



European Securities and  
Markets Authority

## **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 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](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>

The Association Française de la Gestion financière (AFG)<sup>1</sup> is grateful for the opportunity given to comment on ESMA's consultative document on the draft RTS on Benchmark Regulation.

AFG fully agrees with the Efama response to this consultation.

The main issue our members wish to raise is linked to the subject of **transparency and its consistent treatment** across different pieces of regulations. There is currently an open issue for regulators to address:

- on one side, the Benchmark Regulation which does not require full transparency from the administrator
- and on the other side, the ESMA Guidelines on ETFs and other UCITS issues (ES-MA/2014/937/EN) that require asset managers to obtain from the benchmarks administrators a higher degree of transparency

The collection of information required from the asset managers so as to ensure UCITS compliance depends on the wish of the administrator to offer transparency. This is precisely the same issue that is dealt by the Benchmark Regulation.

A second important topic to our members is linked to the **compliance statement** that should be done by single benchmark.

Finally, our members strongly believe that their representatives should be **directly** involved in the governance of the oversight function of benchmarks.

<ESMA\_COMMENT\_CP\_BMR\_1>

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<sup>1</sup> The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. 600 management companies are based in France. AFG members manage 3,000 billion euros, making the Paris fund industry a leader in Europe for the financial management of collective investments (with 1,500 billion euros managed from France, i.e. 19% of all EU assets managed in the form of investment funds). In the field of collective investment, our industry includes – beside UCITS – the whole range of AIFs, such as: employee savings schemes, regulated hedge funds/funds of hedge funds, private equity funds, real estate funds and socially responsible investment funds. AFG is an active member of the European Fund and Asset Management Association (EFAMA) and of PensionsEurope. AFG is also an active member of the International Investment Funds Association (IIFA).

**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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>

AFG members are an important category of users of benchmarks.

They strongly believe that their representatives should be directly involved in the governance of the oversight function of benchmarks, like being part of the oversight function committees.

No one ignores that for instance on the delicate matter of costs and fees that ultimately affect end investors and pensioners, AFG members - as users of benchmarks - are not aligned with administrators.

The user's interests should be expressed in these fora as the oversight function should seek to reach optimal decisions accounting also for market realities and end investor interest.

On many issues, like transparency, methodology, crisis management or policies on conflicts of interest and fee policies, the opinion of users of a benchmark represents a sound and value added contribution.

<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>

Clarifications in this field are useful. The next step is for regulators to ensure consistency with the ESMA's Guidelines on ETFs and other UCITS issues (ESMA/2014/937/EN).



<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>

In the light of this Regulation's verification provisions clearly relying on the administrator, we reiterate our message that users should not be required to make assessments on the organisation and governance of contributors as asked by the ESMA's Guidelines on ETFs and other UCITS issues (ESMA/2014/937/EN).

<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>

The issue of **transparency and its consistent treatment** across different pieces of regulations is of utmost importance.

There is currently an open issue for regulators to address. We have today:

- on one side, the Benchmark Regulation which does not require full transparency from the administrator
- and on the other side, the ESMA Guidelines on ETFs and other UCITS issues (ESMA/2014/937/EN) that require asset managers to obtain from the benchmarks administrators a higher degree of transparency

As users of benchmarks, asset managers continue to consider that transparency requirements of the Benchmarks Regulation on methodology are not sufficient to ensure meeting the objectives of this Regulation, which would require a further transparency on the input data of an index. Users need the detailed composition and weightings of an index to better monitor it and also to comply with the above mentioned ESMA Guidelines. AFG's members continue to be convinced that solutions like a limited delay in the publication of data would have protected intellectual property (which was the administrators' fear) and helped to ensure compliance with the ESMA Guidelines.

In any case, one may presume that difficulties our members have to gather data from administrators to ensure compliance with the ESMA Guideline will grow even further if administrators' specific regulation does not require them to give such transparency.

AFG thus believes that there is a policy option to be taken here by regulators and the industry certainly doesn't wish to pre-empt the outcome of that decision, which can go to one or the other direction (i.e. further and more granular transparency under Benchmark Regulation level 2 or deletion of disclosure requirements in ESMA Guidelines that go beyond Benchmark Regulation level 2).

