

**ISDA's Response to the European Commission's Consultation on
the Review of the EU benchmarks Regulation
31/12/2019**

1. INTRODUCTION

The views set out in this response to the Public Consultation on the Review of the EU Benchmark Regulation (https://ec.europa.eu/info/files/2019-benchmark-review-consultation-document_en) have been provided at the European Commission's request and on an aggregated and anonymized basis. They are based on responses provided by members of the ISDA Americas and Europe Benchmark Working Group; ISDA APAC Benchmark Working Group; ISDA Article 28(2) EU Benchmark Regulation Group; ISDA EU Benchmarks Regulation Advocacy Group; ISDA Interest Rates Legal Group; ISDA Interest Rates Steering Committee; ISDA JPY Benchmark Working Group; ISDA Rates Market Infrastructure Working Group. Not all members responded and not all members of ISDA are members of these working groups. Not all members who provided feedback responded to all of the questions. The views may not, therefore, reflect the full range of views held by ISDA's membership or of the working group in their entirety.

ISDA encouraged members to submit their own responses to this consultation and understands that many intend to do so.

ISDA's membership is diverse: respondents included firms who use benchmarks but do not administer or contribute to them; firms who administer benchmarks but do not contribute to or use them; and firms who administer, use and contribute to benchmarks. In relation to Questions 1-5, responses were received in writing and orally from 7 representatives from the global dealer, European banking and global benchmark administration communities. In relation to Questions 6-24, responses were received in writing and orally from 16 representatives from the global dealer, European banking, global asset management, global benchmark administration, global information vending, European stock exchange and international financial institution communities.

The main proposals described in the responses were supported by ISDA's responding members. Divergent and minority views have been reflected at the relevant points but do not represent the views of the majority of respondents based on the feedback provided. Where percentages are used, they are based on 100% being all respondents who responded to that particular question. Anonymized statistics showing the levels of support for each proposal can be supplied to the European Commission upon request.

2. CRITICAL BENCHMARKS

IBOR reform

Please note that by way of public consultations, ISDA has previously solicited views of its members and other market participants on a range of topics related to fallbacks in derivatives that would be triggered by the permanent cessation of certain benchmarks or other pre-cessation events in relation to those benchmarks. It has published anonymized summaries of the responses it received as part of those public consultations. Some of the views reflected in those summaries might touch, directly or indirectly, on the topics raised by this question. Accordingly, ISDA refers to those summaries and will not repeat those summaries here. Further information on those consultations can be found here: <https://www.isda.org/category/legal/benchmarks/>.

Question 1: *To what extent do you think it could be useful for a competent authority to have broader powers to require the administrator to change the methodology of a critical benchmark? Very useful – not useful at all (5 categories). Please explain.*

- 5 (very useful)
- We also refer you to our response to Question 7 to the extent that also deals with powers to change methodology.
- The power to compel a change in methodology of a critical benchmark could be an important safeguard against a critical benchmark suddenly ceasing to exist or becoming prohibited from use (both of which have the potential to cause systemic risk and severe disruption for individual market participants).
- It may be that an administrator would not voluntarily change a benchmark's methodology if it were concerned that doing so could open it to potential liability.
- It would be important to make clear:
 - whether the power would be used only where doing so would maintain or restore the representativeness of the benchmark or
 - whether it could also be used in circumstances where the change in methodology could make the benchmark non-representative or fail to restore its representativeness.
- It would be important to mitigate to the greatest extent possible potential impacts to valuations of positions (including where the benchmark in question is used in transactions or for discounting or valuation purposes).
- It would be important to consider the impact under the laws of any relevant jurisdiction (including third country jurisdictions, the laws of which often govern international contracts) of the change in methodology of the benchmark.
- It would be important to consider the effect in relation to any applicable consumer protection laws in any relevant jurisdiction.

One responding member was only in favour of this power being available in relation to submission-based critical benchmarks.

Two responding members supported enhancing the power to compel a change from a contribution-based methodology to a non-contribution-based methodology.

Two responding members felt the power should only be used in order to maintain the economic objective of the critical benchmark.

One responding member felt the power should only be provided to ESMA in order to ensure consistency of approach across jurisdictions and that its use should be subject to prior consultation.

One responding member referenced a letter ISDA recently sent to the Official Sector Steering Group of the Financial Stability Board (<https://www.isda.org/a/lwcTE/December-2019-Letter-to-the-FSB-OSSG-FINAL.pdf>) in relation to the inclusion of a pre-cessation trigger for derivatives which incorporate the 2006 ISDA Definitions based upon LIBOR being assessed as non-representative. In that letter, ISDA requested clarification that the “reasonable time period” under Article 11(4) during which ICE Benchmark Administration would be able to change data sources, change contributors or change methodology in order to ensure that the input data represents the market or economic reality that the benchmark is intended to measure, or else to cease providing that benchmark, would be minimal (i.e. a number of months not years). The responding member stated that it would be important for similar considerations to be taken into account when setting and exercising powers to compel a change in methodology (or exercise other powers) in relation to a benchmark which is no longer representative.

One responding member thought that ESMA should publish a public statement regarding the intent behind the imposed change in methodology to avoid undermining confidence in the benchmark during the transition to the new methodology.

Question 2: *Do you consider that such corrective powers should apply to critical benchmarks at all stages in their existence or should these powers be confined to (1) situations when a contributor notifies its intention to cease contributions or (2) situations in which mandatory administration and/or contributions of a critical benchmark are triggered? Yes / no? Please explain.*

- No
- Responding members were divided in their views on this answer:
 - 43% thought it would provide more flexibility if the power were available in circumstances other than when mandatory contributions or mandatory administration had been triggered.
 - 29% thought the power should be limited to scenarios (1) and (2)
- Either way, given the potentially very significant disruption that could result from imposing a change in methodology, its use should be restricted to circumstances in which the regulatory authorities consider that not changing its methodology would be likely to result in the benchmark’s cessation or prohibition and give rise to consequent systemic risks.

Question 3: *Are there any other changes to Article 23(6)(d) BMR relative to the change of methodology for critical benchmarks that might be desirable to improve the robustness, reliability or representativeness of the benchmark? Yes / no? Please explain.*

- Yes.
- It is possible that changing a benchmark's methodology could create a consequential need to make amendments in legacy transactions. It should be clear that any changes in legacy transactions to accommodate the BMR would not trigger new regulatory requirements for such legacy transactions (including e.g. in respect of clearing or margining obligations for uncleared trades).

Question 4: *To what extent do you think that benchmark cessation plans should be approved by national competent regulators? Agree completely – not agree at all (5 categories) + explain*

- 3
- Views from responding members were mixed.
 - 3 members were in favour of an administrator's benchmark cessation plans being approved by the national competent authority (though one member described their preference as not reflecting a strong view).
 - 2 members were strongly against the proposal.
 - One member did not have a strong view either way.
 - Those against and the one member with no strong view either way noted that the application process already requires submission of the administrator's plans and has the power to request them on an on-going basis. They considered these arrangements to have proved sufficient to date.

