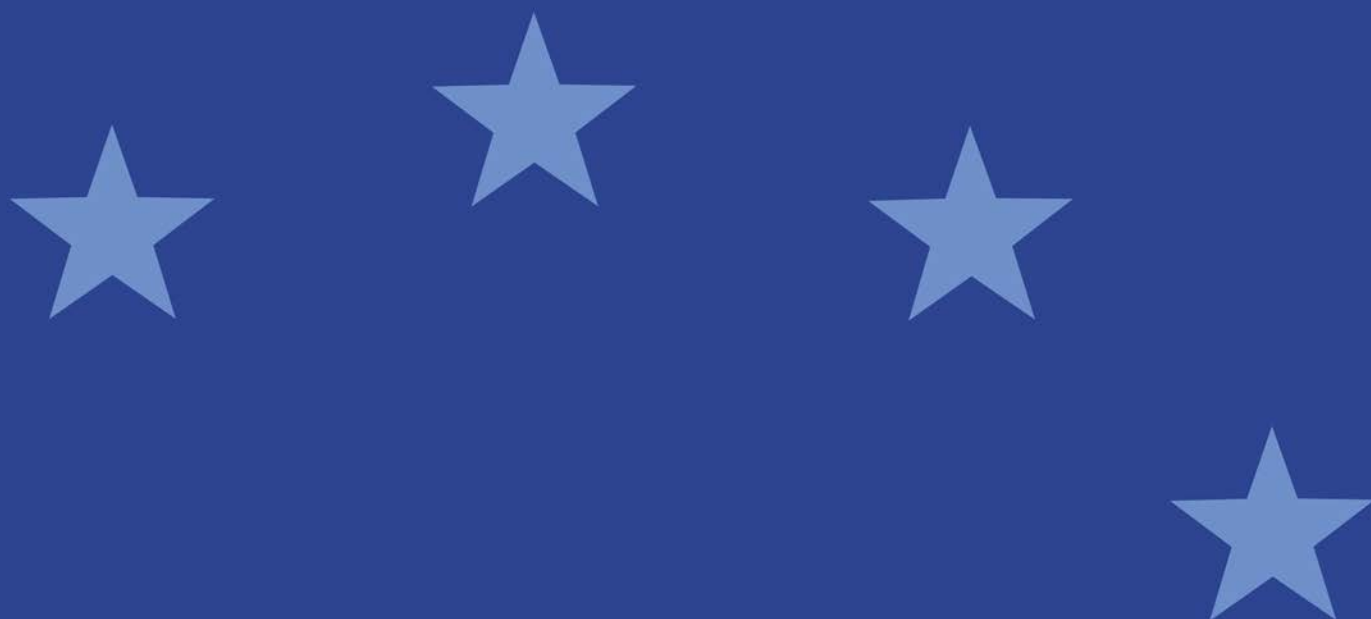


# Response Form to the Consultation Paper

**ESMA's technical advice to the Commission on fees for benchmark administrators under BMR**



## 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 **6 November 2020**.

All contributions should be submitted online at [www.esma.europa.eu](http://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\_TAFE\_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\_TAFE\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TAFE\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading "Your input – Open Consultations" →

“Consultation on ESMA’s technical advice to the Commission on fees for benchmark administrators under BMR”).

### **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](http://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   | <a href="#">Click here to enter text.</a> |
| Activity                             | Choose an item.                           |
| Are you representing an association? | <input type="checkbox"/>                  |
| Country/Region                       | Choose an item.                           |

## Introduction

*Please make your introductory comments below, if any*

<ESMA\_COMMENT\_CP\_TAFE\_1>

The International Swaps and Derivatives Association (ISDA) welcomes the opportunity to respond to ESMA's draft technical advice to the Commission on fees for benchmark administrators under the Benchmarks Regulation (BMR). It is based on responses provided by members of the ISDA EU Benchmarks Regulation Advocacy Group, ISDA Americas and Europe Benchmark Working Group; ISDA APAC Benchmark Working Group; ISDA Article 28(2) EU Benchmark Regulation Group; ISDA Commodity Derivatives Working Group; ISDA European Government Relations Working Group and ISDA JPY Benchmark 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 groups in their entirety.

