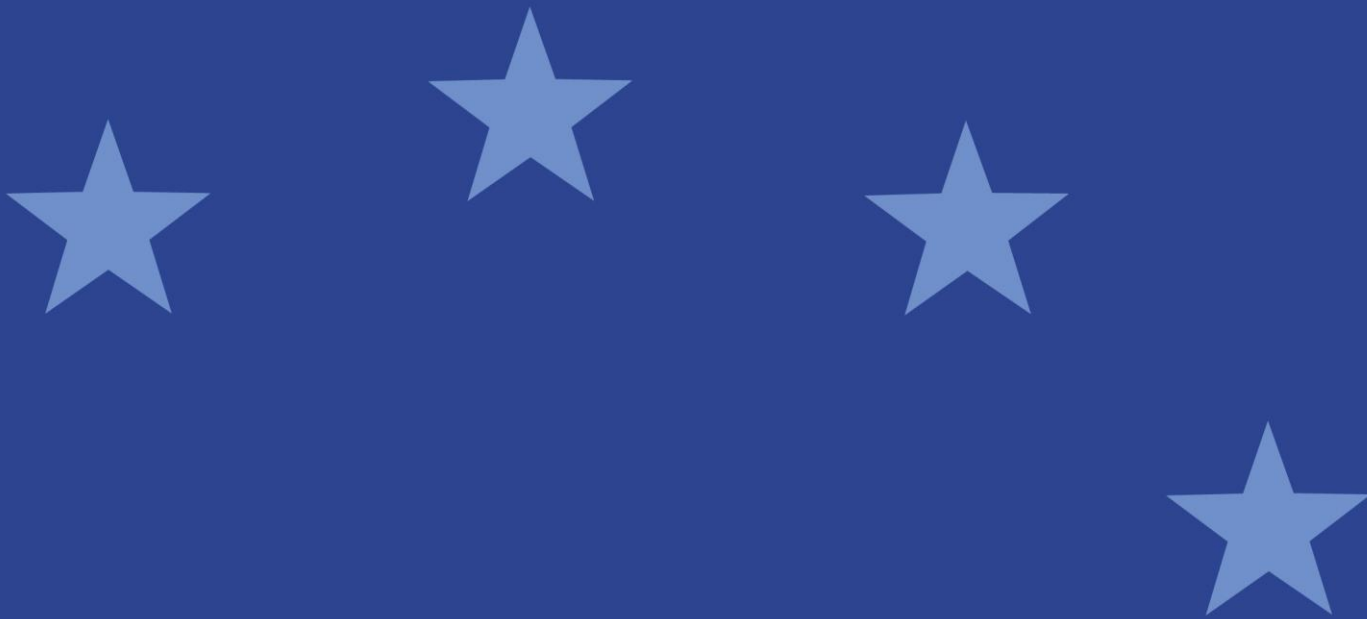


Response Form to the Consultation Paper

Draft Regulatory Technical Standards 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 **9 May 2020**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_CP_BRTS_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_BRTS_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_BRTS_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open Consultations" → "Consultation on MiFIR report on Systematic Internalisers in non-equity instruments").

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, contributors to 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.

General information about respondent

Name of the company / organisation	Nasdaq
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	<input type="checkbox"/>
Country/Region	International

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_CP_BRTS_1>

Nasdaq welcomes the opportunity to provide comments on the Benchmarks Regulation (BMR) draft RTS. BMR applies to all benchmarks, regardless of the underlying market. However, different types of benchmarks pose different types of risks to the markets. From a global perspective – where many developments have taken place - IOSCO has recognised that benchmarks based on regulated data should be subject to a proportionate approach. BMR acknowledged that regulated data benchmarks are less prone to manipulation. Nevertheless, experience with its application has shown that the framework does not differ much from that of other types of benchmarks.

In this context, Nasdaq considers that there overall appears to be a lack of proportionality in the suggested RTS as regulated data benchmarks are mostly suggested to be covered by the same provisions as other benchmarks. We would therefore support changes to the draft RTS to better reflect benchmarks' respective risk profiles.

<ESMA_COMMENT_CP_BRTS_1>

Questions

Q1 : Do you agree with the governance arrangements set above? Do you have any additional suggestions? Please specify.

<ESMA_QUESTION_CP_BRTS_1>

Nasdaq believes that the draft RTS does not allow for sufficient proportionality. While ESMA states that the “concept of “robust governance arrangements” should be interpreted in accordance with the nature, scale and complexity of the benchmark administrator”, the proposed RTS only suggests small alleviations for non-significant benchmarks compared to other benchmarks. Moreover, ESMA proposes that benchmarks based on contribution data and regulated data benchmarks, where the latter are much less susceptible to manipulation, be subject to the same requirements. We would therefore support changes to the draft RTS to better reflect benchmarks’ respective risk profiles in terms of the reliability of regulated market data and the limited impact of non-significant benchmarks.

In addition, we strongly disagree with ESMA’s statement in paragraph (5) that in case an administrator administers different types (i.e. non-significant, significant or critical) of benchmarks, the most stringent requirements should apply to them. In essence, such an approach would wipe away the proportionality which is to a certain extent built in to the BMR regime. Rather, BMR should permit differing governance frameworks to apply to benchmarks with different characteristics, even if they are administered by one administrator. In addition, some of the provisions proposed might not be well suited to financial institutions which are also benchmarks administrators and which may belong to company groups. This is indeed the case for Nasdaq. Financial institutions are already subject to governance requirements. For a company group such as Nasdaq this means importantly MiFID II/MiFIR as well as EMIR. There is a risk for overlapping and divergent requirements. We do therefore not agree with ESMA’s suggestion for a cumulative approach. This would not only lead to a disproportionate burden but possibly also to conflicts, especially where group policies and benchmark related policies would cover the same topic. Indeed, leveraging existing frameworks would be preferred.