Question 5: *Do you consider that supervised entities should draw up contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market?*

- Yes.
- As explained further below, ISDA does not object to the proposal to include the requirement for contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market provided that this is not interpreted as mandating use of a contractual fallback since other plans may be more appropriate in some circumstances.
- On May 16th, 2019, ISDA launched a public consultation on the preferred approach for addressing pre-cessation issues in derivative contracts that reference LIBOR and certain other IBOR benchmarks if a regulator determines that a covered IBOR is no longer representative. Specifically, among other things, the consultation sought feedback regarding (a) the potential inclusion of a pre-cessation trigger based on such a statement in fallbacks implemented in the 2006 ISDA Definitions and/or the related protocol that ISDA intends to publish in relation to

permanent cessation. The consultation, which closed on July 12th, 2019, is published here: <https://www.isda.org/a/md6ME/FINAL-Pre-cessation-issues-Consultation.pdf> and the anonymized summary of results is published here: <https://www.isda.org/a/kkaTE/2019.10.21-Anonymized-Pre-Cessation-Consultation-Report.pdf>

- Feedback to that consultation did not result in sufficient consensus to enable ISDA to proceed with proposals to incorporate such a trigger into fallbacks that will be implemented in the 2006 ISDA Definitions. Respondents expressed a wide variety of views regarding whether and how to implement a pre-cessation trigger related to non-representativeness for derivatives. While 64% of respondents replied that generally they would not be content to continue referencing an unrepresentative covered IBOR in existing contracts following a non-representativeness statement, a notable portion (45.6%) of this majority explained that despite this position, they might nonetheless continue to reference an unrepresentative covered IBOR in certain circumstances. This was in addition to the 22.5% who stated that they would continue to reference an unrepresentative covered IBOR in legacy derivative contracts following a statement by a regulator that such an IBOR is no longer representative. This led to divergent views among respondents on whether and how such triggers should be incorporated. Over a quarter (28.1%) of respondents said that they did not want this trigger incorporated into the 2006 ISDA Definitions at all; 22.5% supported its inclusion in new trades but wanted optionality and flexibility as to whether the trigger was incorporated into existing trades; 26.97% supported its inclusion in new trades and wanted no optionality or flexibility as to whether the trigger was incorporated into existing trades; and 14.6% its inclusion in new trades and expressed no view on whether there should be optionality and flexibility as to whether the trigger was incorporated into existing trades. Reasons provided by those who were opposed to including the trigger in the 2006 ISDA Definitions or who were in favour of flexibility and optionality with respect to its inclusion in legacy trades included:
 - Concerns around basis risk and accounting mismatches that would be created between cash products which did not contain a trigger and fallbacks on the same terms and timelines as derivatives intended to hedge those cash products.
 - Concerns that having such a trigger in less than the global universe of trades would lead to mismatches and arbitrage risk.
 - Actions upon a non-representativeness determination being made would be contingent upon their client's needs in respect of a transaction.
 - A preference for pro-active transition away from IBORs ahead of their cessation to be left to market participants' decision on timing and methodology.
 - A preference for permanent cessation of the IBOR instead of a determination of non-representativeness.
 - The cost/benefit trade-off for contracts which have a short remaining maturity.
 - Concerns about value transfer occurring.
 - Concerns about the liquidity of new RFRs

- The risk of disputes in circumstances where parties could calculate value transfer if the covered IBOR continues to be published.
 - Whereas a non-representativeness determination may have implications for EU supervised entities, entities from other jurisdictions may have to maintain the reference to the benchmark (e.g., because they are required to do so pursuant to covenants in certain financial agreements). There may also be differences in timing and process in different jurisdictions following such a determination.
- On 15 November 2019, the Financial Stability Board wrote the letter at the following link (<https://www.fsb.org/wp-content/uploads/P191119.pdf>) to ISDA asking it to include such a trigger and fallback in the amendment to the 2006 ISDA Definitions and related protocol that ISDA is creating with respect to permanent cessation events and due to publish in the first quarter of 2020.
 - In response, ISDA wrote the letter at the following link (<https://www.isda.org/a/lwcTE/December-2019-Letter-to-the-FSB-OSSG-FINAL.pdf>) to the Financial Stability Board, requesting further information and undertaking to work with the Financial Stability Board and market participants to increase market understanding of the implication of a non-representative LIBOR and attempt to build consensus on how to implement pre-cessation fallbacks.
 - Given the above, ISDA does not object to the proposal to include the requirement for contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market but it is important that this is not interpreted as requiring contractual fallbacks to be put in place.
 - Although use of contractual fallbacks may well be the appropriate action for market participants to take in certain instances, feedback to ISDA's consultation recognised that requiring derivatives to fallback upon such a trigger may cause very significant basis risk. Although cash product documentation templates are in certain cases being updated to include an equivalent trigger, these are often heavily negotiated and not necessarily universally adopted. The majority of cash products in existence today are unlikely to include an equivalent trigger and are, in many cases, very difficult to amend.
 - The interpretation of Article 28(2) as not necessarily requiring contractual fallbacks has already led to alternative appropriate approaches being adopted with respect to the material change of a benchmark. The ISDA Benchmarks Supplement, for example, does not include a fallback if a benchmark changes but instead acknowledges that the transaction will continue in accordance with its terms by reference to the benchmark as changed. This is in recognition that benchmarks have now been designed to evolve over time as market conditions change and that it may not be appropriate to fallback to an alternative benchmark just because a change in methodology has improved the representativeness or robustness of the existing benchmark.
 - This is a very complex area which has caused divergent views among market participants. While planning for non-representativeness is prudent, the appropriate steps to be taken should be left to market participants to formulate based on the facts and circumstances applying to their trades.

One member thought that triggering a fallback in a situation in which the administrator has the ability to make the benchmark representative again was not helpful.

Another member opposed including non-representativeness in Article 28(2) on the basis that it could lead to a fragmented outcome as different users made the determination in different ways or at different times with inconsistent consequences. They did not believe that an additional regulatory requirement to have contingency plans would be beneficial.

Colleges

Question 6: *To what extent do you consider the system of supervision by colleges as currently existing appropriate for the supervision of critical benchmarks? Very appropriate – not appropriate at all (5 categories). If not, what changes would you suggest?*

- 4 (quite appropriate).
- Given ESMA will become the sole supervisor of administrators of critical benchmarks after 1 January 2022 it is unclear how colleges will function going forward and further information is required on the proposed system before market participants are able to provide considered feedback on this question.
- Two members emphasised in their feedback the importance of colleges, particularly where a critical benchmark is based on data received from contributors established in multiple member states.
- One of those members felt that colleges ensure harmonization in the application of the rules throughout the Union, serve as forums for national competent authorities to share their views and advocate positions in respect of supervision activity so that idiosyncratic concerns of the jurisdiction are taken into consideration.
- Two members stated that a college should not be automatically required for a critical benchmark. One of them asserted that a college is not necessary, in cases where the critical benchmark does not rely on contributors or the contributors it does rely on are all established in a single member state. One member opposed the suggestion that the college should not be automatically required for critical benchmarks.

3. AUTHORISATION AND REGISTRATION

Authorisation, suspension and withdrawal

Question 7: *Do you consider that it is currently unclear whether a competent authority has the powers to withdraw or suspend the authorisation or registration of an administrator in respect of one or more benchmarks only? Very unclear – very clear (5 categories)*

- 1 (very unclear)
- Article 35 does not on its face contemplate withdrawal or suspension of an administrator's authorisation or registration on a benchmark-by-benchmark basis.

