Financial Conduct Authority

Policy Statement PS16/4

Fair, reasonable and non-discriminatory access to regulated benchmarks

February 2016

Contents

In this Policy Statement we report on the main issues arising from Consultation Paper 15/18 (*Fair, reasonable and non-discriminatory access to regulated benchmarks*) and publish the final rules.

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Abbreviations used in this paper

CA98	Competition Act 1998
CBA	Cost benefit analysis
CCP	Central counterparty
CP	Consultation Paper
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
ESMA	European Securities and Markets Authority
EU	European Union
FICC	Fixed income, currencies and commodities
FRAND	Fair, reasonable and non-discriminatory
FSMA	Financial Services and Markets Act 2000
IOSCO	International Organization of Securities Commissions
IPR	Intellectual Property Rights
MAR[1]	Market Conduct Sourcebook
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
PS	Policy Statement
REC	Recognised Investment Exchanges Sourcebook
TFEU	Treaty on the Functioning of the European Union

1 Not to be mistaken for the abbreviation also commonly used for the Market Abuse Regulation.

1. Overview

Purpose

1.1 In our Consultation Paper, CP15/18[2], published on 3 June 2015, we set out proposals for fair, reasonable and non-discriminatory (FRAND) access to regulated benchmarks.

1.2 This Policy Statement (PS) summarises the responses we received to our Consultation Paper (CP) and our view on these responses. It also presents the amended Handbook text that will apply to benchmark administrators.

Background

1.3 Following the Government's response to implementing the Fair and Effective Markets Review's (FEMR)[3] recommendations on financial benchmarks, we implemented FEMR's recommendations[4] to bring seven additional benchmarks into regulatory scope on 1 April 2015. Respondents to our Consultation Paper, CP14/32, *Bringing additional benchmarks into the regulatory and supervisory regime*[5] raised concerns, however, regarding the unconstrained ability of benchmark administrators to set prices of benchmarks. In our subsequent Policy Statement, PS15/6[6], we noted these concerns and stated that we would consider whether additions to the Market Conduct Sourcebook (MAR) 8 rules (specifically MAR 8.3) were necessary in this regard.

1.4 Following reflection on this issue, we determined that there may be merit in additional rules.

1.5 We set out our reasoning for proposing the additional rules in our Consultation Paper CP15/18. The consultation closed on 3 August 2015.

1.6 In CP15/18, we stated that some benchmarks have become industry standard in the markets to which they relate. We stated further that the eight regulated benchmarks are the most widely used benchmarks in the markets to which they relate. Given the way that the benchmarks are used, market participants who reference such an industry benchmark may not be able easily to switch to an alternative. At the same time, a benchmark administrator, with general responsibility for the organisational and governance arrangements for the benchmark it administers, controls the terms and conditions for access to the benchmark so that no other firm can provide that benchmark. This means that the administrator of an industry standard benchmark may have market power, such that it can vary the terms, including the price at which

2 www.fca.org.uk/static/fca/documents/consultation-papers/cp15-18.pdf.
3 www.gov.uk/government/uploads/system/uploads/attachment_data/file/389479/FEMR_recommendations_on_financial_benchmarks_response_final.pdf.
4 www.bankofengland.co.uk/markets/Documents/femraug2014.pdf.
5 www.fca.org.uk/static/documents/consultation-papers/cp14-32.pdf.
6 www.fca.org.uk/static/documents/policy-statements/ps15-06.pdf.

it offers that benchmark, with limited fear of customers switching quickly to an alternative, or of other suppliers entering to provide an alternative.

1.7 We observed in the CP that while the possession of market power is not in itself anti-competitive, there is a risk that benchmark administrators could behave in anti-competitive ways and exploit their market power in a way that may adversely affect competition.

1.8 Therefore, we proposed introducing FRAND requirements to limit the ability of benchmark administrators to exploit their market power in a way that might hinder effective competition.

Summary of proposals

1.9 In summary, our proposals required regulated benchmark administrators to grant access to and licences to use benchmarks on a fair, reasonable and non-discriminatory basis, including with regards to price. We proposed that such access should be provided within three months following a written request. We proposed that different fees should be charged to different users only where this is objectively justified, having regard to reasonable commercial grounds such as the quantity, scope or field of use requested. Our proposals also set out a list of non-exhaustive factors that we may consider in assessing whether the terms of access to a benchmark are FRAND.

1.10 The requirements used similar language to the Markets in Financial Instruments Regulation (MiFIR) Article 37 that will apply to access to benchmarks by central counterparties (CCPs) and trading venues for the purposes of clearing and trading. Considering the diversity of users of benchmarks, the proposals we consulted on had a broader scope and applied to all users rather than only to CCPs and trading venues. However, we have revised our proposals following consultation as subsequently set out in this Policy Statement.

1.11 We expect MiFIR Article 37 to come into force in 2019. We note that there is also a current European Union (EU) proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (EU Benchmarks Regulation). We may need to review the benchmarks rules, including our FRAND rules, once the EU Benchmarks Regulation has been finalised, to determine what may need to be replaced or adapted to reflect the requirements set out in the relevant EU legislation. We discuss how we intend to proceed in regards to appropriate consistency with the EU Benchmarks Regulation more fully in subsequent paragraphs.

1.12 To the extent that current or future arrangements would not meet the FRAND requirements, the FRAND rules will have some impact in the way benchmarks are accessed, notably in respect of administrators' approach to setting the level of their fees and conditions of access. It is therefore important that our requirements are flexible enough to ensure that benchmark administrators can operate effectively and price in a manner that reasonably reflects the costs and risks of administering a benchmark, at the same time as ensuring the FRAND requirement is satisfied. This consideration was reflected in our proposals.

Responses to the Consultation

1.13 We are grateful for the feedback we received. We received 18 responses to our consultation from firms engaged in benchmark activities including benchmark users, benchmark administrators, trade associations, and market infrastructure providers. Responses to our proposals were mixed. While benchmark users generally agreed with our proposals to introduce FRAND rules and guidance, most benchmark administrators did not entirely agree that rules were required.

1.14 We have carefully considered the responses we received and have decided to make some modifications to our proposals. As we stated in our CP, we want our FRAND rules to be consistent with future EU regulations such as the EU Benchmarks Regulation and the relevant article on access to benchmarks in MiFIR. Any FRAND or similar provisions in the EU Benchmarks Regulation may apply to a different scope of users from that in Article 37 of MiFIR. Whilst any relevant provision in the EU Benchmarks Regulation may be expected to cover a wide range of benchmark users, Article 37 MiFIR regulation covers only benchmarks users who are central counterparties and 'trading venues' (defined in the Markets in Financial Instrument Directive (MIFID II) as, multilateral trading facilities (MTFs), regulated markets, and organised trading facilities (OTFs)).

