



European Securities and
Markets Authority

Anlage

Reply form for the Consultation Paper on Benchmarks Regulation



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 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 under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_BMR_1>

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

Clarification of transitional provisions

We would appreciate clarification of the scope of the transitional provisions.

Article 51(1) of the BMR grants index providers which have provided a benchmark by 30 June 2016 a two-year period from the regulation's date of application (1 January 2018), i.e. until 1 January 2020, to apply for authorisation or registration as an administrator of these benchmarks. Under Article 51(1), the application for authorisation or registration has to be submitted between 1 January 2018 and 1 January 2020. In principle, index providers are permitted to make full use of this period. Under Article 51(3) of the BMR, an existing benchmark can in principle be used until 1 January 2020. If an index provider submits an application for authorisation or registration by 1 January 2020, the benchmark can carry on being used until the application has been rejected, which may be after 1 January 2020. Article 51(3) refers broadly to "existing benchmarks". This raises the following question: are we correct in thinking that the term "existing benchmarks" covers all benchmarks which are provided up to and including 31 December 2017? If our understanding is correct, then all benchmarks provided up to and including 30 June 2016 should be able to be used until 1 January 2020 or, if an application for authorisation or registration is submitted, also after 1 January 2020 until the date on which the application is rejected. All benchmarks newly provided between 30 June 2016 and 31 December 2017 should also be able to continue being used after 1 January 2018 until an application for authorisation or registration has been rejected or approved. As we see it, the only difference between benchmarks provided before 30 June 2016 and benchmarks first provided between 1 July 2016 and 31 December 2017 is that providers of the former have until 1 January 2020 to submit an application while the latter, pursuant to Article 34(3) of the BMR, have to submit their application no later than 30 working days after 1 January 2018.

Recognition of third-country benchmarks

It is essential that there is adequate transparency for market participants about which third-country benchmarks may be used in the EU under Articles 30 and 32 of the BMR and when. This applies especially to critical and significant benchmarks from the US and Asia, but also to all benchmarks whose endorsement market participants will have to consider in a timely manner in accordance with Article 33 of the BMR. It would therefore be desirable if, as soon as an application for an equivalence decision has been submitted and the analysis of equivalence under Article 30 of the BMR has begun, ESMA and the European Commission were to make this information public. This will ensure transparency about benchmarks already undergoing the process of analysis.

In addition, our understanding of the transitional provision set out in Article 51(5) of the BMR is that it covers all benchmarks used at least once before 1 January 2018.<ESMA_COMMENT_CP_BMR_1>



Q1: 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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BMR_1>

Q2: 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>
We support the option of inviting external stakeholders to guarantee that sufficient expertise is available to the benchmark.
<ESMA_QUESTION_CP_BMR_2>

Q3: Do you support the concept of observers and their inclusion in the oversight function?

<ESMA_QUESTION_CP_BMR_3>
We support the concept of observers as long as their inclusion is at the discretion of the administrator. At least Article 4(1)(a) and (d) of the draft RTS in section 2.5 of the consultation paper should apply to observers.
<ESMA_QUESTION_CP_BMR_3>

Q4: 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.
<ESMA_QUESTION_CP_BMR_4>

Q5: 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. We support ESMA's flexible approach of allowing the administrator to decide on the most appropriate functioning of the oversight committee while avoiding any conflicts of interest.

We do, however, have concerns about ESMA's proposed requirement that the oversight function should assess and challenge the decisions of the management body of the administrator (cf. Article 2(3) of the draft RTS in section 2.5 of the consultation paper) since it would not reflect the variety of governance structures across the industry. An oversight committee might be composed of both executive and non-executive directors, for instance. A more flexible approach is therefore needed.

<ESMA_QUESTION_CP_BMR_5>

Q6: 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>
We generally agree with ESMA's approach in its draft RTS in section 3.5 of the consultation paper. Nevertheless, it would be very helpful if ESMA provided guidance on the definition of "input data", particularly whether the definition of input data should cover references, terms and conditions, and other security metadata or just price data.

