



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 Wholesale Markets Brokers' Association ("WMBA") and the London Energy Brokers' Association ("LEBA") are the European industry associations for the wholesale intermediation of Organised Venue and Over-the-Counter (OTC) markets in financial, energy, commodity and emissions markets and their traded derivatives.

WMBA and LEBA member firms act solely as operators of venues, intermediaries or agents in the markets in which they operate, bringing together two independent counterparties to a transaction. They do not undertake any proprietary trading and therefore do not take the financial risks of the transaction they broker onto their own books. As a result, they hold permissions as MiFID Investment Firms and operators of venues which are classified as Limited Activity and Limited Licence under BIPRU and IFPRU in the UK. Member firms publish almost infinite traded prices and indications, a variety of formalised indices and smaller number of certain benchmarks in the normal course of their business.

WMBA Limited and LEBA Limited were formed to administer the data businesses of WMBA and LEBA. WMBA Limited and LEBA Limited are the administrators of a number of transaction-based indices, some of which fall within the scope of benchmarks under the IOSCO Principles for Financial Benchmarks.

WMBA Limited is the Calculation Agent of the Sterling Overnight Index Average (SONIA) and the Benchmark Administrator for the Repurchase Overnight Index Average (RONIA) and as such undergoes the activity of 'administering a specified benchmark' under the Financial Services and Markets Act 2000 (FSMA). WMBA Limited is regulated and governed by the Financial Conduct Authority (FCA) in this respect. LEBA Limited publishes a large number of indices daily covering European Power, Gas, Carbon and Coal markets. All are Volume Weighted Averages ("VWAP") of consolidated tapes, aggregated across qualifying trading venues.

Both WMBA Limited and LEBA Limited are considered as 'Benchmark Administrators' for the benchmarks they administer and it is on their behalf that this reply is formulated.

Together here, "WMBA" denotes both the entities above and the member firms activities and venues.

<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>

Yes: The WMBA does consider the non-exhaustive list of governance arrangements to be sufficiently flexible allowing for the administrator to determine the requirements specific to it, based on the nature and scope for the benchmarks they are administering.

The key to determining the governance arrangements for particular benchmarks is proportionality. We request ESMA take a proportionate approach when setting out obligations for all parties involved in benchmarks.

<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>

Yes: The WMBA does support the approach to provide this as an option to the administrator. This would be of particular relevance to administrators with a small workforce and where it may be difficult to find staff who are completely separate from any of the functions of the benchmark administrator or the determination of the benchmark. To allow the option for the oversight function to be carried out by an external natural person is a sensible option.

The Annex (3) allows for an employee of the benchmark administrator to provide the oversight function so long as that person has no vested interest in the benchmark or is not directly involved in the provision of the benchmark. This would seem a reasonable and proportionate approach.

We request further clarity on which functions would be classified as being part of 'the provision of a benchmark'. This could have implications on who can carry out particular roles within the oversight function.

<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>

Yes: The WMBA does support the concept of observers on the oversight committee due to the value that could be added through their attendance. Those individuals should not be considered members, but observers with no voting rights, and should be attending with the permission of the oversight committee where the committee determine that their inclusion will be beneficial and not in any way detrimental to maintaining the integrity of the oversight function.

<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: The WMBA does believe the draft RTS allows for sufficient proportionality and the overall determination by the administrator for compilation of the oversight function through the non-exhaustive list of governance arrangements.

<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>

- It would be prudent, considering its broad use, to add a definition for ‘natural person’ within the RTS.
- The WMBA does also have concerns on Article 4 (e) of this RTS - Conflicts of interest management procedures ‘Restrict membership of the oversight function to persons not already sitting on the oversight function of another administrator’.

Currently there are only small number of registered and authorised Benchmark Administrators and all are based in the UK. The expertise required for the governance composition is therefore limited and placing a restriction on the number of committees a person can sit on would seem counterproductive when that person could provide the skills, knowledge and expertise to enhance effective functioning of that committee. We understand the concerns surrounding conflicts of interest but these can be mitigated through disclosures. This should not inhibit a person from being a member of multiple oversight committees which could otherwise enhance the independence of those committees.