1.15 At a time where the Benchmark industry is substantially changing, we see merit in FRAND access requirements covering the full range of benchmark users. After careful consideration, however, we have decided to await finalisation of the EU Benchmarks Regulation before applying a FRAND provision that applies to all users, and initially to align the scope of users covered by our proposals with MiFIR Article 37. This will allow us to ensure appropriate consistency between our rules and the longer-term regulatory requirements applying to each set of users.

1.16 This means that at this stage, our FRAND provisions would cover benchmarks users who are central counterparties, multilateral trading facilities (MTFs) and regulated markets[7]. We are effectively bringing forward to 2016 the implementation of MiFIR Article 37 that is expected to apply from 2019. We refer to these users as 'relevant users' in our rules.

1.17 If the EU Benchmarks Regulation contains a FRAND requirement for users not already covered by our revised proposals, then, we will look to extend the coverage of our FRAND provisions also to cover those users. This would be in line with the policy intention set out in our Consultation Paper to apply FRAND requirements to all users of specified benchmarks.

1.18 In this Policy Statement, we have provided responses based on the feedback we received on specific questions we asked in our Consultation Paper. As we have explained in the preceding paragraphs, our made rules will now initially apply only to those we are describing in this Policy Statement as 'relevant users'.

Structure of the Policy Statement

1.19 In the subsequent chapters of this Policy Statement we set out:

- A summary of the feedback we received on the questions in our Consultation Paper.
- Our response to the feedback.

7 We are not proposing to include all categories of venue covered by the MiFIR provisions in our rule at present because one category - Organised Trading Facilities - will not be introduced until MiFID II has come into force.

- The changes we have made as a result of the feedback.
- The made rules.

Who should read this Policy Statement?

1.20 The requirements set out in this Policy Statement affect the administrators of the eight regulated benchmarks. They will also affect relevant users and potential relevant users of these benchmarks. These changes may also be of interest to other firms with a significant profile in the global benchmark industry, trade associations and other stakeholders such as transparency groups. They may be of indirect interest to consumers and organisations which represent consumers.

Next steps

1.21 The Handbook provisions come into force on 1 April 2016.

2. Summary of feedback and responses

Our proposals

2.1 In Chapter one of this PS (paragraphs 1.9 to 1.12), we summarised the proposed FRAND requirements we consulted on. Our proposals required a benchmark administrator to grant access to and licence regulated benchmarks on fair, reasonable and non-discriminatory terms and conditions (including price).

2.2 In the rest of this chapter, we summarise:

- feedback we received on the questions we asked; and
- our response to the feedback.

2.3 In our Consultation Paper, we asked the following question:

> ***Q1: Do you agree with our proposals to introduce FRAND rules and guidance?***

2.4 Responses to this question were mixed.

2.5 Benchmark users generally agreed with our proposals while most benchmark administrators did not entirely agree that rules were required.

2.6 One respondent stated that our proposals were not sufficient and that we should widen our scope to ensure and promote fair, reasonable and non-discriminatory access to market data and the right to create benchmarks from this data. On the other hand, while agreeing with the proposals, one respondent thought that the scope of the proposals should be restricted to the use of benchmarks by trading venues or CCPs (rather than all benchmark users), as in Article 37 of MiFIR and the relevant provisions in the European Market Infrastructure Regulation (EMIR).

2.7 We have grouped the responses under headings for ease of reference.

Necessity of the rules

2.8 Some respondents, in particular benchmark users, agreed with us that some benchmark administrators have or may gain market power and that the FRAND rules were a useful addition. Most benchmark administrators did not fully agree with our proposals, stating that our competition powers and applicable competition law (i.e., the Chapter 1 and 2 prohibitions in the Competition Act 98 (CA98) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) should be sufficient to ensure FRAND provision of benchmarks. One respondent argued that under the Chapter 2 prohibition in CA98 and Article 102 TFEU, dominant undertakings are already under a duty to provide their products and services on a FRAND basis. This respondent suggested we introduce the concept of 'significant market

power', equivalent to the concept of dominance under EU/UK competition law, to align the proposed FSMA FRAND requirements with the perceived competition problem and avoid the risk of 'disproportionate' and 'unnecessary' regulation.

2.9 Another respondent stated that we had not imposed FRAND rules in other markets where a fee is charged to customers and there is no reason to treat benchmarks differently.

2.10 There was a comment that FRAND rules may potentially interfere materially with the rights of benchmark administrators freely to set the terms of their licensing agreement and that FRAND rules should allow parties to agree to enter into bespoke licence agreements and not be forced to use a standard form.

Our response

We have carefully considered this feedback and set out our response below.

We have a broad range of legal tools to address competition concerns. When considering a potential competition issue, we choose the tool that will allow the most efficient and effective investigation and if necessary remedy of the possible harm identified.[8]

In this instance, we are satisfied that setting FRAND rules will give benchmark administrators greater clarity around their obligations to relevant users (defined in paragraph 1.16). We consider these proposed rules necessary and relevant to our policy objective which is to prevent misuse of any market power benchmark administrators may have. In assessing whether the terms of access meet our FRAND requirements, we will take into account competitive conditions within the relevant market (see MAR 8.3.22G). If that market is competitive, then it is likely that the benchmark administrator would be unable to sustain terms that were not FRAND. For this reason, a separate requirement to establish 'significant market power' (as a respondent suggested) for the benchmarks to which our rules will apply is unnecessary.

With this approach, our desire is for benchmark administrators and relevant users to negotiate and agree terms of use without recourse to us or other authorities. However, the rules specify the standard we would enforce should we consider intervention appropriate.

We note the submissions arguing that dominant undertakings are already under a duty to supply on a FRAND basis under the Chapter 2 prohibition and/or Article 102 TFEU, but think that a FRAND rule usefully establishes beyond doubt that such a requirement applies.

Our FRAND rules will require benchmark administrators to grant relevant users access on a fair, reasonable and non-discriminatory basis, but benchmark administrators will retain the freedom to set the terms of their licensing agreement within the limits of the FRAND rules. Parties remain free to negotiate prices and other terms of the licence agreement on a bilateral basis and free to enter into bespoke licence agreements if they choose, provided that these arrangements comply with the overarching FRAND requirements in the rules.

8 www.fca.org.uk/your-fca/documents/finalised-guidance/fg15-08, see paragraphs 2.18, 2.19.

