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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 | S&P Dow Jones Indices |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | North-America |

**Introduction**

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

<ESMA\_COMMENT\_CP\_BRTS\_1>

S&P Dow Jones Indices (S&P DJI) welcomes the opportunity to comment on the European Securities and Markets Authority’s (ESMA) draft regulatory and technical standards under Regulation (EU) 2016/2011 (Regulation or BMR) and Regulation (EU) 2019/2175. In addition, we would welcome an opportunity to engage with ESMA to discuss the BMR and the benchmark industry more generally.

Given the opportunity to provide comments on the BMR to ESMA we would also like to address a number of persistent issues that we believe ESMA can help play an active part in resolving. We would welcome dialogue on these points with ESMA in the context of the scheduled legislative review of the BMR.

The BMR entered into application across the EU on 1 January 2018. The BMR was implemented, primarily in response to the manipulation and inherent conflicts of interest with specific interest rate benchmarks. However, the scope of the BMR is significantly broader, affecting an enormous number of benchmarks, most of which do not pose systemic or material risks. The considerable scope of the BMR, combined with its extraterritorial reach, has resulted in a substantial compliance burden for administrators, users, and contributors alike.

Significant issues persist and hamper administrators and users from implementing the requirements of the BMR effectively, for example:

* The scope is disproportionately broad leading to unnecessary requirements which are excessive in relation to the risk posed by the majority of benchmarks;
* The extraterritorial scope of the BMR, combined with challenging rules for third country administrators creates an uneven playing-field, which could significantly reduce investment opportunities for EU investors;
* The introduction of bureaucratic and duplicative disclosure requirements (benchmark statements) is a further cost and could act as a barrier to entry for this market;
* The inability for key benchmark classifications (i.e. regulated data benchmarks) to be used in practice has prevented the application of the proportionality intended by the co-legislators, which adds to significant confusion among benchmark users; and
* The impractical, extensive, and onerous obligations, particularly those related to outsourcing create technical barriers to the functioning of benchmark provision.

In addition, there have been a high number of legislative amendments with limited consultation during the short life of the BMR. The amendments have simultaneously introduced greater and additional disproportionate burdens on administrators, whilst failing to address some of the fundamental issues described above. Despite repeated calls for these issues to be addressed they remain unresolved. As a result, the regulatory environment for benchmarks in the EU is becoming increasingly challenging with negative effects for the Capital Markets Union and for investment opportunities, such as the inability to access global benchmarks.

In order to illustrate the instability of the BMR and its consistent migration away from the original intent of the legislation we provide a list of significant changes, which have been introduced with diminishing consultation with the index industry:

* **June 2016** - BMR Level 1 enacted;
* **July 2018** – Final Regulatory Technical Standards published. The RTS were published late and included significant changes from the draft RTS published by ESMA. There was no consultation on the proposed changes;
* **November 2019** – Amendments to the BMR to introduce Climate Benchmarks and ESG Disclosure. There was no consultation on these changes;
* **December 2019** – Regulation 2019/2175 – Amendments to the BMR following the ESA Review;
* **December 2019** – Review of BMR. There was no consultation on these changes;
* **April 2020** – Publication of Draft Delegated Acts – climate benchmarks and ESG disclosure;
* **April 2020** – ESMA No Action Letter due to the Delegated Acts not being finalised on time;
* **April 2020** – ESMA Consultation – draft regulatory technical standards;
* **July 2020** – Expected Level 1 amendment of BMR.

In this context, we very much welcome ESMA’s No Action Relief Letter to provide greater certainty to benchmark providers and users of benchmarks with regard to the ESG and Climate Benchmark provisions.

**Suggested Amendments to the BMR**

The scope of the BMR should be clarified and should properly focus on systemically important benchmarks that pose the greatest risk of manipulation and conflicts of interest. Amending the BMR to focus its scope on systemically important benchmarks will strike the correct balance between effective protection of European capital markets, while also providing European investors with access to a wide variety of benchmarks that pose little risk of manipulation. Addressing the overly broad scope would also help lift the significant and disproportionate burden that the BMR currently places on administrators and users.

* Reduce the scope – the BMR should focus on systemically important benchmarks and those which are most at risk of manipulation and / or have conflicts of interest. Regulated data benchmarks, and other non-critical benchmarks should be removed from the scope.
* Definition of Regulated Data Benchmark – the definition of regulated data benchmark must be extended such that it includes benchmarks that use input data from third country exchanges and trading venues.

<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 believe that the proposals contained in the draft technical standards in relation to the ‘management body’ go well beyond the scope of the Level 1 text of the BMR. The BMR does not include any requirements in relation to an administrator’s management body. Accordingly, *Article 1(2) ‘Organisational Structure’*, of the technical standards for the governance arrangements should be removed to properly align with and reflect the requirements of the BMR.

The proposed draft technical standards for the governance arrangements would place a disproportionate burden on administrators in relation to the risk posed by the majority of non-significant and significant benchmarks. Furthermore, the proposed technical standards make no allowances or exemptions for other benchmark classifications, such as regulated data benchmarks. The risks of manipulation and conflicts of interest for regulated data benchmarks are much lower. We do not believe there is sufficient justification to require all benchmark administrators to implement the extensive requirements proposed by ESMA.

To ensure the technical standards are proportionate to the risks posed, the governance requirements should be applied appropriately to those benchmarks that pose the greatest risks and which are systemically important. This should result in the governance requirements being for critical benchmarks only.

