRTS\_7>

1. : Do you agree with the systems suggested for the surveillance of market manipulation? In particular, do you think that an automated system should be required only when it appears to be adequate according to the nature, scale and complexity of the benchmark? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_8>

1. : Do you think that other criteria should be considered in relation to the transition of the provision of the critical benchmark to a new administrator? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_9>

1. : Do you think that other criteria should be considered in relation to the cessation of the provision of a critical benchmark? Please specify.

<ESMA\_QUESTION\_CP\_BRTS\_10>

Paragraph 108a includes a statement that, “It is possible that even in cases where the critical benchmark is no longer representative of the underlying market, mandatory administration is necessary to ensure the cessation of the provision of the benchmark in an orderly fashion”.

We are strongly of the view that the BMR should not give a competent authority the power to require an administrator to publish a benchmark that is unrepresentative of the underlying market or economic reality the benchmark is intended to measure.

The proposed power is also inconsistent with Article 11(4) which requires administrator to change input data, contributors or methodology or else cease to provide index where input data does not represent underlying economic reality. Furthermore, it runs counter to the whole thrust of Articles 11 and 12 (and indeed the whole of BMR) which relies on a benchmark representing its economic reality.

Any such expansion of a competent authority’s powers would create significant reputational and litigation risks for an administrator and could result in market uncertainty and instability.

With reference to a competent authority’s assessment on cessation of provision of a benchmark, the proposals would give wide discretion to a competent authority to determine at the time of transition whether an administrator’s arrangements were acceptable. We suggest that competent authorities should instead review administrators’ changes and cessation procedures annually so that any comments or concerns could be addressed at that time of review rather than at the time of implementation of cessation or transition plans.

<ESMA\_QUESTION\_CP\_BRTS\_10>

1. : Do you agree with the criteria under which competent authorities may require changes to the compliance statement? Please specify

<ESMA\_QUESTION\_CP\_BRTS\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BRTS\_11>

1. : Do you agree with the criteria under which competent authorities may require changes to the control framework requirements? Please specify

<ESMA\_QUESTION\_CP\_BRTS\_12>

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<ESMA\_QUESTION\_CP\_BRTS\_12>