Our FRAND consultation was in large part in response to concerns from respondents to our CP14/32 consultation on the unconstrained ability of benchmark administrators to set the prices of their benchmarks. We stated in PS15/6 that we would consider the introduction of rules in this regard. Additionally, the eight regulated benchmarks are major benchmarks in the fixed income, currencies and commodities (FICC) markets[9]. They are important to our market integrity objective and the continuity of access to these benchmarks on a FRAND basis is therefore important for confidence in the financial system.

However, as explained in paragraphs 1.13 to 1.17, we have decided at this stage not to pre-empt the final outcome of the EU Benchmarks Regulation negotiations and initially to align the scope of users covered by our proposals with those covered by MiFIR Article 37.

We address the point on access to market data in our response to question 2 below.

Scope of the rules

2.11 Some respondents, mostly benchmark users, agreed that the eight regulated benchmarks should remain accessible to all users. Some respondents compared the scope of our proposals to the scope of competition law. One respondent suggested that the scope of our FRAND proposals is potentially wider than competition law. The same respondent stated that FRAND is a concept borrowed from intellectual property law (specifically industry standards involving patents), and is not suitable in the benchmarks context. Another respondent stated that FSMA (under which our proposed FRAND rules would be set) is not appropriate to deal with the complex legal and economic assessment that a FRAND analysis requires.

2.12 Some respondents commented that the FRAND requirements should not apply only to regulated benchmarks.

2.13 Another respondent suggested that the objectives set out under FRAND should not be restricted to the regulated benchmarks, but are actually overarching principles of good regulation and therefore widely applicable. This respondent referred to the International Organization of Securities Commission's (IOSCO) 38 Principles of securities regulation.

Our response

We have carefully considered this feedback and set out our response below.

Regarding the scope of benchmarks, the UK government passed legislation and brought eight major benchmarks into regulation. We are confident that the eight major benchmarks under regulation are the most used in the markets to which they relate. Our competition powers apply generally to all firms in the financial services sector.

It should be noted that while benchmark users that are not trading venues or CCPs responded positively to our proposals, as explained in paragraphs 1.13 to 1.17, we have decided initially to align the scope of users covered by our proposals with those covered by MiFIR Article 37. Should it be confirmed that

9 www.bankofengland.co.uk/markets/Documents/femraug2014.pdf.

the EU Benchmarks Regulation contain a FRAND provision, then we will proceed as outlined in paragraph 1.17 of this Policy Statement.

It should also be noted that for the users who will not be covered by our FRAND rules, we can use our concurrent competition powers if we were to find that a benchmark administrator was breaching Article 102 of the Treaty on the Functioning of the European Union (TFEU)/Chapter 2 of the Competition Act 98 (CA98) by charging excessive licensing fees or abusively discriminating between users.

We have explained our justification for introducing FRAND rules in the 'Necessity for the rules' response above and the 'Consistency with other regulation' response below.

Consistency with other regulation

2.14 Many respondents, generally benchmark administrators, compared our proposals with MiFIR Article 37. While some respondents considered our proposals to be in line with MiFIR, others did not. Some added that it would be inappropriate to introduce UK regulation before the EU Benchmarks Regulation comes into force or while it is still being negotiated. They suggested this would be premature and add to the already higher level of regulation in the UK compared with other countries, increasing regulatory fragmentation and barriers to entry in the UK benchmark market. They also commented that our proposals risk inconsistency with EU Benchmarks Regulation when this comes into force. Another respondent stated that the FRAND proposals amounted to gold-plating because of the extension of the scope to all benchmark users.

Our response

We have carefully considered this feedback and set out our response below.

The Wheatley Review (2012) and the Fair and Effective Market Review (2014) put the UK at the forefront of benchmarks regulation. FRAND rules are in line with those initiatives and complement our existing benchmarks regulation.

The Wheatley Review makes several references to FRAND in its report: For example, the Report states that '*Widely used benchmarks should also be available to market participants on fair and non-discriminatory commercial terms*[10].' The Report also states that '*where benchmarks are subject to intellectual property provisions, there may be an incentive to prevent fair and non-discriminatory access to those benchmarks through licensing agreements. Fair access is particularly important for systemically relevant benchmarks*[11];' Further, the Report states that '*fair and non-discriminatory access: benchmarks which are systemically relevant should be available to all market participants on a fair and non-discriminatory basis with reasonable commercial terms*[12];'

10 www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf, paragraph 7.11

11 www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf, paragraph 7.12

12 www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf, paragraph 7.13

We reiterate our CP point that we do not see a case for delaying the establishment of a clear FRAND obligation. FRAND terms are not new to our Handbook. For instance, recognised investment exchanges must have objective, non-discriminatory access criteria (REC2.7.1A UK) and if they offer firms access to their arrangements for publishing quotes, must do so on reasonable commercial terms and on a non-discriminatory basis. There are also FRAND style requirements in relation to the publication of pre and post trade information. Outside of our Handbook, FRAND is used in other areas of financial services: for instance General Direction 2 from the Payment Systems Regulator requires payment systems operators to provide access on a FRAND basis.

Given the global nature and extensive use of the eight regulated benchmarks in a wide range of financial markets and products, our aim with the proposals was to ensure that all users, not just a subset, are able to access regulated benchmarks on FRAND terms,.

However, given the feedback from respondents' and other considerations as set out in paragraphs 1.13 to 1.17, we have decided not to pre-empt the outcome of the EU Benchmarks Regulation negotiations but to align the scope of users covered by our proposals with MiFIR Article 37 with the intention to extend the scope if the EU Benchmarks Regulation contains a FRAND provision.

Competition in the benchmark industry

2.15 As previously stated, some respondents, mostly benchmark users, agreed with us that some benchmark administrators have or may gain market power and that the FRAND rules were a useful addition. Other respondents, mostly benchmark administrators, stated that the benchmark industry is competitive and alternatives to benchmarks do exist, particularly for benchmarks based on publicly available data where there is substitutability. These respondents argued we had not adequately demonstrated the need to introduce the FRAND proposals. Some believed that market forces should be the primary mechanism for shaping costs and terms of access to financial indices, including regulated benchmarks.

Our response

We have carefully considered this feedback and set out our response below.

In developing these proposals, we considered the needs of both benchmark administrators and benchmark users. As noted above, our FRAND consultation was in large part in response to concerns from respondents to our CP14/32 consultation on the unconstrained ability of benchmark administrators to set the prices of their benchmarks. The scope of our rules is limited, as stated in CP15/18, to the eight benchmarks that we regulate, which are the most widely used benchmarks in their respective markets. It is possible that alternative benchmarks may be developed over time and this is sometimes recommended[13], but this does not appear to be imminent.

13 www.financialstabilityboard.org/wp-content/uploads/r_140930.pdf.
www.iosco.org/library/pubdocs/pdf/IOSCOPD444.pdf.
www.bankofengland.co.uk/markets/Documents/cpsonia0715.pdf.

