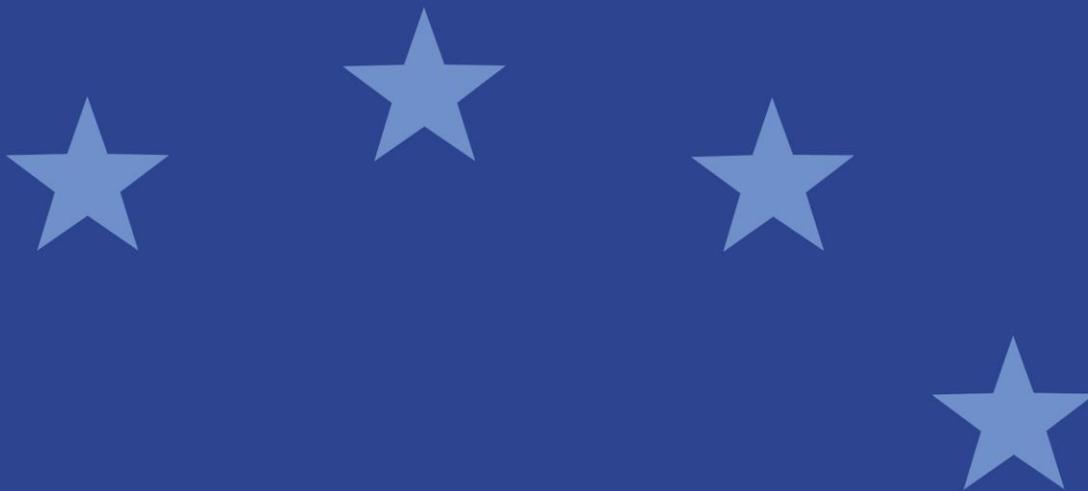


## Reply form for the Consultation Paper on Benchmarks Regulation



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the European Single Electronic Format (ESEF), 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

### **Deadline**

Responses must reach us by **30 June 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>

We appreciate the opportunity to respond to ESMA's consultation paper and we appreciate ESMA's work in trying to address the very complex questions it was tasked to answer. We hope that our responses are helpful and constructive, and we are always available for any questions that ESMA may have.

MSCI has been calculating indexes for more than 40 years, and today MSCI calculates over 170,000 equity indexes per day (over 9,000 on a real-time basis). MSCI implemented the IOSCO Principles for Financial Benchmarks in 2014. In both July 2014 and 2015, MSCI announced that it successfully completed an assurance review of its implementation and we are currently in the process of our 2016 assurance review. MSCI has engaged PricewaterhouseCoopers LLP (PwC) to perform the reviews. Our full IOSCO compliance statement and assurance report can be found on our website at: <https://www.msci.com/index-regulation>.

MSCI is headquartered in New York, with research and commercial offices around the world. MSCI has over 6000 customers worldwide across MSCI's different business units.

While we understand that this consultation is for the Level 2 text, we wish to point out ambiguity in a number of areas in the Level 1 text, which we hope can be clarified in the Level 3 process. They include:

Article 1.24 – We believe that the definition of regulated data benchmarks includes data that comes from stock exchanges but is delivered through data aggregators. It would be helpful if it could be clarified that entirely and directly includes data feeds from data aggregators, and not an outsourced activity under Article 10. The latter would result benchmark administrators being responsible for data aggregators' automated processes that are responsible for sending data feeds globally to thousands of clients, including financial institutions, etc.

Article 15 – We believe that the code of conduct requirements are excluded completely with respect to regulated data benchmarks and that has always been the intent. To avoid ambiguity in the implementation by regulators we would like a clarification that the exclusion applies to the entire benchmark and not just with respect to the regulated data itself (e.g., only stock exchange prices for equity indexes). The latter interpretation, would fundamentally disruptive to the market, leading to anomalous and unintended results. While the stock prices are a key driver of the return of an equity index, no equity index only uses stock exchange prices. Data such as company fundamental data, number of shares, company shareholdings, dividends, and corporate events is used, which can be sourced from market data vendors or from public company filings. GDP data could be used for GDP weighted indexes. ESG data could be used for ESG indexes.