In addition, it would be helpful if ESMA could provide further clarity about the requirement to maintain a physical presence in the front office “where applicable”. We would also welcome more clarity about procedures to prevent the exchange of information between front office staff and contributors’ staff (Article 6(3)(h)(vi) of the draft RTS in section 3.5).

<ESMA_QUESTION_CP_BMR_6>

Q7: 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>

We suggest that the proposed fall-back arrangement to ensure the provision of input data even in times of stress (Article 6(2)(d) of the draft RTS in section 3.5) should also cover cases where an administrator is unable to publish a benchmark due to a lack of data or a lack of adequate data. Otherwise, administrators (and by extension contributors) might find themselves in the position of having to publish or provide misleading information, which could constitute a criminal offence.

We would ask ESMA to clarify what is meant by “monitoring” in Article 6(3)(e) and (f) of the draft RTS in section 3.5. We interpret it as maintaining constant vigilance.

<ESMA_QUESTION_CP_BMR_7>

Q8: 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>

We generally agree. It would, however, be helpful if ESMA provided clarification about the key elements of the methodology and what constitutes a secured algorithm.

<ESMA_QUESTION_CP_BMR_8>

Q9: 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>

We agree with ESMA’s approach, but would like to point out some difficulties with a few of the proposed elements. Whilst we agree with the need to disclose material changes in the benchmark’s methodology, the requirement to “ensure” that stakeholders are informed of the key elements of the proposed future methodology should be clarified (cf. Article 3(1)(a) of the draft RTS in section 4.7). Our understanding is that publishing the information should be sufficient to meet this requirement.

We would also like ESMA to clarify for how long the comments received when consulting on a proposed material change and the administrator’s response to these comments should remain accessible (cf. Article 4 of the draft RTS in section 4.7).

<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the procedure for consultation on material changes to the methodology?

<ESMA_QUESTION_CP_BMR_10>



The administrator should grant an adequate period of time for consultation and take account of the interests of stakeholders. If methodological changes are planned to a critical or significant benchmark, the consultation period should not be less than four weeks unless there are compelling reasons to justify a shorter period.

Publishing information about the start of a consultation phase only on the administrator's website is not sufficient, in our view, to ensure that all stakeholders are aware of the consultation and can take part. Administrators of critical or significant benchmarks should ensure that the entire market is informed, which means the information needs to be disseminated throughout the EU. This could be achieved by using the services of distribution channels which disseminate information such as ad-hoc disclosures within the meaning of the Market Abuse Regulation, such as DGAP-News.

<ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with this approach? Please explain your response.

<ESMA_QUESTION_CP_BMR_11>

Yes.

<ESMA_QUESTION_CP_BMR_11>

Q12: 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>

Yes.

<ESMA_QUESTION_CP_BMR_12>

Q13: 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>

We do not understand the term "substantial exposure" or the mechanism behind it. It is particularly important to know how a substantial exposure should be determined. We have the following questions in this regard: Should previous data be considered when determining whether an exposure is substantial? If so, what timeframe should be examined? Are there other aspects to consider? We believe it will be essential to take account of the specificities of the instrument involved when determining whether or not an exposure is substantial. It would not be practicable, in our view, to apply a one-size-fits-all approach to all instruments relating to different benchmarks.

<ESMA_QUESTION_CP_BMR_13>

Q14: 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>

We basically support the idea of also informing the competent authority. We believe contributors should be given a certain period of time to allow the transaction to first be looked into by the compliance unit, however. This will reduce the number of reports that turn out to be false alarms.

<ESMA_QUESTION_CP_BMR_14>

Q15: 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>
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<ESMA_QUESTION_CP_BMR_15>

Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

<ESMA_QUESTION_CP_BMR_16>

ESMA states in para 104 that input data which is readily available to an administrator is not considered a contribution and that, in consequence, no code of conduct is necessary in such cases. It would be very helpful to clarify exactly what is meant by “readily available”. This definition would have a significant impact on how firms engage with data vendors and on their ability to produce various indices.