Caution in introducing price regulation

2.16 One respondent stated that benchmarks should be available at a fair charge, despite the degree of market power that some benchmark administrators are likely to have. The same respondent thought the new obligations would give them greater confidence in the administration of benchmarks.

2.17 Benchmarks administrators and their trade associations saw the proposals as price regulations and urged caution because we had not conducted the necessary factual analysis to justify this introduction. They argued that new regulation should only be introduced where there is evidence of market failure or where no existing regulation addresses the identified concerns adequately. These respondents stated that we have not provided evidence of anti-competitive behaviour.

2.18 Some respondents stated that the proposals should balance an administrator's interests, financial commitments and the need to protect intellectual property with the benchmarks users' interests.

2.19 There was also a comment that the FRAND rules ignore the fact that the fees levied by benchmark administrators are, in the view of that respondent, very small.

Our response

We have carefully considered this feedback and set out our response below.

Our view is that the proposals contain sufficient flexibility to account for individual circumstances and so balance the needs of both administrators and relevant users, so that competition is not distorted. As we stated in CP15/18: *'…we consider it important that such rules are flexible enough to ensure that benchmark administrators can operate effectively and price in a manner that reasonably reflects the costs and risks of administering a benchmark. This was recognised in the Wheatley Review which stated that the review '…understands that the balance of incentives may not be sufficient to encourage a new administrator to take ownership of the benchmark in absence of a financial incentive'*.[14] We also stated in CP15/18 that the FRAND proposals *'…should enable benchmark administrators and users to agree amongst themselves what amounts to a FRAND price without the need for further regulatory intervention'*..[15]

Our FRAND rules are not a formulaic process but leave a margin of discretion to benchmark administrators to determine the benchmark's prices in a commercial way that allows for the benchmark's sustainability and investment and other enhancements in the benchmark. We want benchmark administrators to agree terms of access without the need for our intervention, and to do so with users we are referring to as 'relevant users' (see paragraph 1.16) having regard to the rules. We also emphasise that there are aspects to FRAND other than price. These are the terms and non-discrimination aspects that we expect administrators to adhere to when granting access to the benchmark.

14 www.fca.org.uk/static/fca/documents/consultation-papers/cp15-18.pdf, paragraph 2.4

15 www.fca.org.uk/static/fca/documents/consultation-papers/cp15-18.pdf, paragraph 1.13

The FRAND rules are there to ensure that relevant users of the benchmark pay a reasonable level of licence fees and benchmark administrators can operate effectively and price in a manner that reasonably reflects the costs and risks of administering a benchmark, while preventing unfair, unreasonable or discriminatory pricing. The proposed rules address the risk to relevant users that benchmark administrators misuse the market power they may have.

As stated elsewhere in this Policy Statement, it should also be noted that for the users who will not be covered by our FRAND rules, we can use our concurrent competition powers if we were to find that a benchmark administrator was breaching Article 102 of the TFEU/ Chapter II CA98 by charging excessive licensing fees or abusively discriminating between users.

Although one respondent felt that the size of fees levied was small, these fees are still significant and could increase. Our view is that, as stated in the cost benefit analysis (CBA), the benefits of the proposed rules significantly outweigh the costs and we therefore consider that there is merit in introducing the proposed rules irrespective of some parties' perception of the sums involved being relatively small.

Rights of defence

2.20 One respondent wanted the proposals to explicitly provide for the adapting of procedures under FSMA to ensure that a benchmark administrator's rights of defence will be no less robust than would be the case under a CA98 abuse of dominance investigation.

Our response

We have carefully considered this feedback and set out our response below.

The proposed rules are being made under our rule-making powers in FSMA and therefore we will enforce the rule according to our rights and duties under FSMA. While there are some differences in the procedures for FCA enforcement action under the Competition Act 98 and FSMA, FSMA enforcement is subject to rigorous and established processes that fully respect the rights of defence for firms subject to FSMA.

Reasonable return on capital

2.21 One respondent requested a usable definition for a 'reasonable return on capital'. The respondent stated that this should include as a minimum a spread over the near risk free rate in the currency concerned (presumably GBP) and a methodology to calculate and audit the capital employed, together with a basis for a periodic recalculation. They also requested we set out the proposed relationship between the proposed FSMA treatments of 'reasonable return on capital' compared with the EU understanding of 'reasonable commercial basis'.

Our response

We have carefully considered this feedback and set out our response below.

On providing a definition of 'reasonable return on capital', we consider that a reasonable return on capital should relate to the administrator's cost of capital. This would be determined on a case-by-case basis, factoring in the particular circumstances of that benchmark's administrator including costs incurred and risks borne in commencing and continuing to provide a specified benchmark.

Regarding the request that we set out the proposed relationship between the proposed FSMA treatments of 'reasonable return on capital' and the EU understanding of 'reasonable commercial basis', we note that 'reasonable return on capital' as used in our guidance relates to the return on capital by the benchmark business as a whole, whereas the term 'reasonable commercial price' in MAR 8.3.21R (1) relates to the price charged to a particular user. The European Securities and Markets Authority's (ESMA's) Technical Advice to the Commission of 19 December 2014 on what is a 'reasonable commercial basis' in MiFID II and MiFIR is unrelated to Article 37 of MiFIR. ESMA's advice is in the context of trading venue's trading data fees, which is part of a wider set of provisions that also cover appropriate disaggregation of market data.

2.22 We set out in Appendix 1 of CP15/18 the draft FRAND rules and guidance and have summarised these requirements in paragraphs 1.9 to 1.12 of this PS.

2.23 In our Consultation, we asked the following question:

> ***Q2: Do you agree with the wording of the FRAND rules and guidance as set out in Appendix 1 of this Consultation Paper?***

2.24 Responses to this question were also mixed. While benchmark users generally agreed with our proposals, most benchmark administrators did not fully agree.

2.25 Comments received covered a number of areas and we have grouped these under the relevant rule/guidance heading for ease of reference. Many respondents commented on several aspects of the rules.

2.26 Many respondents cautioned against a 'one size fits all' approach to FRAND. Also, some respondents questioned the cost-based approach inherent in the proposed requirements, with one respondent stating that this approach is disproportionate, unwarranted and too interventionist.

MAR 8.3.19R

Licences, data and information on composition and methodology

2.27 There were many comments regarding the data being licensed and how the data can be used, with some respondents stating that this should be considered on a case-by-case basis by administrators.