- Article 35 is principally intended to cover circumstances in which an administrator completely withdraws its services, has acted dishonestly or materially breached its obligations under BMR.
- In these circumstances, it would not make sense to withdraw or suspend authorisation or registration of the administrator in respect of only one benchmark but allow it to continue to publish other benchmarks.
- A separate provision should be created to provide Competent Authorities with a toolbox of powers for use in circumstances where the benchmark in question is vulnerable or otherwise of concern (but which may not be the fault of the administrator).
- Providing these powers in a separate provision would avoid undermining the administrator's credibility by withdrawing or suspending its authorisation or registration when it may not be at fault.
- A separate provision should set out criteria for use of the powers provided to competent authorities, including consideration of the impact of exercising powers or failing to exercise the powers on the administrator, contributors and users of the benchmark. Those powers should include controls to ensure that they are only exercised in a proportionate manner given the prevailing circumstances.
- A separate provision could consolidate and replace the currently disparate powers of competent authorities under Article 35 (see also response to Question 8) and Article 54 (see also response to Question 24), removing the unhelpful conditionality on exercising powers which those articles currently contain.
- The separate provision could include powers, subject to harmonised guidance, to:
 - compel the administrator of a critical benchmark to stop publishing the benchmark (subject to a run-off period wherever possible in order to avoid creating a cliff-edge with respect to users' legacy positions). Also, in this context, see ISDA Proposal in response to Question 8).
 - compel the administrator of a critical benchmark to continue publication of the benchmark for a maximum of 5 years and subject to the other limitations currently envisaged under Article 21 if the administrator wishes to stop publication in circumstances where to do so would create a cliff-edge with respect to users' legacy positions.
 - compel the administrator of a critical benchmark to change the benchmark's methodology (subject to the administrator's ability to notify the competent authority of its intention to cease publication (which itself is subject to the competent authority's power to compel administration for a maximum of 5 years and the other limitations currently envisaged under Article 21)).

- For critical benchmarks, compel submission by contributors to the benchmark for a maximum of 5 years and subject to the other limitations currently envisaged under Article 23.
- For the competent authority of the administrator of the benchmark to prohibit use of the benchmark by supervised entities in the Union except for ‘permitted purposes’ (as described further in the answer to question 8 below i.e. new and life-cycle trades would be permitted provided they were for the purpose of managing or reducing legacy positions which reference the benchmark or by dealers, CCPs and market makers for facilitating their clients’ permitted purposes).

One member thought that the above powers should only be available in relation to contribution-based critical benchmarks. One member thought that the powers should also be available in relation to non-critical benchmarks.

Continued use of non-compliant benchmarks

Question 8: *Do you consider that the current powers of NCAs to allow the continued provision and use in existing contracts for a benchmark for which the authorisation has been suspended are sufficient? Totally sufficient – totally insufficient (5 categories). Please explain.*

- 1 (Totally insufficient).
- See also the response to Question 7 regarding individual benchmarks.
- The powers of NCAs to allow continued provision and use of a benchmark under Article 35(3) are only available when the administrator’s registration or authorisation have been temporarily suspended. Yet, the risks and disruption to users in the Union of being suddenly prevented from using a benchmark are higher when an administrator’s authorisation or registration is permanently withdrawn because at that point users become permanently prohibited from using the benchmark.
- The powers as drafted are subject to a number of vague and unhelpful contingencies:
 - “where cessation of the benchmark would result in a force majeure event, or frustrate or otherwise breach the terms of any financial contract or financial instrument, or the rules of any investment fund, which references that benchmark
 - First, cessation of the benchmark may not occur upon suspension of the administrator’s authorisation or registration. The administrator may keep publishing the benchmark and it may continue to be used by non-supervised entities or third country users. Using cessation instead of prohibition of use by supervised entities as the criteria for this power may mean significant issues are not considered.
 - Second, it is unclear how the competent authority with responsibility for the benchmark administrator would satisfy itself that a force majeure event, frustration or breach would occur in relation to users of the benchmark (who may not be within their jurisdiction):

- Would the analysis and relief need to be on a contract-by-contract basis (which could involve analysing millions of contracts); or
 - Could analysis showing that just one contract would suffer such an outcome be sufficient for the relief to be given to all users; or
 - Would the competent authorities be able to consider the question in the abstract, without looking at any actual contractual terms, to determine that such an outcome would be likely to occur?
 - In each of these alternatives, what standard of analysis would be required? For example, the legal analysis of the doctrine of frustration is complex and varies from jurisdiction to jurisdiction. It appears unlikely that a law firm could provide a clean opinion that frustration would occur.
- All of these issues should be resolved by removing the contingency itself. No restriction of that nature should be placed on the competent authority's power to permit continued use of a benchmark in circumstances in which the administrator's authorisation or registration has been suspended or withdrawn or in other circumstances in which users would otherwise be prohibited from using the benchmark.
 - Instead, guidance should be given to competent authorities as to the type of issues they should consider (such as the potential impact on users of the benchmark becoming prohibited).
 - The powers under Article 35 and Article 51 to permit on-going use of an EU or third country benchmark which has not qualified for use under BMR or, which having so qualified, loses that qualification, should be consolidated into a single provision which is reframed in the following way:
 - The provision should cover all circumstances in which a supervised entity which has been using a benchmark would otherwise be prohibited from using that benchmark. This should include:
 - Withdrawal of an administrator's registration or authorisation under Article 35
 - Suspension of an administrator's registration or authorisation under Article 35
 - Withdrawal of a third country administrator's registration under Article 31

- Withdrawal of equivalence, recognition or endorsement of a third country administrator’s benchmarks
 - Failure by an administrator or its benchmark to comply with the BMR within the time periods set out in Article 51 (Transitional Provisions).
 - Exercise of the powers contemplated in the ISDA Proposal in the response to Question 7.
- The provision should provide that supervised entities may continue to enter into new and life-cycle trades referencing any benchmark whose use would otherwise be prohibited for the purposes of managing existing exposures (i.e. to transition to new benchmarks or to hedge, reduce or close out exposures, each a ‘permitted purpose’) and not (subject to the below) for the purpose of acquiring new exposures to the benchmark.
 - CCPs, dealers, market makers and other client-facing supervised entities should be allowed to take on new exposures but only to the extent they do so to facilitate the permitted purposes of their clients in managing or reducing their existing exposures.
 - Supervised entities should also be allowed to use such benchmarks to perform their legal obligations under legacy positions (including the calculation and payment of any termination amount).
 - This approach provides users of benchmarks which fail to become compliant or which become non-compliant with the ability to manage and to manage down their exposures in a safe and efficient way, avoiding the current risk of a cliff edge. This will become critically important in the run up to any discontinuation of any systemically important benchmarks, like LIBOR.

Question 9: *Do you consider that the powers of competent authorities to permit continued use of a benchmark when cessation of that benchmark would result in contract frustration are appropriate? Very appropriate – not appropriate at all (5 categories). Please explain.*

- 1 (Not appropriate at all)
- Please refer to our response to Question 8
- One member suggested that these provisions just apply to critical benchmarks.

4. SCOPE OF THE BMR

Question 10: *Do you consider that the regulatory framework applying to non-significant benchmarks is adequately calibrated? Which adjustments would you recommend? Completely adequately calibrated – not well calibrated at all (5 categories). Please explain.*

- 1 (not well calibrated at all)
- The Index Industry Association estimates that there are over 3,700,000 benchmark in use globally¹, the vast majority of which pose no systemic or material risk.
- The vast scope of the BMR combined with its considerable extraterritorial reach has resulted in a disproportionate compliance burden being placed upon benchmark users, administrators and contributors.
- The benefits of regulating against a benchmark's potential future development do not justify the cost and complexity for those the regulation is intended to protect.
- BMR Recital 40 recognises this danger when it states that proportionality is needed "to avoid putting an excessive administrative burden on administrators of benchmarks the cessation of which poses less threat to the wider financial system". Similarly, the IOSCO Principles acknowledge that "the application and implementation of the Principles should be proportional to the size and the risks posed by each Benchmark and/or Administrator and the Benchmark-setting process".
- As we understand will be noted by GFMA in its response to this consultation, Article 26 states that an administrator of a non-significant benchmark may choose not to apply certain elements of Articles 4, 5, 6, 7, 11, 13, 14, 15 and 16 of the BMR. However, as was noted by ESMA's own Securities and Markets Stakeholders Group (SMSG) in its response to ESMA's consultation on its Guidelines for Administrators of Non-Significant Benchmarks (Guidelines), administrators of non-significant benchmarks must still comply with similar requirements as administrators of significant benchmarks in relation to other key areas – for example, accountability frameworks, complaints handling, record keeping, and outsourcing. As noted by the SMSG, this lack of proportionality could act as a barrier for entry to providers of non-significant benchmarks.
- The BMR should be revised in the following ways:
 - Non-significant benchmarks should be removed from the scope of BMR (supported by 85% of responding members) and further consideration should be given to also removing significant benchmarks from its scope (approximately one third of responding members think BMR should only apply to critical benchmarks, citing in particular that this would reflect the approach of benchmark regulations adopted in other jurisdictions globally).
 - Narrowing the scope of BMR under both the third country and EU administrator regimes should be undertaken in a calibrated way (i.e. only categories of benchmark which are in scope for EU administered benchmarks should be in scope for third