An example of a person sitting on multiple oversight committees would be David Clark. David sits on the WMBA RONIA oversight committee in addition to the ICE Libor and Swap Rate committees, the Thomson Reuters WM Fix O/C and the Bank of England’s SONIA Advisory Committee. David’s expertise enhances the effective functioning of each of these committees with any conflicts of interest mitigated through the governance arrangements at each of the administrators and therefore the RTS should not restrict this transfer of skills. Conflict would arise should a person sit on more than one Board of the Benchmark Administrators but this does not apply to oversight committee where the terms of reference relate to the integrity of the benchmark and not to the commercial aspects of the products.

It would not seem appropriate to restrict members of staff of the administrator from having voting rights in the oversight function. These persons would have in depth knowledge with regards to the provision of the benchmarks and therefore it seems that this restriction is limiting the input that they can provide. Conflicts are mitigated through disclosures and therefore members of staff could add valuable input to the voting of the committee.

- The WMBA requests further clarity as to what extent the Oversight Function should have voting rights or hold the decision making capacity. For example, where a benchmark administrator recommends a change to the methodology of a benchmark based on the appropriate consultations with stakeholders, should the oversight function be able to block the change.

<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>



Yes. The WMBA does agree with the appropriateness and verifiability of input data measures as described in Article 1 and 2.

As Benchmark Administrators producing benchmarks measuring the total volume traded by a particular part of the market and the volume weighted average of those transactions, so long as the methodology remains transparent and accurately and reliably states what the benchmark is intended to measure, this would seem reasonable.

<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>

No. The WMBA does not agree that it is the benchmarks administrator's responsibility to verify front office contributor's procedures for the reasons that this would place undue burden on its own resources to ensuring the contributor controls in place are compliant at all times. We recommend that these provisions are placed within the Code of conduct for contributor to verify and comply with.

By way of an example, Article 6 (2) "administrators shall ensure that front office staff undergo training periodically or as necessary". We would question what expectations are there on the administrator to be able to ensure the contributor undertakes this training on front office staff and to assess its "effective functioning"? Whilst we agree that the administrator should, through its contributor code, outline and monitor expectations on contributors, in order to measure the effective functioning of each aspect of the requirements, would suggest an administrator would need to be internal within the contributor to be able to review the defence lines. For example, by attending the training programme.

The continuous use of the wording "the administrator shall ensure" is too onerous on the administrator, especially where the number of contributors to a particular benchmark could be vast. These obligations should be passed on to the contributors through the code of conduct for contributors.

<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>

Yes. The WMBA does agree in principle to establishing a list of key element for disclosure. However, where an entity is the administrator of multiple indices, for example LEBA Limited is an administrator for over 500 energy indices receiving traded data from regulated contributing member firms and aiming to represent total volume traded for a particular product, this may be unachievable.

The WMBA does not believe that Article 1 (2) 'estimate of the size of the underlying market' can be disclosed or identified across all these indices as:

- 1) information is not publically available to assess the size of the market and
- 2) difficulty in identifying what the underlying market is/represent.

We would also question why this information would be relevant where the administrator is producing benchmarks measuring the total volume and weighted average of a particular sample of the market.

Should the wording “as applicable” within Article 1 (1) of the regulation prevent the need to supply the complete list of key elements for disclosure, then we recommend ESMA to provide guidance on how this can be achieved.

The WMBA requests that the term “secured algorithm” within Article 1(14) be defined within the RTS.

<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>

Yes. The WMBA does support the internal review of methodology approach.

<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>

Yes. The WMBA does support the procedure for consultation on material changes to methodology. We would however seek clarity on what is defined as a ‘material’ change.

<ESMA\_QUESTION\_CP\_BMR\_10>

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

<ESMA\_QUESTION\_CP\_BMR\_11>

Yes. The WMBA does agree with approach.

<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. The WMBA does agree with this approach. We believe the different characteristics of contributors should be dependent on whether the contributor is a principle or intermediary or other.

- 1) a principle contributor is made by a regulated entity traded data contribution based on its own traded activity
- 2) Intermediary report traded data executed by a client’s activity as a principle
- 3) Others
  - a. Data contributed by a reporting agency
  - b. Exchange reporting traded data
  - c. Data generated by an algorithm – e.g. ICE SWAP
  - d. Data derived from a fixing process - e.g. WM Fix





These characteristics should be taken into the Code by reference to the nature of the data i.e. traded or non-traded data, exchanged traded data or data reported by the media.