Furthermore, the RTS and Level 1 text make it clear that an administrator should have the flexibility to implement an oversight framework that is appropriate and proportionate to the risks posed by the benchmarks it provides (Recital 69 of the BMR). The proposed technical standards significantly reduce the concepts of flexibility and proportionality, which are at the heart of the BMR and which were intentionally included by the co-legislators.

We urge ESMA to ensure that the proposed requirements only apply to systemically important benchmarks which pose the greatest risks, and allow administrators of non-critical benchmarks the flexibility to implement a proportionate and appropriate governance framework for the benchmarks which they administer.

<ESMA\_QUESTION\_CP\_BRTS\_1>

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

<ESMA\_QUESTION\_CP\_BRTS\_2>

The BMR already requires administrators to identify, prevent and/or manage conflicts of interest. Inherent within the requirement to prevent and/or manage conflicts of interest is the setting an appropriate remuneration structure. The overarching principle in relation to conflicts of interest would adequately address remuneration frameworks, whilst allowing administrators sufficient flexibility to implement an appropriate and proportionate structure. We do not understand the reasoning for new proposals which go well beyond these requirements.

It is standard practice for many corporate entities to establish a remuneration framework. However, we do not believe requirements should be imposed on administrators in relation to the content and structure of a remuneration framework. We are not aware of any reports or incidents which call into question the remuneration of personnel responsible for the provision of a benchmark.

The index industry is a vibrant and competitive market, with numerous and varied providers operating from across the globe. Consequently, administrators should be free to implement a remuneration structure that is appropriate to the market and region in which they operate. Imposing additional requirements in relation to remuneration is disproportionate and will likely be a barrier for new entrants to the market in the EU.

<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>

The methodology provisions under the Level 1 text of the BMR are sufficiently clear, are currently working, and should not be broadened unnecessarily. The proposed technical standards themselves have clearly been drafted to address interest rate benchmarks because they do not reflect how other benchmark classification are designed, calculated, and maintained. This could pose significant problems if implemented for all benchmarks.

For example, the proposed requirements would not be appropriate for regulated data benchmarks or benchmarks that use readily available data. The BMR creates a proportionate regime for regulated data benchmarks. However the definition of regulated data benchmarks is poorly constructed, which has resulted in this proportionality being unavailable to administrators in contradiction to what was intended by the co-legislators. As a consequence, there is significant legal uncertainty for those administrators of benchmarks which use input data from trading venues outside of the EU – such benchmarks should be construed as regulated data. It is currently unclear whether benchmarks that use input data from trading venues from outside of the EU can rely on the exemptions under Article 17.

We urge ESMA to amend the technical rules to reflect the limited risk of manipulation posed by regulated data benchmarks. Please refer to our suggested amendments in Appendix A which is provided as an attachment.

<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>

We refer to our comment above in response to Question 4 and we believe that there should be an exemption or a simplified regime for those benchmarks that pose far less risk, such as regulated data benchmarks.

<ESMA\_QUESTION\_CP\_BRTS\_5>

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

<ESMA\_QUESTION\_CP\_BRTS\_6>

We refer to our comment above. We do not believe that the proposed back-testing requirements are appropriate or proportionate for all classifications of benchmark. For administrators of benchmarks that use regulated data or readily available data, back-testing is generally defined as a procedure carried out prior to the launch of an index to test whether the index behaves as anticipated using historical input data.

Once they are launched and in use, benchmarks that use regulated data or readily available data are generally calculated automatically using an input data feed. Back-testing intra-day or end of day values for regulated data or benchmarks which use readily available data is not an appropriate mechanism to validate index returns because it will not identify errors. Accordingly, these provisions should not apply to benchmarks that use regulated data or readily available data.

<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>

The proposals for reporting of infringements are not adequately calibrated for different categories of benchmarks and would cause potential disruption if applied to a broad body of benchmarks. The requirements in this proposal may also apply unintentionally to regulated data benchmarks due to the limited scope of regulated data benchmarks as defined in the BMR. i.e. The definition of regulated data benchmarks does not adequately capture benchmarks that use input data from trading venues and exchanges based outside of the EU.

In addition, the proposed technical standards recommend the installation of automated systems. Administrators would need to incur significant costs to meet these requirements, accordingly they are disproportionate to the level of risk posed by the majority of benchmarks. The final requirements should be amended to ensure that they are restricted to benchmarks that are critical under the BMR and/or pose the greatest risk of manipulation.

Article 5 paragraphs 1 and 2 of the technical standards are particularly unclear and do not reflect how many administrators monitor benchmarks and/or use input data. Furthermore, paragraphs 2 of Article 5 is particularly unclear, the paragraph makes reference to ‘data integrity breach’ and ‘data subjects’. These are terms are more commonly associated with data privacy and the General Data Protection Regulation. We would urge ESMA to clarify what these phrases mean and how ESMA believes that they apply to the analysis of benchmarks and input data.

<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>

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<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>

We believe that the BMR does not take account of the difficulties facing benchmark administrators when it comes to calculating the total value of products referencing a benchmark. It is extremely difficult and problematic for administrators to calculate the total value of all financial instruments, financial contracts, and investment funds referencing its benchmarks with any certainty. There is no obligation on supervised entities under the Regulation, or under any other EU law including MiFID, to provide the value of their financial instruments, financial contracts and investment funds to benchmark administrators.

<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>