¹ <https://www.businesswire.com/news/home/20181114005124/en/Index-Industry-Association-Survey-Reveals-3.7-Million>

country benchmarks and vice versa). See response to Question 24 for further details on proposals with respect to the third country regime.

- ESMA should be responsible for designating which benchmarks are in scope of BMR in the same way as proposed for the reformed third country regime in the response to Q24.
- Administrators should be able to voluntarily apply to qualify out-of-scope benchmarks under the BMR and be allowed to label their benchmarks accordingly. This would:
 - encourage improvements in the standards of EU and third country non-significant benchmarks.
 - provide a marketing tool for administrators who meet the high standards of governance, transparency and robustness demanded by the BMR.
 - Provide users with confidence that benchmarks they use meet those high standards.
 - Provide recognition of the efforts and investment that EU and third country administrators have made to comply with BMR already in relation to benchmarks which are taken out of the mandatory scope in order to achieve a more balance proportionate approach.

The Australian² and New Zealand³ benchmark regulations both contain an elective regime of this nature.

Two members disagreed with the above proposals. One of these members disagreed on the basis that non-significant benchmarks are most likely to lack robust governance and controls and be more susceptible to conflicts of interest. They stated that the collective risk of non-significant benchmarks may exceed that of significant or critical benchmarks; investors would find it difficult to distinguish between benchmarks which were compliant and those which were non-compliant and that the failure of a non-compliant benchmark would impact confidence in all benchmark administrators. The other member who disagreed thought that an opt-in regime would be confusing for users and that some families may contain significant and non-significant benchmarks.

Other members have previously provided counterarguments to some of these concerns including that it is highly unlikely that a mass of non-significant benchmarks will fail at the same

² <https://www.legislation.gov.au/Details/C2018A00027>. In Australia, administrators of significant benchmarks must be licensed under the Corporations Act 2001 as opposed to administrators of non-significant benchmarks, which may voluntarily “opt-in” to that licensing scheme.

³ <http://www.legislation.govt.nz/act/public/2013/0069/latest/whole.html>. In New Zealand, under legislation that received Royal assent on 30 August 2019, licensing is not required for any benchmark administrators. However, administrators may “opt-in” to obtain licensing under the benchmark administrator licensing scheme.

point in time or for the same reason and therefore collective risk is not an appropriate measure. A proportionate approach to regulation would target those benchmarks which pose the greatest risk on an individual basis and not seek to overburden administrators whose benchmarks are not so widely used in the Union or whose cessation would not pose such a threat to the wider European investor population. Investors would find it easier to distinguish between compliant and non-compliant benchmarks if a labelling scheme were adopted (per the proposal above).

Question 11: *Do you consider quantitative thresholds to be appropriate tools for the establishment of categories of benchmarks (non-significant, significant, critical benchmarks). If applicable, which alternative methodology or combination of methodologies would you favour? Completely appropriate – not appropriate at all (5 categories). Please explain.*

- 2 (not very appropriate)
- See response to Question 10 above regarding removing certain categories of EU and Third Country benchmarks from scope of BMR.
- ISDA understands that GFMA are proposing in their response to this consultation that the current quantitative threshold for significant benchmarks is raised from a total average value of EUR 50 billion over six months to EU100 billion over six months. ISDA supports this proposal.
- A number of responding members preferred for the quantitative threshold to form guidance as part of the qualitative criteria that a competent authority could use to designate a benchmark as being in scope of the BMR rather than a stand-alone quantitative criteria.
 - This was motivated by the unreliability or unavailability of data for the purposes of making such a determination.
 - It would also facilitate equality between a reformed third country regime and a reformed EU benchmark regime in which ESMA designates on a benchmark-by-benchmark basis which benchmarks are in scope of the BMR. This would be important for third country benchmarks because otherwise users would be required to make the determination which would be disproportionately burdensome on users and result in a fragmentary outcome.

One member was in favour of ESMA collecting better usage data from users.

One member was opposed to using quantitative thresholds at all, preferring that benchmarks are measured as to their vulnerability by reference to a number of different factors, including discretion, transparency and conflicts of interest.

Question 12: *Do you consider the calculation method used to determine the thresholds for significant and critical benchmarks remains appropriate? If applicable, please explain why and which alternatives you would consider more appropriate.*

Completely appropriate – not appropriate at all (5 categories). Please explain.

- 2 (not very appropriate)
- Although the methodology for calculating whether the thresholds have been met seems reasonable, the quality of the data available to regulators, administrators and market participants is very poor.
- Consolidated trade repository data is only available to ESMA and there is no publicly available 'golden source'.
- ESMA has suggested using its Financial Instruments Reference Data System (FIRDS) to determine the member state of reference for the purposes of obtaining recognition for third country benchmarks. However:
 - ESMA is not able to warrant that the available data is complete, accurate or up to date.
 - Systematic internalisers (SIs) only have to report reference data on their MiFID instrument trading and underlying of MiFID instrument, which does not cover all potential trading of indices.
 - Relying solely on FIRDS data leads to erroneous impression of use, as BMR has three other legs to the "use" definition, one of which is benchmarks used for the performance measurements of funds, their asset allocation and fee calculation. If benchmarks are used in this context there is no specific FIRDS record.
 - The designation of benchmarks as critical benchmarks (or where relevant as significant benchmarks) should be undertaken by the Commission or requested by ESMA and should be codified by the Commission.
 - Given that national competent authorities have best access to data on, and information about, benchmarks they supervise, they should notify the Commission or ESMA of any benchmarks which, in their opinion, fulfil the criteria identifying critical and (if relevant) significant benchmarks.

One member suggested that since large benchmark administrators are likely to administer all their benchmarks to the standards currently applicable to significant benchmark, the threshold distinction between significant/non-significant was not useful.

Question 13: *Would you consider an alternative approach appropriate for certain types of benchmarks that are less prone to manipulation. If so, please explain for which types. Completely appropriate – not appropriate at all (5 categories). Please explain.*

- 5 (completely appropriate)
- Where the input data is regulated at its source (i.e. through regulation of contributors) then it is appropriate to reduce the regulatory burdens applicable to these benchmarks under the BMR. In respect of a regulated data benchmark, it would be helpful if the definition of

trading venue could be broadened to include the major global exchanges, so that indices which purely rely on inputs from these trading venues could benefit from the more proportionate regime set out in Article 17 (Regulated Data Benchmarks).

- In addition to the examples of regulated trading venues provided in the BMR (i.e. certain trading venues, electricity exchanges, natural gas exchanges, auction platforms), the definition should be expanded to include indices or rates where the benchmark administrator has no financial interest in the performance of contracts referencing the index, e.g. equity indices.
- One member also said it was essential that global equity benchmarks using regulated FX rates are no longer excluded from the regulated data category.