2.28 There were requests for us to define certain terms. Some respondents asked what is meant by 'relevant price and data feeds' in the proposed requirements. One of the respondents stated

that this was particularly important because if the reference to 'data feeds' was understood as 'input data', this could be a significant issue from an intellectual property law perspective. One respondent also asked for a usable definition of a 'licence'. This respondent presumed there would be a minimum number of expected terms in order to qualify as such, and it would not include an ad-hoc or transitory arrangement. They suggested we consider whether benchmark data can only be provided by an administrator under a formalised licence. There was also a request to define various terms such as 'derived data' and 'manipulated data'.

2.29 On transparency of composition and methodology, one respondent expected information on the composition, methodology, conditions and pricing of a specified benchmark to be publicly available free of charge. Conversely, another respondent stated that such access should not include the underlying submission data, disclosure of weightings or details of the benchmark methodology that are proprietary. They also stated that requiring operators to publish the detailed constituent weighting of each benchmark would be inappropriate. This would go beyond the notion of composition and could affect confidential elements of benchmark methodology and/or technology. It could facilitate manipulative behaviour as the publication of such detailed information could make benchmark manipulation more effective. This respondent also suggested the use of such data should be restricted to specific requests and internal purposes such as risk management, market surveillance, regulatory compliance etc. When the data is provided on a wider basis, the respondent stated, the legal framework should ensure that the users have appropriate system and controls in place to protect the confidentiality of the sensitive information. The respondent believes that the value of underlying data to a benchmark should not be subject to any data provision requirements/requests.

2.30 Similarly, one respondent stated that access to licences without any limitation on the purposes for which the licence is requested leaves benchmark administrators exposed as this may encourage speculative requests or those seeking to access confidential information for the purposes of unfair competition rather than commercial reasons.

2.31 Another respondent emphasised the importance of clarifying that information is licensed, to avoid any inadvertent implication of an independent obligation for benchmark providers to provide such information other than on a licensed basis. They argued that allowing the possibility of arguments to the contrary would risk creating material disincentives for investment in administration and innovation by independent index providers.

Our response

We have carefully considered this feedback and set out our response below.

We agree that there is no 'one size fits all' solution for benchmarks. We expect there to be some case-by-case consideration of what is appropriate access, taking into account the specifics of the benchmark and relevant users/licensees. However, we want to avoid a relevant user's request for relevant information being rejected or delayed on unreasonable grounds.

Our proposals are not a single price formula and are not intended to prejudice benchmarks administrators' intellectual property rights (IPRs). Benchmark administrators still have the right to protect their IPRs adequately (e.g. prevent reverse engineering of the data, prevent sub-licence etc.). However, they must grant access to relevant users of their benchmarks on a FRAND basis.

Regarding intellectual property, proprietary (or sensitive) information or underlying (or sensitive) data, we are not requiring that such information be provided as part of a licence. We encourage benchmark administrators in general to publish their methodologies in compliance with the International Organization of Securities Commissions' (IOSCO) Principles of Financial Benchmarks in particular Principle 11: '*The Published Methodology should provide sufficient detail to allow Stakeholders to understand how the Benchmark is derived and to assess its representativeness, its relevance to particular Stakeholders, and its appropriateness as a reference for financial instruments*'.[16]

We expect that data feeds and information should include both current and historical benchmark data that can be provided for various purposes, such as research. We agree with respondents that certain data could be misused if provided on a granular and real time basis. However, we expect that data should be kept by the administrators so it can be requested by users on a delayed basis.

In addition, a benchmark administrator is free to provide a benchmark and any relevant data to relevant users if the arrangements are properly documented and the terms of provision are clear. We note that the IOSCO Principles for Financial Benchmarks provide a framework for good practice including transparency.

We recognise that relevant users should use the licence and data provided to them in a responsible and legitimate manner and we are not absolving relevant users of this responsibility.

Regarding what is meant by 'relevant price and data feeds', and 'licence' and other specific terms, these terms may have different meanings in relation to different benchmarks. Therefore, we are not proposing to provide specific guidance on these terms.

MAR 8.3.20R

FRAND basis

2.32 One respondent said that the FRAND rules should state that benchmark administrators are only required to grant access for legitimate commercial purposes or for fair dealing purposes such as non-commercial or private study.

Access within three months

2.33 We received many comments on granting access to the benchmark within three months. While benchmark users thought this time period was too long, benchmark administrators thought it was too short or that we should be flexible regarding the timeframe.

2.34 Respondents stated that it is not always possible to conclude these access arrangements within three months, even if both parties are negotiating in good faith and in a focused manner, especially when negotiating with other vendors/distributors. One respondent suggested that the wording in the draft rules be amended to 'using reasonable endeavours to grant access without undue delay'.

2.35 Similarly, another respondent stated that negotiating licence agreements involves many complex issues, not all of which directly relate to the intellectual property in question. They

16 www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf, pages 22 and 23.

also thought specifying a timeframe could be to the user's advantage. The user could refuse to agree to any terms offered by the benchmark administrator (irrespective of whether or not access was FRAND), knowing that the benchmark administrator would have to agree within three months to avoid breaching the regulatory requirements.

2.36 One respondent stated that the three month access period does not take account of the risks associated with dealing with a particular party.

Our response

We have carefully considered this feedback and set out our response below.

FRAND basis
We have addressed this point in our response to MAR 8.3.19R above.

Access within three months
We have considered the comments on providing access to a benchmark within three months. While we consider three months to be a reasonable timeframe within which to provide access to a regulated benchmark, we acknowledge that negotiating licences may not always be straightforward (as stated by some respondents). Therefore, we have amended MAR 8.2.30R (2) to state as follows: *'without undue delay, following a written request by the relevant user'*, and added guidance stating that we expect access to be provided within three months.

MAR 8.3.21R

Reasonable commercial price

2.37 Some respondents commented on benchmark administrators' pricing tactics. One respondent urged us to be conscious of pricing schedules which could obscure the overall economic impact of a benchmark administrator's fee collection. For example, a benchmark administrator could charge based on the individual activities of data recipients and then charge a separate fee for a variety of conceivable activities. No one fee seems overly burdensome, but the aggregated fees charged for ordinary course participation in financial markets may turn out to be wholly unreasonable compared with the aggregated costs associated with making such data available. Other respondents said that they were charged numerous times for the same data.

Different categories of users

2.38 Some respondents commented on access by different categories of users. On a related point to 'reasonable commercial price' above, one respondent suggested it would be appropriate to consider the price at which access is granted to other users, provided this consideration is limited to other comparable users.

Definition of terms

2.39 One user requested that we define what is meant by 'quantity, scope or field of use requested'.

2.40 On a different note, one respondent suggested that the FRAND rules should state that they will not prejudice a benchmark administrator's IPR.

Our response

We have carefully considered this feedback and set out our response below.