As a general comment, ISDA would like to state that the application cost and minimum annual fee could act as a barrier to entry either for small firms or for larger firms which do not derive a large portion of their income from EU activity and therefore may conclude that registering does not make financial sense potentially reducing the benchmarks that can be used in the EU and thus limiting the options available to consumers.

### About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 925 member institutions from 75 countries. These members comprise a broad range of derivatives market participants, including corporations, investment

managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: [www.isda.org](http://www.isda.org). Follow us on [Twitter](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).

<ESMA\_COMMENT\_CP\_TAFE\_1>

## Questions

**Q1: Do you agree with the approach for determining the recognition fee for third country administrators? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_1>

As a general comment, ISDA would like to note that the suggested ESMA annual recognition fee does not appear to be consistent with the annual flat fee it previously proposed for the fees to be charged to third-country CCPs. We would very much welcome clarity on the reasoning behind the different ESMA approaches as the proposed initial recognition fee for third country benchmark administrators (EUR 65,000) appears high relative to the proposed recognition fee for Tier 1 third-country CCPs (EUR 50,000).

A flat fee incentivises ESMA to control its supervisory costs over time – under this proposal any and all increases in costs allocated to benchmark supervision would be automatically paid by administrators. Accordingly, ISDA is of the view that an approach which corresponds to ESMA's proposed approach for third-country CCPs, with no reference to ESMA's supervisory costs, would be preferable in this context.

<ESMA\_QUESTION\_CP\_TAFE\_1>

**Q2: Do you think that the recognition fee should include a proportionality element? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_2>

ISDA believes that the lack of proportionality in the recognition fee paid may create high barriers to entry for some benchmark administrators. We thus would encourage ESMA to consider the following aspects:

- The size and risk profile of the administrator and its benchmarks as well as the number of benchmarks under administration;
- The existing benchmark framework from the third country jurisdiction, as some applicants may be based in a jurisdiction with less stringent requirements;
- Fees for recognised administrators should be proportionate given the oversight by a regulated entity;
- As a suggestion, the Dutch AFM calculates recognition fees based on the number of hours spent on the application, which we think could be a good way of integrating proportionality in the fee calculation.

<ESMA\_QUESTION\_CP\_TAFE\_2>

**Q3: Do you agree with the approach for determining the authorisation fee for critical benchmarks? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_3>

**Q4: Do you think that a different authorisation fee should apply when ESMA has to establish a college of supervisors for the critical benchmark? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_4>

**Q5: Do you agree with the proposed first-year fee arrangements? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_5>

**Q6: Do you agree with the proposed definition of annual supervisory fee for administrators of a critical benchmark supervised by ESMA? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_6>

**Q7: Do you agree with the proposed definition of annual supervisory fee for recognised third country administrators? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_7>

ISDA is of the view that the annual supervisory fee for recognised third country benchmark administrators, regardless of revenue generated, is high and could potentially further disenfranchise the filing of relevant applications.

The complexities associated with fee calculation could amount to another reason for third country administrators to decide not to provide benchmarks in the EU, further cutting EU users off from being able to use these benchmarks, which are often vital to their investment and hedging activities relating to EU and non-EU markets.

ISDA is of the view that the current third country benchmarks regime in BMR already represents a significant threat to the ability of EU users to access third country benchmarks after the end of the BMR transition period, particularly where EU users represent a small proportion of the overall users (globally) of a specific benchmark (even where the benchmark in question is of relatively high importance from the perspective of EU users) and hence the revenue base of the third country administrator. This fee represents another input to the cost side of cost/benefit calculations undertaken by non-EU benchmark administrators when considering the various means by which they could make themselves compliant with BMR.

The proposed fee could also reduce competition as some third country administrators may decide not to provide benchmarks in the EU. These effects do not seem to be in line with the Benchmark Regulation's wider policy objectives.

ESMA may also wish to consider accounting separately for the costs of supervising critical benchmark administrators and third-country administrators. The proposal envisages a single supervisory cost pool, meaning that if ESMA fails to charge critical benchmark administrators a sufficient level of fees to recover the costs of supervision, third-country administrators of

recognised benchmarks will most likely have to bear the unrecovered costs. Also the anticipated resources for critical benchmarks are higher, so fees should be charged separately to avoid any unintended consequences for third country administrators.

Where ESMA incurs exceptional costs related to investigations or other supervisory actions related to one administrator, it may be unreasonable for ESMA to make other administrators bear those costs.

Please see the response to Q8 for a concrete proposal regarding fees.