One responding member stated that the scope of the regulation should be narrowed by reference to 'use of discretion' and 'risk of manipulation'. They stated that BMR provisions should apply in either case and specific obligations should depend on the importance and risk of index manipulation.

One member who was opposed to the above proposals stated that they view all benchmarks as open to potential manipulation regardless of the quality or type of input.

5. ESMA REGISTER OF ADMINISTRATORS AND BENCHMARKS

Question 14: *To what extent are you satisfied with your overall experience with the ESMA register for benchmarks and administrators? If not, how could the register be improved? Completely satisfied – not satisfied at all (5 categories). Please explain.*

- 2 (not satisfied)
- As acknowledged by the EC in the consultation paper, users of the ESMA register have raised concerns regarding its functioning. This is consistent with the experiences of ISDA members, who consider the register could be improved by:
 - Listing benchmarks provided by compliant EU administrators in order to provide a 'golden source' of compliant benchmarks (see further comments on this point under Q15).
 - Benchmark designation (e.g. critical) should be on the register. Without a benchmark's designation being clearly published it is very hard for users to discover.
 - Allowing for filtering of benchmarks by category (e.g. critical/significant benchmarks).
 - Standardized information should be included (standardised per category of benchmark) including the following additional information:
 - The status of applications for authorisation or registration that are under consideration with relevant dates;

- Those benchmarks where the authorisation has been suspended or withdrawn and the date such notice was issued.
- Benchmarks impacted by the withdrawal of registration of third country administrators, equivalence, recognition or endorsement.
- Other status flags to the extent that additional powers are exercised in relation to administrators or their benchmarks.
- Additional fields to help users keep track of changes to each administrator (e.g authorisation date/last update). These features are included in other registers such as the MiFID/UCITS/AIFMD register.
- The 'contact info' field should provide a link to the website pages of the administrator that deal with EU BMR-specific information, including links to the benchmarks statements pursuant to Article 27. Currently, many of the links take users through to the administrator's home page which is of very limited use.
- Being machine searchable
- A notification e-mail service which alerted subscribers to updates and new information added to the register would also be valuable.
- Benchmark level identifiers (including ISINs) where available to remove uncertainty caused by inconsistencies between very similar benchmark names as recorded in the register and internal systems.

One ISDA member agreed that improvements are needed but also believes the ESMA register should be complemented by registers published and maintained by individual benchmark administrators that list all of the benchmarks that they administer in accordance with, and therefore useable under, BMR. The member believes that it should up to ESMA to prescribe a specific format for each register and the means by which each is made available.

Another member responded that while they agree with most of the above proposals, they would add that the ESMA Register could be improved by requiring the same information for all the various types of Benchmark Administrators (i.e. EU or Third Country administrators). They did not support the idea that lists of Benchmarks should be included on the ESMA register and that only the name of the Administrator should be included (as is currently applicable only to EU Administrators). This approach removes the burden on Benchmark Administrators/NCAs/ESMA to keep the ESMA register up-to-date with a list of specific Benchmarks. It also enables business to happen quicker because there is not any time delay between when an index is notified to the NCA to be added to the ESMA register and when it is then added to the ESMA register (a burden that EU Administrators do not have – their EU BMR Compliant Benchmarks can be traded as soon as the Administrator is on the ESMA Register).

They also supported the ability for registered benchmark administrators to sponsor both in-scope benchmarks and indices that remain out-of-scope of the regulation. They therefore felt it would be wrong for a user to deduce from the fact that an administrator's name is on the register that a particular index is a benchmark.

Another member was opposed to the proposal to list benchmarks on an individual basis saying that it was unworkable but was in favour of listing benchmark families. They were also opposed to the register providing information on the status of applications or whether authorisation has been suspended or withdrawn, saying this was not in line with existing regulatory approaches.

Question 15: *Do you consider that, for administrators authorised or registered in the EU, the register should list benchmarks instead of/in addition to administrators?*

Agree completely – do not agree at all. (5 categories)

- 5 – Agree completely.
- See also answer to Q14
- There is currently a gap between the ESMA register and Benchmarks Statement which means that users are unable to definitively identify if a benchmark they wish to use is compliant with BMR or not. This is particularly the case in relation to indices that are included in a family of benchmarks.
- Listing compliant benchmarks in the register would provide a definitive golden source for users to consult.
- It would be important that the register remained capable of being updated in real time in order to avoid any delay between a benchmark becoming compliant and its being able to be used by investors.

6. BENCHMARK STATEMENT

Question 16: *In your experience, how useful do you find the benchmark statement?*

Very useful – not useful at all (5 categories)

- 3 – neutral
- Benchmark Statements were seen as potentially useful where they provided information to investors that was not otherwise available and that would help them make an informed investment choice by allowing them to compare standardized information between different indices and administrators. One member particularly supported their use at family level.
- One member suggested its primary purposes should be to make clear the objective of the benchmark, how it is used and to disclose risk factors in relation to its potential vulnerabilities. Another suggested they could set out the administrator's contingency plans or the methodology.

- The experience of many respondents suggested, however, that in practice Benchmark Statements do not fulfil these criteria. They are seen as repetitive of, and less valuable than, information available from other sources (such as the key information documentation for products governed by regulations such as UCITS, PRIIPS and MIFID II, the full description of the index's rules for wholesale investors, or the methodology description). A Benchmark Statement does not seem to be the appropriate place to make investment risk disclosures since those risks will depend upon the product in which the benchmark is to be referenced. They are also seen as often being limited in terms of how much information by the need to protect intellectual property rights in relation to the index.
- There is a desire to avoid unnecessarily burdening administrators with requirements in relation to Benchmarks Statements which do not perform a valuable function for the investor. One member suggested that a template should be published, in line with ESG requirements.

Question 17: *How could the format and the content of the benchmark statement be further improved?*

- To the extent that the Benchmark Statement remains a requirement, it should be a high level document for which a link from the ESMA register is available providing in a standardised but flexible format:
 - The name and identifiers of the benchmark or each benchmark in the family.
 - a high level description of the benchmark or family of benchmarks
 - the market/economic reality it is intended to measure.

It should be left to administrators to decide whether to group benchmarks into families or not.

Question 18: *Do you consider that the option to publish the benchmark statement at benchmark level and at family level should be maintained?*

Should definitely be maintained – should definitely be removed (5 categories). Please explain.

- 5 – definitely be maintained
- Having the benchmark statement published at family level reduces the administrative burden on administrators, some of whom may administer thousands of benchmarks.
- Benchmarks statements for families of benchmarks are seen as being more user friendly.
- While one member suggested the criteria for determining when benchmarks should be grouped into families should be clarified, others preferred for this to be left to the discretion of the administrator.

7. SUPERVISION OF CLIMATE-RELATED BENCHMARKS

Question 19: *Do you consider that competent authorities should have explicit powers to verify (1) whether the chosen climate-related benchmark complies with the requirement of the Regulation and (2) whether the investment strategy referencing this index aligns with the chosen benchmark? Agree completely – do not agree at all (5 categories). Please explain.*

- 2 – do not agree
- The majority of those responding ISDA members who answered this question were opposed to the EC proposal for the NCA to have explicit powers to make verifications as to whether a benchmark is a climate-related Benchmark, preferring for the Administrator to make this determination. They believe that an explicit ex ante power of NCAs to verify a benchmarks' compliance with the climate related benchmark provisions would only delay launching such benchmarks. They would suggest that the process be aligned to the launching of regular benchmarks by an EU administrator, i.e. self-attestation by the index provider.
- One responding ISDA member was in favour of the NCA having such powers as it believes they would tackle green-washing and are in line with some practices already established at some Member States' level.
- If the competent authority for the administrator considers that a benchmark ceases to qualify as a "climate-related benchmark", it should first issue a warning to the administrator to rectify the non-compliance issues with a reasonable time limit. If that time limit lapses, the competent authority could then make a public statement to this effect and the information could be included on ESMA's Register.
- This would provide market participants with visibility of the event and provide an objective basis for a contractual trigger to the extent that its status was so relevant to the counterparties that they wished to incorporate a consequence.
- It would also help to avoid creating a cliff edge for investors as a result of a sudden public determination by a competent authority.

