



European Securities and
Markets Authority

Consultation Paper

Draft technical advice 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 **30 June 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 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 under the heading Legal Notice.

Who should read this paper

This paper may be specifically of interest to administrators of 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



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

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

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, ...)?

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

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?

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?

With the following, we would like to comment on the statements 79 and 80 of the Consultation Paper.

Europex agrees that only a very small number of commodity benchmarks will fall under the category of critical benchmarks.

However, when it comes to the seasonal pattern of certain commodity prices or the consumption volume, it is not a matter of size, the liquidity of the market or the usage of a benchmark but it depends on the physical characteristics of the underlying commodity. Commodities that follow seasonal patterns because of their physical characteristics (e.g. non-storability, weather-dependency or season-driven consumption) do so even in relatively liquid markets.

For these commodity benchmarks a six-month average is not adequate from our point of view, as the seasonality tends to be spread over the whole year. As a result, we propose to choose an annual average as seasonal patterns should then be levelled out.

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?

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

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?

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

Europex is concerned about potential unintended consequences of some of the proposed details of the objective reasons required for endorsement.

First, the Consultation Paper states that an index provider with a large subscriber-base outside the EU could use this fact as a valid objective reason for endorsement. While this model constitutes a sensible solution for well-established benchmarks, we believe that it creates unnecessary, higher entry barriers for new(er) global index providers to offer their services within the EU, thus creating an anti-competitive environment and potentially disadvantaging EU benchmark users.

Europex strongly suggests that ESMA considers softening or expanding this language so as to not create an anti-competitive landscape that discourages new index providers from offering services to EU benchmark users.

Second, the Consultation Paper goes on to describe that a strong objective reason would include that *'relying on the individual experience and/or personal skills of the employees of the third-country benchmark provider for the provision of the benchmark leads to a reduction of costs and that this is directly and significantly advantageous to the benchmark users.'* Europex believes that this wording does not account for a strong physical EU presence of some benchmark providers, nor does it recognise the support staff dedicated to assisting their EU client benchmark users.

Third, we would highly welcome an explicit confirmation from ESMA that the avoidance of a significant increase of costs borne by benchmark users is an analogous advantage to the users as a reduction of costs. If an endorsement in the EU required the transitioning of the benchmark operations to an EU entity, this would constitute a significant cost burden that would ultimately have to be passed on to the benchmark users.

Fourth, Europex suggests including the following additional objective reasons for endorsement.

IOSCO Principles for Financial Benchmarks

According to Recital 34, the Regulation should take into account the IOSCO Principles for Financial Benchmarks which serve as a global standard for regulatory benchmark requirements. Europex believes it would be prudent for ESMA to consider adding to the list of valid objective reasons one that allows to base a third-country benchmark endorsement on the compliance with the IOSCO Principles in combination with an EU presence.

Historical presence in a third country

We further believe that the endorsement provisions in the BMR have been drafted with the specific aim to prevent regulatory arbitrage (i.e. preventing benchmarks currently provided in the EU from moving to third countries in order to benefit from a lighter regulatory regime). However, administrators of benchmarks which have been historically provided from third countries (i.e. before the development of the BMR) have by definition not based their location decisions on the existence of the BMR. The addition of the criterion of historical presence in a third country to the list of objective reasons should therefore allow that benchmarks which have been historically provided from third countries directly qualify for endorsement.



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?