The requirement that contributors should report suspicious input data needs further clarification (Article 7(2)(a) of the draft RTS in section 5.4 of the consultation paper). At present, it appears to suggest contributors have to review all input data, including published data of other contributors. In many cases it will be impossible for contributors to police their peers, however, because they will not know the details and possibly confidential drivers behind other contributors’ submissions. This provision should only require a contributor to report suspicious data from its own submitters.

Article 8(1)(vi) of the draft RTS in section 5.4 requires physical and operational separation between submitters and other staff “where reasonably practicable”. We suggest that the principle of proportionality should apply here, meaning that the contributor’s activities and the potential for the submitter to manipulate should be taken into account. The principle of proportionality is also applied to other types of control. We would suggest replacing “reasonably practicable” with “proportionate”.

<ESMA_QUESTION_CP_BMR_16>

Q17: 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>

We generally agree. The draft RTS seem to be based on good market practice. However, the requirement to test all submitters’ knowledge once a year is overly burdensome (Article 2(2) of the draft RTS in section 6.6), and would add little value given that the contributor is already required to ensure that each submitter has adequate knowledge (Article 2(1) of the draft RTS in section 6.6 requires this on a continual basis but leaves it to the contributor to decide how to carry out the assessment).

Article 3 of the draft RTS in section 6.6 addresses the use of expert judgment. We suggest adding to the guiding policies clear circumstances in which expert judgment should not be used. Expert judgment has its limits, in our view. Without acknowledging this, contributors and submitters may feel required to use expert judgment in circumstances where it may constitute a criminal offence.

<ESMA_QUESTION_CP_BMR_17>

Q18: 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>

Please see our reply to Q17.

<ESMA_QUESTION_CP_BMR_18>

Q19: Do you agree with ESMA’s specifications of the criteria?



<ESMA_QUESTION_CP_BMR_19>

Yes.

<ESMA_QUESTION_CP_BMR_19>

Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA_QUESTION_CP_BMR_20>

We welcome the fact that the principle of proportionality is applied by including fewer requirements in the compliance statement for non-significant benchmarks. We would nevertheless ask ESMA to bear in mind that the bureaucratic burden will only be noticeably reduced if the content of individual items in the two templates is not identical but is comparatively less onerous in its requirements for non-significant benchmarks. This applies especially to item B 4 in the template in Annex II.

Further, we welcome the confirmation that administrators can use one compliance statement for a family of benchmarks.

We would like ESMA to clarify what is meant by “immediately” amending the compliance statement whenever any of the information included is no longer up to date (cf. Article 1(2) of the draft RTS in section 8.4). We would also appreciate clarification of what “publishing” the updated compliance statement means in this context.

<ESMA_QUESTION_CP_BMR_20>

Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA_QUESTION_CP_BMR_21>

We largely agree. The information should be clear, precise and user friendly as highlighted in para 175.

We nevertheless take the view that the benchmark statement is clearly intended for users within the meaning of Article 3(1)(7) of the BMR. These are not retail investors. Nor, in particular, is the benchmark statement intended to deliver consumer protection information. It is therefore not clear why ESMA expects the content of the statement to be geared to “persons with limited financial knowledge” (para 201).

<ESMA_QUESTION_CP_BMR_21>

Q22: 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>

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<ESMA_QUESTION_CP_BMR_22>

Q23: 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>

Yes.

<ESMA_QUESTION_CP_BMR_23>

Q24: 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>



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<ESMA_QUESTION_CP_BMR_24>

Q25: Are the requirements covering the information on the applicant's internal structure and functions appropriate?

<ESMA_QUESTION_CP_BMR_25>
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Q26: 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>
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Q27: Is the specific treatment for a natural person as applicant appropriate?

<ESMA_QUESTION_CP_BMR_27>
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Q28: 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>

Q29: 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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Q30: 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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Q31: 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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