We are reproducing hereafter the ESMA Guidelines section on Financial Indices. The issue with this section is that some requirements (for instance those that are highlighted below) are fully dependent on the information given by the index administrator. These sections do not represent a complement of information sourced from the asset manager's own information. The collection of information so as to ensure UCITS compliance depends on the wish of the administrator to offer transparency. This is precisely the same issue that is covered by the Benchmark Regulation.

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### XIII. Financial indices

49. When a UCITS intends to make use of the increased diversification limits referred to in Article 53 of the UCITS Directive, this should be disclosed clearly in the prospectus together with a description of the exceptional market conditions which justify this investment.

50. A UCITS should not invest in a financial index **which has a single component that has an impact on the overall index return which exceeds the relevant diversification requirements i.e. 20%/35%.** In the case of a leveraged index, the impact of one component on the overall return of the index, after having taken into account the leverage, should respect the same limits.

51. A UCITS should not invest in commodity indices that do not consist of different commodities. Subcategories of the same commodity (for instance, from different regions or markets or derived from the same primary products by an industrialised process) should be considered as being the same commodity for the calculation of the diversification limits. For example, **WTI Crude Oil, Brent Crude Oil, Gasoline or Heating Oil contracts should be considered as being all sub-categories of the same commodity (i.e. oil).** Sub-categories of a commodity should not be considered as being the same commodity if they are not highly correlated. With respect to the correlation factor, two components of a commodity index that are sub-categories of the same commodity should not be considered as highly correlated if 75% of the correlation observations are below 0.8. For that purpose the correlation observations should be calculated (i) on the basis of equally-weighted daily returns of the corresponding commodity prices and (ii) from a 250-day rolling time window over a 5-year period.<sup>7</sup>

52. A UCITS should be able to demonstrate that an index satisfies the index criteria in Article 53 of the UCITS Directive and Article 9 of the Eligible Assets Directive, including that of being a benchmark for the market to which it refers. For that purpose:

a) an index should have a clear, single objective in order to represent an adequate benchmark for the market;

b) the universe of the index components and the basis on which these components are selected for the strategy should be clear to investors and competent authorities;

c) **if cash management is included as part of the index strategy,** the UCITS should be able to demonstrate that this does not affect the objective nature of the index calculation methodology.

<sup>7</sup> These guidelines modify the existing guidelines on eligible assets for investment by UCITS (Ref. CESR/07-044b) with respect to commodity indices. UCITS should not invest in commodity indices that do not comply with the requirements laid down in paragraph 53.

53. An index should not be considered as being an adequate benchmark of a market if it has been created and calculated on the request of one, or a very limited number of, market participants and according to the specifications of those market participants.

54. The UCITS' prospectus should disclose the rebalancing frequency and its effects on the costs within the strategy.

55. A UCITS **should not invest in a financial index whose rebalancing frequency prevents investors from being able to replicate the financial index.** Indices which rebalance on an intra-day or daily basis do not satisfy this criterion. For the purpose of these guidelines, technical adjustments made to financial indices (such as leveraged indices or volatility target indices according to publicly available criteria) should not be considered as rebalancing in the context of this paragraph.

56. UCITS should not invest in financial indices for which the full calculation methodology to, inter alia, enable investors to replicate the financial index is not disclosed by the index provider. This includes providing **detailed information on index constituents**, index calculation (including effect of leverage within the index), **re-balancing methodologies, index changes and information on any operational difficulties in providing timely or accurate information.** Calculation methodologies should not omit important parameters or elements to be taken into account by investors to replicate the financial index.

This information should be **easily accessible, free of charge, by investors and prospective investors**, for example, via the internet. Information on the performance of the index should be freely available to investors.

57. **A UCITS should not invest in financial indices that do not publish their constituents together with their respective weightings. This information should be easily accessible, free of charge, by investors and prospective investors,** for example, via the internet. Weightings may be published after each rebalancing on a retrospective basis. This information should cover the previous period since the last rebalancing and **include all levels of the index.**

58. A UCITS should not invest in financial indices whose methodology for the selection and the rebalancing of the components is not based on a set of pre-determined rules and objective criteria.