Article 16 – Benchmark administrators appear to be supervised contributors. If a benchmark administrator's benchmark regulated under the regulation is being used as an input in another benchmark created by another party, we do not believe that benchmark should also be subject to Article 16. That would lead to the anomalous result of the benchmark being regulated under two different standards (i) by the regulation generally as a benchmark and (ii) by Article 16 as "contribution" by a supervised contributor.

Article 29(1) - We assume that Article 29(1) applies to existing *benchmark providers* and that all indexes produced by existing benchmark providers can be used during the 24 month period, not just the *indexes* existing as of the date of application. The latter interpretation would mean that *no new benchmarks* could be used in the EU for 2 years. We do not think that is the intent, and clarity around that issue would be helpful.

Article 32(4)(c) refers to financial instruments "still traded". We would like clarity whether "still traded" refers to the date of publication of the regulation, date of application or some other date. We would also like clarity that if products stop trading that the administrator is not required to apply again, potentially in another jurisdiction.

<ESMA\_COMMENT\_CP\_BMR\_1>





**Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?**

<ESMA\_QUESTION\_CP\_BMR\_1>

In principle, yes. We believe it that it should be defined in a broad manner to address the issue of investor protection and ensure that all benchmarks used in connection with financial products are captured. Given that, we are concerned that by referring to an “indeterminate number of people” that may provide an incentive for financial product issuers to try to exclude their own indexes from the regulation by (i) limiting or identifying the number of investors in the financial product on which their indexes are based or (ii) not providing the data to investors. One way to amend the language is as follows: *“made available to the public’ means the provision of any benchmark to a counterparty, any investors or any potential investors for the purposes of issuing or creating a financial instrument or financial contract or benchmarking the performance of an investment fund”.*

We agree that the mechanism for delivery on the index is irrelevant. For investor protection, what is important is that an index that is used for financial products is captured.

<ESMA\_QUESTION\_CP\_BMR\_1>

**Q2: Do you agree with the proposed specification of what constitutes *administering the arrangements for determining a benchmark*?**

<ESMA\_QUESTION\_CP\_BMR\_2>

In principle, yes. We believe this aligns with IOSCO. However, there are a few points that should be clarified, as set forth below. Ongoing control of a methodology is equally as important as the initial “setting” of a methodology. For example, an administrator or benchmarks may be sold and the new company should be the new benchmark administrator and have responsibility under the regulation. Further, the maintenance and periodic reviews should refer to both the methodology and the benchmark itself. The maintenance of the benchmark is the rebalancing activity, which should be captured as part of benchmark administration.

*The ~~control setting~~ of a specific methodology for the determination of each benchmark or, with the necessary adaptations, each family of benchmarks provided, and ~~the methodology’s and the benchmark’s~~ maintenance through periodic reviews.*

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<ESMA\_QUESTION\_CP\_BMR\_2>

**Q3: Do you agree that the ‘use of a benchmark’ in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, ...)?**

<ESMA\_QUESTION\_CP\_BMR\_3>

Yes, we would agree that when a benchmark is referenced in determining the payout of a derivative contract that this constitutes the “use of a benchmark”. We would also extend that further to say that when a benchmark index is used to determine the value of the derivative contract outside of its expiry as is usually the case for derivatives contracts that are already in existence, that this also constitutes the “use of a benchmark”. Generally speaking, benchmarks are typically used and clearly identified as the underlying reference index for derivative products such as listed futures and listed options that are traded on exchanges and cleared by clearinghouses and swaps traded in the OTC market that are traded by banks and market participants. Exchanges, clearinghouses and market participants enter into license agreements to use the intellectual property of the index providers in referencing the indexes so this is clearly “use of a benchmark” by these market participants. And parties that are trading those products in the markets use the value of the benchmark index to determine the economic value of the derivative contract.