Reasonable commercial price
Regarding pricing, we note the comments relating to the overall economic impact of a benchmark administrator's fees. We expect benchmark administrators to be open and transparent with relevant users regarding their pricing methods and schedules, as set out in the proposed FRAND requirements.

Different categories of users
The proposed rules do not require uniform pricing for all relevant users. Regulated benchmark administrators may differentiate their prices between different relevant users or categories of relevant users where justified by differences in quantity, scope or field of use, but they must treat like cases alike, and may treat unlike cases differently. It is important that no user is placed at a competitive disadvantage.

Definition of terms
On defining 'quantity, scope or field of use requested', we refer to our comments on MAR 8.3.19R. We stated that these terms may have different meanings in relation to different benchmarks. Therefore, we are not proposing to provide guidance on any specific terms.

We have addressed the IPR point in MAR 8.3.19R

MAR 8.3.22G

Competition and potential competition in the market

2.41 One respondent proposed that we should prevent benchmark administrators from unfairly disadvantaging downstream competitors by means other than price. For example, by providing less advantageous technology for the delivery of benchmark data to competitors of its downstream business, such as slower data feeds. The respondent added that data is often provided under complex agreements that are rife with conditions and restrictions on the recipients' use of the data, and an administrator could disadvantage competitors of its affiliated business by inserting contract restrictions (e.g. against the creation of derived data) into its contracts with unaffiliated businesses while enforcing restrictions against the unaffiliated business more vigorously. Additionally, they say that such contracts could include 'poison pill' provisions. These are benign in the context of an agreement between affiliated entities, but deeply problematic in an agreement between companies that compete in various markets. For instance, terms requiring the disclosure of confidential business information to the benchmark administrator that is not truly necessary for its administration. The respondent proposed to address this concern by amending the proposed text of MAR 8.3.22G (3). Other respondents also suggested amendments to the proposed MAR 8.3 FRAND requirements.

2.42 The respondent also advocated removing reference to 'markets' from MAR 8.3.22G because this suggests that the competitive impact must be recognisable in a 'relevant market' – as understood in competition law – for us to be able to intervene effectively against measures that would be problematic for downstream competition. They argued that debates about the definition of the relevant market would be an unnecessary distraction from our core authority to prevent inappropriate behaviour by benchmark administrators, regardless of the precise scope of the financial market at issue. On the other hand, another respondent thought

we should provide further guidance on how the term 'market' should be interpreted. One respondent believed it appeared inappropriate to consider the degree of competition within the market when considering price, on the basis that the benchmarks subject to our regulation have been selected because of their market position. Another respondent stated that market power should not be a relevant criteria in MAR 8.3.22G (1).

2.43 Another respondent considered MAR 8.3.22 (4) G to be inconsistent with MAR 8.3.21R (2), which, they said, correctly articulates the principle of non-discrimination. Another respondent observed that the principle of non-discrimination does not require that different situations be treated comparably, i.e. two licensees in different circumstances may receive different terms and conditions if justified by their particular circumstances.

2.44 There were also comments on what constitutes 'competition and potential competition' in a market and requests for guidance on this.

2.45 One respondent stated that MAR 8.3.22G should apply to underlying market data sources and to the rights available from these data sources to use this data for the purposes of benchmark creation and licensing.

2.46 One respondent commented that they were concerned about how we would determine whether fees charged bear a 'reasonable relationship to the costs and risks of producing the specified benchmark'.

2.47 There was also a suggestion that we include the ease or difficulty of a benchmark's user ability to switch to an alternative benchmark in MAR8.3.22G.

Aggregate fees

2.48 Regarding aggregate fees, respondents stated that benchmark administrators are not responsible for all the costs incurred by benchmark users. In most cases, Market Data Vendors are the final distributors adding their mark up or even levying additional charges for special data (for example, valuation data or historical data) which might be needed by different users. Therefore a benchmark administrator may not be in a position to fulfil the 'aggregate fees' requirement.

Our response

We have carefully considered this feedback and set out our response below.

Competition and potential competition in the market

As previously noted, our rules will apply to eight regulated benchmarks which are major benchmarks in FICC markets. In deciding whether or not an individual price is FRAND, we may consider the degree of competition and potential competition in the relevant market. If a market is competitive, it is likely that the terms of supply within it will be FRAND because users would move to an alternative benchmark were this not so. Regarding the comment on whether non-discrimination allows different prices to be charged to different users, we reiterate our previous point that the proposed rules do not require uniform pricing for all users where there are differences in the quantity, scope or field of use.

On the suggested amendment to MAR 8.3.22G (3) and the comment on removing references to 'markets', we consider that it is useful to analyse

the competitive dynamics if necessary. We accept that users may be put at a competitive disadvantage (and competition distorted) by terms of supply other than price. Therefore, we will amend MAR 8.3.22G (3) to refer to 'terms of access', which has a wider range but includes fees charged.

Regarding the request for guidance on what constitutes 'competition and potential competition', we think these terms are sufficiently clear. Therefore, we will not be giving specific guidance.

On the suggestion that we consider the ease of switching to another benchmark, we think that this would be captured by 'the degree of competition or potential competition' for the supply of the specified benchmarks in MAR 8.3.22G (1).

MAR 8.3.22 (4) G is consistent with MAR 8.3.21R (2) – discrimination may occur when similar terms are applied to dissimilar circumstances, or when dissimilar terms are applied to similar circumstances.

On a general note regarding MAR 8.3.22G, this guidance sets out some non-exhaustive factors. We may consider some, or all of these factors when deciding if access to a regulated benchmark is FRAND. We may also consider factors not included in this guidance.

Aggregate fees
Our MAR 8.3 rules apply only to the administrators of the current regulated benchmarks. Therefore, on 'aggregate fees', we are referring to fees charged directly by the benchmark administrators to relevant users, not third party fees.

Other comments

When we will intervene

2.49 Another respondent suggested we articulate when and how competitors, customers and others could request that we review a specific fee or fee structure. They argued that otherwise, benchmark administrators may not feel compelled to respond quickly to requests challenging the appropriateness of a particular fee or fee structure. Similarly, one respondent felt it would be beneficial to have a more detailed explanation of how the considerations in MAR 8.3.22G will be proved.

Existing licences and agreements

2.50 Some respondents commented that the proposals should not affect existing contracts as this would result in legal uncertainty and potentially put such parties in an economically disadvantageous situation.

Our response

We have carefully considered this feedback and set out our response below.

When we will intervene
We will assess the considerations in MAR 8.3.22G on a case-by-case basis, looking at all information relevant to the case. If we think that the FRAND rules have been breached, our review may take considerable time and resources, subject to the case's complexity. Therefore, we expect parties (benchmark

administrators and relevant users) to take all reasonable steps to agree what a FRAND provision of a benchmark is or should be.