<ESMA_QUESTION_CP_BRTS_1>

Q2 : Do you agree that administrators should have in place a remuneration framework?

<ESMA_QUESTION_CP_BRTS_2>

The BMR regulation is very clear regarding handling of Risk of Conflict and we see no need for further elaborations nor separate framework.

<ESMA_QUESTION_CP_BRTS_2>

Q3 : Do you agree that the same requirements should apply to an administrator that is a natural person? Please elaborate.

<ESMA_QUESTION_CP_BRTS_3>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_BRTS_3>

Q4 : Do you think that other conditions should be taken into account to ensure that the methodology complies with the requirements of the BMR? Please specify.

<ESMA_QUESTION_CP_BRTS_4>

No.

Regarding the type of data to be used, we agree that transaction data should preferably be used where available. However, for certain benchmarks, such as commodity benchmarks and certain bond benchmarks, it might not be possible to use transaction data in all cases. It should therefore still be possible to use other types of input data, including quotes.

<ESMA_QUESTION_CP_BRTS_4>

Q5 : Do you consider that additional requirements are needed to ensure that the methodology is traceable and verifiable? Please specify.

<ESMA_QUESTION_CP_BRTS_5>

No.

<ESMA_QUESTION_CP_BRTS_5>

Q6 : Do you think that the back-testing requirements are appropriate? Please specify.

<ESMA_QUESTION_CP_BRTS_6>

The proposed requirements for back-testing as proposed in the draft RTS Article 3.2e are very far-reaching.

While ESMA repeatedly outlines that benchmarks based on transaction data are less prone to manipulation, it is still suggested that regulated data benchmarks be subject to the same requirements as benchmarks based on contribution data. ESMA should make it clear that benchmarks based on transaction data do not need to be back-tested.

<ESMA_QUESTION_CP_BRTS_6>

Q7 : Do you agree with the requirements set out above? Do you have any additional suggestions? Please specify.

<ESMA_QUESTION_CP_BRTS_7>

Nasdaq welcomes the proportional approach proposed by ESMA whereby regulated data benchmarks and certain commodity benchmarks would not be subject to this RTS due to the character of the input data used for these types of benchmarks.

We note, however, in this context, that benchmark administrators obtain data from other sources that corroborate the input data, they can e.g. compare the values received from vendors for the calculation of indices against public sources e.g. against data from APAs and information vendors. Benchmark administrators can e.g. monitor price jumps; prices after jumps are not used until data has been checked. However, benchmark administrators are not in a position to establish market surveillance processes which detect any potential input manipulation that could influence the calculation of an index. In this context, the information accessible to a benchmark administrator should be taken into account as benchmarks administrators only have access to data from vendors or publicly available data.

<ESMA_QUESTION_CP_BRTS_7>

Q8 : Do you agree with the systems suggested for the surveillance of market manipulation? In particular, do you think that an automated system should be required only when it appears to be adequate according to the nature, scale and complexity of the benchmark? Please specify.

<ESMA_QUESTION_CP_BRTS_8>

Please see the answer under Question 7.
<ESMA_QUESTION_CP_BRTS_8>

Q9 : Do you think that other criteria should be considered in relation to the transition of the provision of the critical benchmark to a new administrator? Please specify.

<ESMA_QUESTION_CP_BRTS_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_BRTS_9>

Q10 : Do you think that other criteria should be considered in relation to the cessation of the provision of a critical benchmark? Please specify.

<ESMA_QUESTION_CP_BRTS_10>
We strongly believe that the BMR should not give a competent authority the power to require an administrator to publish a benchmark that is unrepresentative of the underlying market or economic reality the benchmark is intended to measure. Any such expansion of a competent authority's powers would create significant reputational and litigation risks for an administrator and could result in market uncertainty and instability.
<ESMA_QUESTION_CP_BRTS_10>

Q11 : Do you agree with the criteria under which competent authorities may require changes to the compliance statement? Please specify

<ESMA_QUESTION_CP_BRTS_11>
Nasdaq reiterates that non-significant benchmarks should be subject to a proportional approach. We share ESMA's understanding that 'changes (to the compliance statement)' does not mean that NCAs could require administrators of non-significant benchmarks to apply the requirements which they have chosen not to comply with.
We underline that the proposed requirements for administrators of non-significant benchmarks to supply additional information regarding how they address requirements they have chosen to opt out of, should not become in reality as burdensome as applying the actual requirements, in which case the proportional regime set out in the BMR would be of limited value.
<ESMA_QUESTION_CP_BRTS_11>

Q12 : Do you agree with the criteria under which competent authorities may require changes to the control framework requirements? Please specify

<ESMA_QUESTION_CP_BRTS_12>
Nasdaq considers that non-significant benchmarks should be subject to a proportional approach. Regarding the proposed criteria, it is worth reminding that non-significant benchmarks are deemed such following an assessment concluding that there would not be a significant or adverse impact were the benchmark no longer to be provided.
<ESMA_QUESTION_CP_BRTS_12>