<ESMA\_QUESTION\_CP\_BMR\_3>



**Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?**

<ESMA\_QUESTION\_CP\_BMR\_4>  
No additional comments  
<ESMA\_QUESTION\_CP\_BMR\_4>

**Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in the case where the regulatory data is not available or sufficient?**

<ESMA\_QUESTION\_CP\_BMR\_5>  
We agree that the only data that benchmark administrators can be required to report is data that (i) is publicly available through exchanges, (ii) is subject to regulatory reporting obligations and is sufficient, is made available to benchmark administrators, and can reasonably be extracted/used by benchmark administrators for reporting purposes, or (iii) is available by third parties on a subscription basis to regulators and benchmark administrators. For (ii) and (iii), it is important that these two mechanisms do not create significant barriers to reporting. For example, if regulatory reported data is reported in a manner or format that makes it very difficult or very expensive to extract the data needed for reporting under the benchmark regulation, then it is not reasonable to rely on that as a data source.

Data outside those categories should be excluded from tracking and reporting requirements under the benchmark regulation because it is unjust to require reporting where the data is not available equally to regulators and benchmark administrators.

Also, assets tracking the benchmark should extend only to assets actually tracking the benchmark (e.g., funded amounts). If there are elements that are not tracking the benchmark then that shouldn't be attributed to the benchmark.

Finally, because of the widely acknowledged difficulty with benchmark administrators having to report data that they do not own or control or in many cases even have access to, we believe that data reporting should be on a reasonable efforts basis. Because of the size of the penalties and the difficulty in reporting, we believe it should be made clear that data discrepancies can be cured instead of a strict liability standard immediately resulting in sanctions.

<ESMA\_QUESTION\_CP\_BMR\_5>

**Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?**

<ESMA\_QUESTION\_CP\_BMR\_6>  
The question should not be whether it makes sense to measure at a specific point in time but instead whether it is even possible to do this for certain types of financial products, for example products such as OTC derivatives and structured products which in many cases are private bilateral transactions with little to no public information available. The only reasonable way to achieve this would be to limit the requirements to publicly listed securities such as listed futures and options and exchange traded funds and to prescribe what are the acceptable sources of vendors that can be used to source this data in a standardized way for reporting purposes across the market by the various market participants.

<ESMA\_QUESTION\_CP\_BMR\_6>

**Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?**



<ESMA\_QUESTION\_CP\_BMR\_7>

We do not believe this is reasonable or appropriate. Firstly, the information may not be collected as part of the license agreement. Asking benchmark administrators to renegotiate all of their agreements is not practical and has far reaching consequences with respect to the contractual relationships between private parties. Secondly, the benchmark administrator has no legal or regulatory authority to force clients to agree to this. Thirdly, clients may not report on time or at all, inappropriately resulting in the benchmark administrators facing liability under the BMR. Finally, any data that may be reported to benchmark administrators today, will be inconsistent across benchmark administrators and may not consistent with what is required under the benchmark regulation (which again would require benchmark administrators to renegotiate their client agreements causing significant disruption to the business relationships of the benchmark administrators.)

<ESMA\_QUESTION\_CP\_BMR\_7>

**Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?**

<ESMA\_QUESTION\_CP\_BMR\_8>

We believe that the most important factor that should exclude a benchmark from being designated as "critical" is substitutability. If there are any reasonable substitutes provided by another benchmark provider, then the users have a choice and can switch benchmarks. By definition the benchmark cannot then be critical because alternatives can be used/chosen.

<ESMA\_QUESTION\_CP\_BMR\_8>

**Q9: Do you think that the concept of "significant share of" should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?**

<ESMA\_QUESTION\_CP\_BMR\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_9>

**Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?**

<ESMA\_QUESTION\_CP\_BMR\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_10>

**Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?**

<ESMA\_QUESTION\_CP\_BMR\_11>

Yes, generally. However, we do not agree with the last provision in Section 2 : "Whether the transitioning of the benchmark to another administrator would lead to a substantial change in the benchmark." That should be deleted because it could force a benchmark administrator to provide its intellectual property to its competitor. This is not reasonable or appropriate, especially considering that benchmarks would still be used outside of Europe.

<ESMA\_QUESTION\_CP\_BMR\_11>