Question 20: *Do you consider that competent authorities should have explicit powers to prevent supervised entities from referencing a climate-related benchmark, if such benchmark does not respect the rules applicable to climate-related benchmarks or of the investment strategy referencing the climate-related benchmark is not aligned with the reference benchmark? Agree completely – do not agree at all (5 categories). Please explain.*

- 1 – do not agree at all
- Competent authorities should not have explicit powers to prevent supervised entities from referencing a climate-related benchmark.
- This would be inconsistent with the fact that the 'EU climate transition benchmark' and 'EU Paris-aligned benchmark' labels are optional designations – and so it is possible for a benchmark to pursue climate-related objectives without obtaining one of these formal designations.

- Preventing supervised entities from referencing these labels would produce the odd result that a supervised entity could use a benchmark pursuing a climate-related objective which has never obtained a formal designation (i.e. 'EU climate transition benchmark' or 'EU Paris-aligned benchmark'), but if the benchmark is so-designated and then loses its designation, supervised entities would be prevented from using it.
- This could act as a disincentive to benchmark administrators obtaining a designation in the first place, which would presumably be an undesirable outcome and not in line with the intent of the climate-related benchmarks regulation.

8. COMMODITY BENCHMARKS

Question 21: *Do you consider the current conditions under which a commodity benchmark is subject to the requirements in Title II of the BMR are appropriate?*

Completely appropriate – completely inappropriate (5 categories). Please explain.

- 3 (moderately appropriate)
- Title II of the BMR will apply if a commodity benchmark is either:
 - a regulated-data benchmark
 - the majority of contributors are supervised entities or
 - a critical benchmark and the underlying asset is gold, silver or platinum.
- ISDA believes that the general application of the BMR related to commodity benchmarks is reasonable. At a high level, commodity benchmarks, particularly those where there is no physical settlement, are capable of being treated in the same manner as any other class/type of derivatives (such as FX, equities).
- However, we would like to express our support for the following positions which we understand may also being put forward in response to this consultation by EFET and GFMA:
 - The fact that the majority of contributors are supervised entities should not change the regime which regulates the commodity benchmarks because it is irrelevant whether the contributors to such benchmark are supervised or not.
 - In fact, supervised entities are themselves highly regulated and so there is no need to reinforce control over a commodity benchmark to which they contribute when compared with benchmarks produced on the basis of contributions by non-supervised entities.
 - The current structure may actually disincentivize administrators from seeking contributions from supervised entities in order to avoid the re-classification of the

commodity benchmark into the more challenging compliance regime (i.e. Title II instead of Annex II). This may render the benchmark in question less robust.

- Including platinum but not including palladium seems inconsistent given the specialist nature of both markets and their participants. Therefore, we recommend that palladium be included with gold, silver and platinum.

One member noted that the rules in relation to Commodity Benchmarks are unclear and onerous to monitor.

Question 22: *Do you consider that the compound de minimis threshold for commodity benchmarks is appropriately set?*

Completely appropriate – completely inappropriate (5 categories). Please explain.

- 2 (inappropriate)
- ISDA supports the views which it understands GFMA and EFET intend to put forward in their response to this consultation, that:
 - there are diverging calculations of the 'total notional value of financial instruments referencing the benchmark' condition in the exemption for small commodity benchmarks in Article 2(2)(g)
 - some index providers refer to an average maturity at a given point in time over the past (as a broadly representative quantification), whereas others use front month calculations to determine the total notional value.
 - A yearly average would seem to be a more appropriate alternative to smooth the potential volatility effect of the underlyings of the indexes.
 - Otherwise, administrators and contributors would be exposed to different rules depending on market trends, and this should not be the goal of the BMR.

One ISDA member believes that the condition in (g)(i) (i.e. that the request for admission to trading has been made on only one trading venue) may be enough to adequately capture the majority of such commodity benchmarks that should be excluded.

Another ISDA member believes that the de minimis exemption being applicable if financial instruments are traded only on one trading venue is a potential brake on competition.

Some ISDA members think that the commodity exemption under Article 2 could be in contradiction with the Open Access rights under Art 37 MiFIR given that Art 2(g)(i) of the BMR suggests some form of exclusivity where Art 37 MiFIR explicitly prevents it. In particular, Article 37 of MiFIR refers to criteria being "non-discriminatory, transparent and objective so as to ensure fair and open access" and that restriction of access should only really apply so as to "control risk"; with denial of access only being supported where this is "duly justified in writing and based on a comprehensive risk analysis". In addition to this, the explanatory note paragraphs of the BMR refer (in paragraph (38)),

when considering critical benchmarks, to ensuring that administrators: "take adequate steps to ensure that licences of, and information on, benchmarks are provided on a fair, reasonable, transparent and non-discriminatory basis to all users". The exclusivity is just included within the wording, without any further background having been provided on the inclusion of the suggestion of exclusivity in Article 2(g)(i) of the BMR, which would provide an explanation to justify its inclusion in this circumstance (). It would seem, unless there are circumstances showing justification for this drafting, that the terms of Article 2(g)(i) of the BMR do contradict the principle in Article 37 of MiFIR, without there being a sufficient justification for this position and therefore guidance and/or clarifications from the regulator would be welcomed to that end.

9. NON-EEA BENCHMARKS

Question 23: *To what extent would the potential issues in relation to FX forwards affect you?*

Very much – not at all (5 categories)

If so, how would you propose to address these potential issues?

- 5 – very much
- ISDA's responding members support GMFA's response to this question.
 - A 2018 survey of the GFXD's members showed that between 38% and 52% of global volumes traded in three Asian non-deliverable forwards (NDFs) (USD/KRW, USD/TWD and USD/PHP) were traded by EU entities.
 - There are seven FX rates which are used in NDFs and non-deliverable options, which are not administered by their central bank (KRW, TWD, PHP, INR, ARS, NGN and KZT). These benchmarks would all be within the scope of BMR because they are referenced in financial instruments which are traded on a trading venue (TOTV), submitted to be TOTV or traded via a Systematic Internaliser.
 - Those financial instruments are used by EU entities such as pension funds, asset managers and manufacturers, to hedge currency exposures arising from investments or exports/imports with emerging market economies
 - Preventing EU supervised entities from using these NDFs will have a number of significant adverse effects, including:
 - fewer liquidity providers and increased costs will incentivize end-users to trade outside the EU in jurisdictions which may not enjoy the same investor protections or robust governance;
 - EU supervised entities with local onshore exposures will be unable to hedge their currency risk and will most likely have to withdraw from those markets. This is likely to create market instability;
 - creating the risk of market fragmentation;

- EU supervised entities currently act as a source of funding for Asian entities and use swaps based on third-country benchmarks including NDFs to manage their risk. Prohibiting them from entering into such hedges will effectively close a source of funding for Asian entities (an important market for the EU and its citizens).
- ISDA supports the approach previously proposed by the EC to expand the definition of 'public authorities' under the BMR to include third-country administrators of FX spot rates in non-convertible and pegged currencies.
- In addition, ISDA believes that non-deliverable swaps which reference floating rates in restricted currencies but under which payments are net settled in USD or other freely traded currencies will be similarly impacted.
- ISDA proposes that third country administrators of floating rates (e.g. NDIRS) in non-convertible currencies (including pegged currencies) should be included in the expanded definition of 'public authorities'.
- Any benchmarks (regardless of whether they are interest rates, fx rate or other rates, such as inflation indices) provided by the public authorities (including third country public authorities) that offer utility type functions to EU users should be exempted so that users of all types, including non-financial counterparties, financial market infrastructure and financial counterparties can use these benchmarks.