59. A UCITS should not invest in financial indices **whose index provider accepts payments from potential index components for inclusion in the index.**

60. A UCITS should not invest in financial indices whose methodology permits retrospective changes to previously published index values **(‘backfilling’)**.

61. The UCITS should carry out appropriate documented due diligence on the quality of the index. This due diligence should take into account whether the index methodology contains an adequate explanation of the weightings and classification of the components on the basis of the investment strategy and whether the index represents an adequate benchmark. **The due diligence should also cover matters relating to the index components.** The UCITS should also assess the availability of information on the index including:

a) whether there is a clear narrative description of the benchmark;

b) **whether there is an independent audit and the scope of such an audit;**

c) **the frequency of index publication** and whether this will affect the ability of the UCITS to calculate its net asset value.

62. The UCITS should ensure that the financial index is **subject to independent valuation.**

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<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>

Cf our answer to question 8.

<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>

AFG fully supports ESMA's proposed approach regarding the general rule to proceed to a consultation for any material changes to the methodology.

<ESMA\_QUESTION\_CP\_BMR\_10>

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

<ESMA\_QUESTION\_CP\_BMR\_11>

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<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>

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<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>  
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<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>  
TYPE YOUR TEXT HERE  
<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>  
AFG members generally agree with the proposed RTS related to the code of conduct for contributors and would even suggest that administrators of non-critical indices that rely on contributions to consider the RTS when designing their own code of conduct.

As this Regulation sets rules at level 1 and 2 regarding the prevention of conflicts of interest, there is no need to ask users (who besides have no control on the administrators' processes) to duplicate the task with another assessment on conflicts of interest on the indices they are using, as it is required in the ESMA's Guidelines.

<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>  
TYPE YOUR TEXT HERE  
<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>  
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**Q19: Do you agree with ESMA's specifications of the criteria?**



<ESMA\_QUESTION\_CP\_BMR\_19>  
TYPE YOUR TEXT HERE  
<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>  
Our members fully disagree with the change of proposal from ESMA regarding the publication of one single compliance statement for all indices.  
AFG strongly believes that the initial ESMA's proposal (in the DP) was the appropriate one. We urge ESMA to come back to a more useful and user friendly proposal which is a straight-to-the-point compliance statement by single benchmark.  
We think that maybe mandating a consumer test would be very useful in the matter.  
<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>  
AFG members believe that the benchmark statement will be of high interest of use for them.  
This is why they insist on several features; the document should:

- be user friendly, concern only one index at a time, be short so as to show material information only (and eventually links to other more detailed sections);
- flag indices that rely on contributions.
- flag indices that comply with the UCITS rules (cf our answer to Q8). To be more specific, it can only be the responsibility of the administrator to determine whether its internal procedures enable the index to be UCITS compliant. Also, it is the administrator who can intent and ensure that his index complies with the UCITS diversification requirements i.e. 20%/35% or say if cash management is included as part of his index strategy.

<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>  
AFG suggests the inclusion in the statement of the date of publication. This is very useful for users.  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE



<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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<ESMA\_QUESTION\_CP\_BMR\_25>

**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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_26>

**Q27: Is the specific treatment for a natural person as applicant appropriate?**

<ESMA\_QUESTION\_CP\_BMR\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_27>

**Q28: Do you agree with the proposals outlined for requirements for other information?**

<ESMA\_QUESTION\_CP\_BMR\_28>

TYPE YOUR TEXT HERE

<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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<ESMA\_QUESTION\_CP\_BMR\_29>

**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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<ESMA\_QUESTION\_CP\_BMR\_30>

**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>

Benchmarks are heavily used in the asset management in relation to investors' interest to be able to clearly identify a strategy they are investing in.

Thus, asset managers have a duty towards their client investors to ensure continuity and visibility of the investment strategies. This is why the third country grandfathering clause is important (continuity) as well as the ability for users of benchmarks to dispose of clear notice well in advance of the administrators' intent of compliance (visibility).

<ESMA\_QUESTION\_CP\_BMR\_31>