<ESMA\_QUESTION\_CP\_TAFE\_7>

**Q8: Do you agree with the proposed approach to determine the applicable turnover?  
Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_8>

We would like to point out that turnover is not necessarily a representation of the level of risk presented by a benchmark administrator and therefore not necessarily linked to the level of supervision that would need to be performed by ESMA. In particular, the revenue of a benchmark administrator is not necessarily reflective of size or complexity of the administrator or the activities it conducts.

We would thus suggest a fee model (see below) based on the number of benchmarks administered by the firm as this is data that would be readily accessible. It is also a reasonable proxy for the amount of benchmark activity undertaken by the firm and therefore the level of supervision needed.

Given that the proposed formula may not be attractive to benchmark administrators that earn limited revenues from 'use' (as defined in the Benchmarks Regulation) within the EU relative to revenues generated outside the EU, we would suggest capping of supervisory fees to avoid creation of a fee regime which such administrators may view as disproportionate and disadvantageous.

The proposal envisages using third-country administrators' global revenues from benchmarks provision as an appropriate proxy for reflecting turnover in the fees to be paid by third-country administrators. This will be burdensome because ESMA envisages requiring third-country administrators to provide audited figures showing revenues generated by the provision of benchmarks globally, i.e. within the EU and outside of it. It is appreciated that the proposal to use global benchmark revenues is intended to make it simpler for administrators to identify and report revenues. However, for many third country administrators the bulk of their revenues could derive from non-EU related activity which is not supervised by ESMA and therefore it is questionable whether it is appropriate to include for ESMA fee calculation purposes. It may be difficult to identify global revenues in this way, in particular where there are internal uses of proprietary benchmarks in packaged products.

An overly costly and complex approach could represent one more reason for third-country administrators to decide not to seek recognition under BMR.

As noted by ESMA, firms' overall revenue per annual reports would often include revenue from other activities and therefore may not be the right metric for this purpose. For firms which undertake a range of activities, identification of revenue solely related to the provision of benchmarks may be very hard, if not impossible, depending on their model. For example, firms which do not charge a licence fee for use of their benchmarks but instead derive revenue from trading activity related to those benchmarks will find it hard to determine what proportion of any revenue is from trading activity and what proportion is from provision of a benchmark (nb: firms already pay fees to regulators in respect of trading activities, of which benchmark-linked trading activity may be a part). While it may be possible to make estimates of the revenue, that would not be sufficient to fulfil the requirement for provision of audited figures.

Moreover, the provision of 'audited' figures could imply that they need to be reviewed by a third party auditor. For firms which conduct a range of activities having figures specifically relating to benchmark administration audited by a third party would be a new requirement and one which seems unduly burdensome to facilitate fee calculation.

We would therefore suggest a banded fee model based on the number of 'benchmarks' (as defined in the EU Benchmarks Regulation, as opposed to the IOSCO Principles for Financial Benchmarks) and whether such benchmarks are 'significant' (as defined in the EU Benchmarks Regulation). Different fixed fee levels would apply according to, for example,

- (i) Number of non-significant benchmarks
  - a. 1 to 50
  - b. 51 to 500
  - c. More than 500
- (ii) Number of significant benchmarks
  - a. More than zero

Numbers would be counted on the basis of unique industry identifiers. The band structure would mitigate issues of if/when an index is deemed a benchmark.

Such a structure would be simple, verifiable and reflective of relevant EU benchmark activity and importance. Furthermore, consideration could be given to having lower levels of fees for ESG benchmarks to encourage development in that area.

<ESMA\_QUESTION\_CP\_TAFE\_8>

**Q9: Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_9>

**Q10: Do you agree with the proposed timing of payment of recognition and authorisation fees? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_10>

**Q11: Do you agree with the proposal to not reimburse administrators in case they decide to withdraw their application for recognition / authorisation before the end of the assessment by ESMA? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_11>

**Q12: Do you agree with the proposed timing of payment of annual supervisory fees? Please elaborate.**

<ESMA\_QUESTION\_CP\_TAFE\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_12>

**Q13: Do you agree with the proposed approach defining the reimbursement of costs to a national competent authority in case of delegation of tasks by ESMA under Article 48m of BMR? Please elaborate.**



<ESMA\_QUESTION\_CP\_TAFE\_13>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_CP\_TAFE\_13>