Equivalence; Recognition and Endorsement

Question 24: *What improvements in the above procedures do you recommend?*

- ISDA supports the observations in the consultation document regarding the many flaws in the third country regime.
- The BMR's third country benchmark regime is widely seen as unfit for purpose and its transition period required a two year extension in order to delay the serious effects that prohibition of many third country benchmarks would have had for EU users of those benchmarks, including:
 - Lack of visibility of which benchmarks were on course to qualify and which were unlikely to qualify meant end users could not risk manage their positions safely or efficiently.
 - Equivalence is not a scalable solution because the vast majority of other jurisdictions have not introduced regulation similar to BMR.
 - Where jurisdictions have introduced regulations, they have only covered systemically important interest rate benchmarks and occasionally FX benchmarks.

- This means that equivalence decisions, when they are given, are only provided on a benchmark-by-benchmark basis (e.g. an equivalence decision in respect of Japan will only qualify TIBOR for use in the EU but not, for example, any of the Nikkei or Topix equity indices).
- Recognition requires third country administrators to apply to their 'member state of reference'. This is a complex regime which relies on administrators having access to trade volume or licensing data which does not exist in any reliable form. The reforms of the ESA's review of this system will come too late since the extended transition period will have already expired.
- Recognition also requires appointment of a legal representative. This representative is required to perform the oversight function of an administrator and is held accountable to the competent authority of the member state of reference.
- The precise responsibilities and liabilities of the legal representative remain unclear, making it difficult to judge whether third party entities would be willing to take on the role and what their terms of engagement (including cost) might be.
- However, for benchmarks on smaller markets and less-widely traded currencies, it may prove unprofitable for either a non-EU administrator to pay the costs of registration or for an administrator registered in the EU to invest in administering those non-EU benchmarks.
- Endorsement requires a third country administrator to have its benchmarks endorsed by an EU administrator as being compliant with the EU BMR on an on-going basis.
- The EU administrator must also 'monitor effectively the activity of provision of the benchmark in the third country and manage the associated risks'
- In the absence of a supervised affiliate to perform this role, endorsement effectively requires third country administrators to cede governance and control of their benchmark activities to a third party in the EU. Although we understand that some EU administrators have started to offer endorsement services, it is unclear whether the costs and terms for doing so will be acceptable to small and medium third country administrators.
- Prohibition on using non-qualifying third country benchmarks would put EU users at a competitive disadvantage compared to their non-EU peers (who will be able to continue using the benchmarks).
- EU users would be driven to trade in non-EU jurisdictions, not all of which have investor protection standards equivalent to those enjoyed within the Union.
- ISDA proposes that the third country administrator and benchmark regime is replaced with a regime which:

- provides protection to investors on a proportionate basis
 - imposes high standards on administrators of the most important third country benchmarks
 - encourages those whose benchmarks are used on a more minor scale in the Union to adopt similar standards to those of EU Administrators.
 - ensures EU end users have visibility of the application process to allow them to manage down their exposures to non-qualifying benchmarks ahead of and/or over time.
- Under this proposal:
 - Third country benchmarks would be permitted to be used in the Union unless specifically prohibited.
 - ESMA would be given the power to designate third country benchmarks as being in scope based upon their use or potential impact on users in the EU using equivalent criteria to those applicable for in-scope EU benchmarks.
 - In this respect, 92% of ISDA's responding members are in favour of 'non-significant' third country benchmarks being outside the scope of the BMR. Additionally, approximately one third are in favour of 'significant' third country benchmarks being outside of the scope of BMR, citing in particular parity with benchmark regimes in other jurisdictions.
 - Given the unreliability of the data, any quantitative thresholds should be used as indicators within the qualitative criteria rather than as hard thresholds.
 - If the administrators of in-scope Third Country benchmarks fail to gain qualification within a fixed period of time, or to maintain qualification thereafter, they would become 'Non-qualifying third country benchmarks'.
 - As per the response to Question 8, supervised entities would only be permitted to continue using Non-qualifying third country benchmarks in new and life-cycle transactions for 'permitted purposes' (i.e. to transition to new benchmarks or to service, hedge, reduce or close out existing exposures) and not, subject to the below, for the purpose of acquiring new exposures.
 - Client facing supervised entities would be permitted to acquire new exposures to Non-qualifying third country benchmarks but solely to facilitate their clients' permitted purposes.
 - As per the proposal for EU administrators in our response to Question 10, third country benchmark administrators would also be able to voluntarily apply to qualify

their out-of-scope benchmarks for use in the Union in order to promote enhanced governance standards and allow such administrators to promote their benchmarks as BMR compliant.

- Per the response to Question 10, narrowing the scope of BMR under both the third country regime and EU administrator regimes should be undertaken in a calibrated way.
 - In order to allow end users of benchmarks visibility of whether benchmarks have or are likely to qualify for use at the end of the transition period or have become Non-qualifying third country benchmarks, ESMA would be required to publish details of each application received, including the name and location of the administrator or the benchmark, the name and ISIN of the benchmark, the status of the application (received/approved/rejected/withdrawn/suspended). This will allow EU end users to manage down their exposures to third country benchmarks ahead of their failing to qualify under the EU BMR.
 - Third country administrators who comply with the IOSCO principles should be permitted to apply for EU authorisation of specific benchmarks or a local administrator within a group.
- These proposals represent a practical, proportionate regime, which respects the overarching aims of the EU BMR.

One responding member did not agree with the above proposals, saying that they believe improvements in recognition and endorsement, an improved system of exemptions and continued use of equivalence would provide an effective third country regime that would protect investors who might otherwise be exposed to poor quality benchmarks and conflicts of interest as well as not disadvantaging EU administrators versus third country administrators. Counter-arguments to some of these points which have previously been discussed by ISDA members include that investors may be put more at risk of losses and harm if they are prevented from using benchmarks which allow them to hedge their naturally occurring risks than they would be at from using a non-compliant benchmark. It may be more important to investors, therefore, that they are able to make informed decisions on which benchmarks they use than that their business activities are restricted in ways which put them at a competitive disadvantage in comparison to their non-EU peers. The exemptions which have been discussed historically are symptomatic of the fact that the Benchmark Regulation does not work on a practical level because its scope is too broad and out of kilter with the regulatory regimes employed in other jurisdictions.

One member suggested that endorsement and recognition services should only be provided by EU BM Administrators and that the question of IOSCO compliance should be demonstrated by means of an external audit. These proposals were strongly opposed by a number of other responding members as disproportionate, unduly restrictive, not simplifying the 3rd country benchmark regime and creating barriers to entry for third country benchmarks whose usage may be low.

ADDITIONAL INFORMATION

The following proposals do not respond directly to any of the questions asked in the Consultation but are relevant to considerations of Scope for the BMR (per Section 4 of the Consultation).

Definition of ‘index’

In January 2018, the EC adopted Delegated Act (DA) [2018/65](#) to specify technical elements of the index definition. ISDA members felt that those specifications did not provide enough clarity as sought by benchmark users and administrators.

BMR Article 3 paragraph 1 defines the meaning of ‘index’. In general, all indices which are ‘made available to the public’ and are ‘regularly determined’, published by an entity which is not exempt under Article 2, could be in scope of the BMR.