Existing licences and agreements
On existing licences and agreements, we stated in CP15/18 that '*The proposed FRAND rules and guidance will apply to existing and future pricing and licensing arrangements. They will not apply retrospectively*'.[17] This means we will not ask for adjustments to fees incurred prior to the rule coming into force. Parties (benchmark administrators and relevant users) to existing contracts will not need to renegotiate fees already incurred for services already provided. However, prices must be FRAND once our proposed rules enter into force and existing contracts may need to be reviewed if the contractual terms and prices to be paid from that moment on are not FRAND.

Regarding the cost-based approach comments made by respondents, we do not expect cost to be the only consideration when pricing a benchmark. However, the fees charged should bear a reasonable relationship to the costs and risks of producing the benchmark, including a reasonable return on capital.

Cost benefit analysis

2.51 We set out our CBA in Annex 1 of CP15/18. We explained that if left unchecked, a benchmark administrator could exercise its market power by charging prices that are excessive relative to costs and risk, including a reasonable return on capital.

2.52 On competition, we stated in CP15/18 that where a benchmark administrator or its affiliates competes with users of the benchmark, they can apply access rules or pricing schemes that disadvantage their competitors. This includes in downstream activities that rely on the benchmark's use.

2.53 We also said that we intend to absorb our own ongoing costs from introducing these proposals into our existing budget for benchmark related activities. We estimated that for firms, the cost of our proposals would be approximately £85,000 to £250,000.[18]

2.54 We do not expect our proposals to impose material costs on benchmark users. However, we stated in CP15/18 that there will be costs to users and to benchmark administrators in the event of a dispute and that estimating such costs is difficult.

2.55 On our proposals' benefits, we said it is difficult to estimate such benefits quantitatively with any precision, but the notional outstanding value of contracts relying on these benchmarks is in excess of US$400 trillion. Benchmark users have large outstanding positions and are likely to experience difficulties in switching to alternatives, for the ongoing hedging of these positions and, for new business. Therefore, we believe the costs of complying with the FRAND standard are likely to be small compared to the fees charged by a benchmark administrator taking full

17 www.fca.org.uk/static/fca/documents/consultation-papers/cp15-18.pdf, paragraph 1.15.
18 We stated in CP15/18 that firms may need to obtain an expert and/or legal opinion on whether their pricing and licensing structures are FRAND. We estimated the lower range of the cost of such an opinion by using a legal hourly rate of £850 for an estimated 100 hours' work. The upper range is to take account of an expert (for example, regulatory economist) opinion, should such an opinion be sought.

advantage of its market power. We also think these costs will be small relative to the potential benefits of greater efficiency and more competition in markets relying on these benchmarks.

2.56 We asked the following question in our CP:

Q3: Do you have any comments on the CBA?

2.57 We received many comments on our CBA. Some respondents, mainly benchmark users, agreed with the CBA or did not comment on it. There were some remarks on our market failure analysis, with respondents, mainly benchmark administrators and their trade associations, expecting the CBA to make some reference to empirical evidence of anticompetitive behaviour. They suggested that the CBA relies on the possibility that administrators may gain market power rather than an actual observation of such power. Some respondents reiterated that we have recourse to our competition powers, and argued that it would be more cost effective for us to rely on those.

2.58 Some respondents said the CBA understated the extent to which the proposed FRAND requirements may result in benchmark administrators incurring increased expense and time in relation to regulatory compliance. Some respondents stated that we did not provide any quantification of the estimated benefits. Others felt that the costs had been underestimated and/or that the CBA was incomplete and the effects of FRAND not fully considered. Another comment was that the CBA should take into account a different set of factors and the nature of the benchmark's use. Some respondents proposed further areas to consider in our CBA but did not suggest how to quantify them. Further comments were that the FRAND rules increase costs and regulatory uncertainty for benchmark administrators. It was noted that the CBA did not provide an estimate of the cost or administrative burden for us and market participants of ensuring compliance. Another remark was that the CBA does not recognise the costs and benefits associated with third party administration.

2.59 One respondent pointed out that benchmarks are international in nature as the UK is the only country in the world introducing FRAND rules, there is a risk of discouraging investments in benchmark activity in the UK. The respondent said that this risk had not been considered in the compatibility statement. Similarly, one respondent said that the CBA had not examined whether certain benchmark administrators may exit the market as a result of the FRAND rule.

2.60 One respondent suggested all contracts, processes and policies for the supply and receipt of benchmarks data between the introduction of UK FRAND regulation and the introduction of any EU FRAND regulation will need to be reviewed, potentially several times. They suggested this may generate a large amount of work and cost (including but not limited to any external legal/expert advice) for administrators and users that is not currently addressed in the CBA.

2.61 Another respondent was concerned that we think they could seek an 'expert or legal opinion' on whether their pricing and licensing structures comply with FRAND. Their view is that determining whether pricing and licensing structures constitute a 'reasonable commercial price' will be too subjective for any expert or law firm to provide a definitive view. The respondent disagreed that FRAND should be considered in the context of the notional outstanding value of contracts reliant on the regulated benchmarks. They thought that the appropriate reference point would be the number of users of the benchmark. Another respondent stated that the CBA is valid only to the extent that the proposed rules deliver the anticipated benefits. They said that in the long term the benefits are likely to be delivered more cost-effectively (for both regulators and market participants) if the rules governing benchmark administrators are supplemented by greater focus on the broad availability of fair, reasonable and non-discriminatory terms of rights to create benchmarks.

Our response

We have carefully considered this feedback and set out our response below.

Due to the wide and diverse use of benchmarks, data on costs is sparse and difficult to gather. We approached the CBA by using the data available in the most efficient way without the estimation of costs itself creating an additional burden for benchmark administrators.

We acknowledge that there may be other costs and impacts not specifically estimated in our CBA. However, having considered responses carefully we remain of the opinion that the benefits of regulating to ensure fair access to benchmarks are greater than any reasonable estimate of the costs.

Complying with the rule does not create new system development or implementation costs, and no respondent produced any evidence of such costs. The main costs for an administrator relate to the time required for suitably qualified personnel to review whether their terms and conditions meet the FRAND rule. We do not expect such compliance costs to be significant except where an administrator is close to the margin of not satisfying the FRAND requirement, thereby making a dispute more likely. We accept that in such a case, the administrator may incur significant costs in commissioning legal, economic and/or other analysis to justify its benchmark pricing. These costs are difficult to estimate as they depend on each administrator's own choices on how close its prices are to breaching the FRAND rule. No respondent offered their own quantification of costs.