This should apply irrespective of the regulated status of the contributor, however, the obligations imposed on contributors should not act as a deterrent for persons contributing to a benchmark.

<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>

No comment.

<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>

Yes The WMBA does agree contributors should be subject to reporting suspicious transactions.

<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>

No. The WMBA would rather agree with the provisions already identified.

<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>

No further comment.

<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>

No comments as none of the WMBA members are deemed to be supervised contributors in the EU.

<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>



No further comments.

<ESMA\_QUESTION\_CP\_BMR\_18>

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

<ESMA\_QUESTION\_CP\_BMR\_19>

Yes. The WMBA does agree with the criteria for significant benchmarks. However, we would seek further guidance on how to measure the value of financial instruments, contracts or investment funds that reference a benchmark.

<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>

- Yes. The WMBA does agree with the content and structure of the two compliance statement templates.
- We would however request further clarity on ‘single identifier’ and how ESMA, or another, would intend to compile this list.
- The WMBA requests more clarity of the position of a Benchmark Administrator where they might opt to apply compliance to a family of benchmarks as significant, even though some of those benchmarks may not meet the ‘significant’ thresholds. We seek further clarity if in this scenario the significant benchmarks should be individually identified outside of the family and have its own compliance statement as per Annex 1?

<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>

Yes. The WMBA does agree with the proposed specifications of the content of a benchmark statement and in particular to the proportionate approach taken for disclosure when considering the different types of benchmark.

We would however encourage ESMA to prevent duplication of information provided under each aspect of the authorisation/registration. For example, within the benchmark methodologies and the benchmark and compliance statements.

<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>

Yes. The WMBA does agree that the compliance statements should be reviewed and updated where the benchmark administrator becomes aware that the statement is no longer correct or sufficiently precise. Article 8 (3) allows for a benchmark administrator to update a benchmark statement after an event.

<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. The WMBA does agree that authorisation and registration should be two distinct applications.

We seek more clarity on the status of firms already regulated by the FCA for ‘administering a specified benchmark’ (WMBA Limited being one of them) and whether these firms will be required to submit a full authorisation application to ESMA. It would seem unnecessary and unduly burdensome to impose the full authorisation process on these firms given the extent of information provided to the FCA on applying for relevant permissions under UK law.

<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>

Yes. The WMBA would concur, however, we question the necessity of a non-supervised entity needing to supply all of the information where they are only applying to become an administrator of a non-significant regulated data benchmark. There doesn’t seem to be any proportionality on authorisation based on the type of benchmark that firm shall be administering

<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>

Yes. The WMBA does agree that the information required on structure and functions seems appropriate. However, we again request that ESMA (and FCA) take a pragmatic approach for firms who have already been authorised for ‘administering a specified benchmark’.

<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>

Yes, these requirements are appropriate.

<ESMA\_QUESTION\_CP\_BMR\_26>

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

<ESMA\_QUESTION\_CP\_BMR\_27>

In the opinion of the WMBA, where the natural person is an employee of the Benchmark Administrator, we would question what information would be necessary in this regard. For example, the provision of financial statements.



A 'natural person' as defined within the DP is an employee, or external person. What information on organisational structure could an individual possibly provide?

We also question why the individual's financial strength is relevant when they are carrying out the role of oversight and not acting as a guarantor to the administrator. We note this information was not requested as part of Controlled Function applications under MAR.

Where there is an outsourcing of an activity forming part of the process for the provision of the benchmark, the relevant information for the party undertaking the outsourced activity should be included within the application. We would however request that the information required should be proportionate based on the function that is being outsourced.

<ESMA\_QUESTION\_CP\_BMR\_27>

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

<ESMA\_QUESTION\_CP\_BMR\_28>

Yes. The WMBA does agree with the proposal but request that adequate time is given to the market participants to review and engage with the respective competent authority to discuss any issues within the application forms prior to the window of the application opening.

We also believe that 'requisite information' should be limited to information that is relevant to the application.

<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>

The WMBA requests further clarity from ESMA on the status of benchmark administrators within the UK post Brexit.

<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>

No comment.

<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>



No comment.

<ESMA\_QUESTION\_CP\_BMR\_31>