In particular, regulatory guidance provided regarding the meaning of ‘made available to the public’

- stated that its meaning should be understood by reference to legislative precedents relating to intellectual property law.
- suggested that if the level of an index can be reverse engineered by observing the amount of coupon payable on a financial instrument, then the index will have been ‘made available to the public’.

However, the precedents on the meaning of this phrase do not readily read across to use of a benchmark and the fact that even indirect observations and reverse engineering appear to be enough to satisfy this criteria make the scope of BMR almost impossible to determine (in that it is difficult to say beyond reasonable doubt what is not in scope).

Proposed action:

- ‘made available to the public’ should be defined as the public having widespread financial or economic exposure to the index and not simply the index being published. This would exclude, for example, indices solely referenced in narrowly distributed or relatively high denomination financial instruments as well as in bilateral derivatives agreements.
- One member prefers for the definition to have been satisfied where multiple investors are exposed to an index.

‘Index’ is defined too broadly and does not include the arguably crucial element that an index should be a figure that is used to represent a broader class of inputs over which the index provider has discretion, not simply the price of something, combination of prices, the application of a simple formula (such as compounding) or the addition of a spread.

Proposed action:

- Redefine ‘Index’ accordingly.

Definition of financial instrument

The definition of financial instrument in Art 3(1)(16) is so expansive and vague that it is difficult to know what could be out of the BMR scope and whether this could vary over time. This causes difficulties to firms from an organisational perspective.

The definition of financial instrument cross-references the systematic internaliser (SI) definition in MiFID 2, point (20) of Article 4(1).

Certain OTC derivatives may fall under the scope of the BMR only under limb (iii) (i.e. traded via an SI) of Art 3.1. (16) that defines what is a financial instrument.

However, scoping OTC derivatives into the BMR appears to be in contradiction with Recital 9 of the BMR that states "This regulation should therefore cover benchmarks which are used to price financial instruments listed or traded on regulated venues."

In September 2018, ESMA published the BMR [Q.A 5.8](#) which further defines when financial instruments traded on a SI are in scope of the BMR. Nonetheless, this Q&A created additional confusion in the industry instead of clarifying the intent of the Regulation given that its limb (b) appears to scope in financial instruments not traded on trading venues (ToTV) i.e. *"all other instruments that are actually traded on a systematic internaliser, regardless of any requirement of the systematic internaliser to provide reference data"*. Again this appears to make the scope of BMR extremely broad.

ESMA's recently updated market transparency [Q&A 11](#) seems to acknowledge that *"it might be challenging for investment firms to access reliable and comprehensive sources of EU wide information preventing de facto the systematic internaliser test to be carried out"*. This statement appears to recognise that it may in fact be impossible for firms always to know whether or not they have become an SI in particular non-TOTV instruments or classes of instruments. This has the unfortunate result under the BMR that firms cannot know which OTC derivatives are 'financial instruments' in scope of the BMR and therefore equally cannot be sure that they are complying with their obligations with respect to the use of benchmarks except by assuming that all OTC derivatives are in scope.

- Additionally, the reference to SIs is problematic over the lifecycle of a derivatives contract given that the BMR does not distinguish between the mandatory and voluntary SI regimes. Financial market participants are thus facing a problem of lacking visibility regarding their counterparties' SI status since a counterparty could have a) passed or fallen below a threshold for financial instruments or b) could have voluntarily opted-in or opted-out as an SI for a class of financial instruments.

Proposed actions:

- remove reference to 'via an SI' from the scope of the BMR.
- ISDA proposes that the test to determine whether a benchmark is used in a financial instrument only apply at the time of entry into the derivative contract to avoid contracts which are out of scope when traded coming into scope because of some subsequent event outside the control of the parties.

'Use' of a benchmark

BMR Article 3(7) defines the 'use of a benchmark'. The broad definition of 'use' under the BMR triggers considerable uncertainty in relation to common activities in financial markets.

The determination of the amount payable, which ESMA's BMR [Q&A 5.2](#) attempts to clarify, does not explicitly state that determination of a close out amount following termination of a derivative does not constitute 'use of a benchmark'.

This is problematic in respect of BMR Article 35 on 'Withdrawal or suspension of authorisation or registration'. If determination of the amount payable and payment of a close out amount constitutes 'use' and an administrator's authorisation is removed, a transaction referencing the benchmark in question can neither be terminated nor continued. It should be further noted that alternative benchmarks would not solve this issue as they are unlikely to be immediately available in view of a) intellectual property protections, (b) the amount of time and effort required to identify alternative rates to the IBORs and c) that use of any identified substitute is likely to result in value transfer.

ESMA's BMR [Q&A 5.11](#) relates specifically to whether use of an index to calculate interest payable on collateral amounts to use under the BMR, as opposed to considering whether a benchmark that is utilised to determine the collateral that is payable in the first place amounts to BMR use.

Proposed actions:

- ISDA proposes:
 - a) determination and payment of a close out amount resulting from the termination of a derivative as a result of (for example) a benchmark or its administrator failing to obtain or maintain its authorised/registered status should not constitute 'use of a benchmark'. Otherwise, counterparties will be left in a position in which they are unable to exit transactions they can no longer perform their obligations under.
 - b) use of an index for the purposes of determining initial and/or variation margin should not amount to use given that margining amounts to risk management of an exposure.
 - c) Due to the lack of clarity of ESMA Q&A 4.4 of 8 November 2017 about 'BMR outside the EU', we would like to ask for a clarification that the Regulation does not apply to users when transacting with non-EU counterparties (i.e. 'use of a benchmark' in a financial instrument, financial contract or investment fund that is distributed or offered to investors or clients outside of the EU).

Exemptions under BMR

The BMR exempts certain entities from the regulation under Article 2(2). However, ISDA members remain concerned about the scope of various exemptions and feel that further calibration is warranted in that regard.

CCPs which provide reference price or settlement prices used for CCP risk-management purposes and settlement are, in general, exempted from the BMR. However, there remain diverging views as to whether the exemption includes indirect contracts that form part of an indirect clearing chain, i.e. a contract between a client of an exchange member and their indirect clients.

Proposed actions:

- Indirect contracts should be treated as falling within the scope of the CCP exemption because they arise as a result of the execution of a transaction between an exchange member and the CCP, reflect the same risk that the member/CCP contract does, and form an integral part of the indirect clearing chain rather than being separate and distinct from it.

- BMR Article 2(2)(d) exempts 'single reference prices' from the requirements of the BMR. In addition, ESMA BMR Q&A 4.23 clarifies that single prices of equities and prices which only require simple calculations, without a discretionary element in the methodology, would be covered by the exemption. However, it remains unclear what constitutes 'simple calculation'. Recital 18 excludes the use of discretion when a single price or value is used as a reference to a financial instrument. However, some ISDA members feel that it could be useful to apply the single reference prices in illiquid markets where some discretion may be needed for price determinations. One member preferred that 'without a discretionary element' remained a criteria in this context. One member suggested that it would be useful to confirm that baskets of single reference prices which are referenced in financial instruments (such as derivatives) but whose price movements are not synthesized into an index which is made directly available to the public fall within the single reference price exemption.

- The scope of the exemption for index providers in Article 2(1) is too narrow to be useful. It only applies where that index provider is 'unaware and could not reasonably have been aware' that that index is used for the purposes referred to in point (3) of Article 3(1). This effectively places a positive obligation on index providers to monitor possible use of their indices across the Union in circumstances in which data on usage is unreliable or not publicly available. On this basis, we propose that 'and could not reasonably have been aware' is deleted.