It was suggested that the CBA should refer to empirical evidence of anticompetitive behaviour and that it relies on the possibility that administrators may gain market power rather than an actual observation of such power. Our response is that we do not need to wait for or make a judgement on whether there already is evidence of anticompetitive behaviour before we put pre-emptive rules in place to address such behaviour.

Our analysis shows that some of the eight benchmark administrators already have market power because of the difficulty for their customers of moving to an alternative supplier, so market power is an actual rather than a potential feature of the market. To the extent that benchmark administrators with market power may already be subject to similar obligations under competition law, our proposals should not impose material additional compliance costs. These administrators either already face potential complaints from their customers if their terms of access are not FRAND, or already provide access to their benchmarks on a FRAND basis. Besides, benchmark administrators will anyway have to ensure in due course that their access conditions satisfy the FRAND requirement that will apply to CCP and trading venue users under MIFIR.

Therefore, compliance costs should not be significant where the terms and conditions of access to the benchmark are already FRAND.

In addition, the eight regulated benchmarks are already required to comply with our standards set out in MAR 8. In particular, MAR 8.3.2 requires an administrator to have regard to the importance of maintaining market integrity and the continuity of the specified benchmark, including the need for

contractual certainty for contracts which reference the specified benchmark. We consider the obligation to ensure the benchmark's continued supply as a benefit to the market.

The eight benchmarks currently under regulation are linked to a large volume of long term legacy contracts, which means that continued access to the benchmarks is relied upon for market integrity. Ensuring that this access will be on FRAND terms will support orderly FICC and equity markets.[19] Therefore, the benefits of the FRAND rule are likely to be considerable.

To the extent that the FRAND rules will ensure prices charged by benchmark administrators to relevant users are fair and reasonable any lost revenue for benchmark administrators is offset by the savings for those users and does not represent a net cost. Additionally, this will create increased efficiency and overall economic gain to the extent that lower prices lead to wider productive use of the benchmark or any downstream products whose own price is influenced by the benchmark's price.

As we stated in our CP, we intend to absorb any costs to us into our existing budget for benchmark related activities. However, if a benchmark administrator sets terms of access that appear to infringe the FRAND rule, we may appoint external experts to review the administrators' pricing at their expense.

On benchmarks being international in nature and administrators exiting the market, we consider that the FRAND rules will complement UK benchmarks regulation that started in April 2013. We consider the effects of the benchmarks regulation to have been positive. There has been no evidence of benchmarks moving outside the UK since the requirements have been introduced.

Regarding the effect of FRAND rules on regulatory uncertainty, our rules set out our expectations of administrators in terms of access to regulated benchmarks, and will increase rather decrease certainty around what requirements benchmark administrators must meet.

Also, it should be noted that use of our concurrent competition powers is not prevented by having a FRAND rule. We would evaluate the most appropriate and effective options when considering intervention.

19 Indirectly through equity valuations.

Annex 1
List of non-confidential respondents

Aberdeen Asset Management

CME Group Inc.

Index Industry Association

McGraw Hill Financial, Inc.

MSCI Inc.

Rights Management Associates Ltd

RIMES Technologies Limited

The Association of Corporate Treasurers

The Federation of European Securities Exchanges

The Investment Association

The London Metal Exchange

The Wholesale Markets Brokers' Association and the London Energy Brokers' Association

The WM Company PLC

Thomson Reuters Benchmarks Services Ltd

Virgin Money plc

Appendix 1
Made rules (legal instrument)

BENCHMARKS (AMENDMENT NO 2) INSTRUMENT 2016

Powers exercised

A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):

(1) section 137A (The FCA's general rules);
(2) section 137F (Rules requiring participation in benchmark);
(3) section 137T (General supplementary powers); and
(4) section 139A(1) (Power of the FCA to give guidance).

B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on 1 April 2016.

Amendments to the Handbook

D. The Glossary of definitions is amended in accordance with Annex A to this instrument.

E. The Market Conduct sourcebook (MAR) is amended in accordance with Annex B to this instrument.

Citation

F. This instrument may be cited as the Benchmarks (Amendment No 2) Instrument 2016.

By order of the Board
5 February 2016

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text.

benchmark administrator	~~A~~ a *person* ~~carrying out~~ who has *authorisation* to carry on the *regulated activity* of *administering a specified benchmark*.

Annex B

Amendments to the Market Conduct sourcebook (MAR)

In this Annex, underlining indicates new text.

8.3 Requirements for benchmark administrators

…

Fair, reasonable and non-discriminatory access to benchmarks

8.3.19 R (1) A *benchmark administrator* of a *specified benchmark* must ensure relevant users are granted non-discriminatory access to:

(a) relevant price and data feeds and information on the composition, methodology and pricing of that *specified benchmark*; and

(b) licences or other arrangements to use that *specified benchmark*;

for the purpose of clearing and trading by the relevant users.

(2) In this section, "relevant user" means:

(a) a *central counterparty*;

(b) an *MTF*; and

(c) a *regulated market*.

8.3.20 R A *benchmark administrator* must grant relevant users access for the purpose of clearing and trading to the *specified benchmark* it administers (including access to information):

(1) on a fair, reasonable and non-discriminatory basis; and

(2) without undue delay, following a written request by the relevant user.

8.3.21 R (1) Where a *benchmark administrator* charges a relevant user a fee for access to the *specified benchmark*, it must grant the relevant user access at a reasonable commercial price taking into account the price at which access is granted or the intellectual property rights are licensed to other relevant users or any related persons for the purposes of clearing and trading.

(2) Different fees can be charged to different relevant users or related persons only where this is objectively justified having regard to

reasonable commercial grounds such as the quantity, scope or field of use requested.

8.3.22 G In assessing whether the terms of access to a *specified benchmark* are fair, reasonable and non-discriminatory, the factors the *FCA* may consider include:

(1) the degree of competition and potential competition in the market for the supply of the *specified benchmark*;

(2) whether the aggregate of the fees charged to users of the *specified benchmark* bears a reasonable relationship to the costs and risks of producing the *specified benchmark*, including a reasonable return on capital;

(3) (where "A", the *benchmark administrator* or a member of its *group*, is active on a downstream market) whether the terms of access granted for the *specified benchmark* would prevent a competitor as efficient as A's downstream business from competing effectively on that downstream market on a lasting basis; and

(4) whether a *benchmark administrator* applies dissimilar conditions to equivalent transactions with relevant users or different categories of relevant users, thereby placing them at a competitive disadvantage.

8.3.23 G For the purposes of *MAR* 8.3.20R(2), the *FCA* would expect access to be provided within three months of a written request.

Financial Conduct Authority

PUB REF: 005161

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