# Fair, reasonable and non-discriminatory access to regulated benchmarks

June 2015

Consultation Paper

CP15/18**

# Contents

We are asking for comments on this Consultation Paper by 3 August 2015.

You can send them to us using the form on our website at:
www.fca.org.uk/your-fca/documents/consultation-papers/cp15-18-response-form.

**Or in writing to:**

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You can download this Consultation Paper from our website: www.fca.org.uk.

# Abbreviations used in this paper

| | |
|---|---|
| **CA98** | Competition Act 1998 |
| **CBA** | Cost benefit analysis |
| **CCP** | Central counterparty |
| **CMA** | Competition and Markets Authority |
| **CP** | Consultation paper |
| **EA02** | Enterprise Act 2002 |
| **EU** | European Union |
| **FCA** | Financial Conduct Authority |
| **FRAND** | Fair, reasonable and non-discriminatory |
| **FSMA** | Financial Services and Markets Act 2000 |
| **LIBOR** | London Inter-Bank Offered Rate |
| **MAR** | Market Conduct Sourcebook |
| **MiFIR** | Markets in Financial Instruments Regulation |
| **PS** | Policy Statement |
| **TFEU** | Treaty on the Functioning of the European Union |

# 1. Overview

## Introduction

**1.1** Following the Fair and Effective Markets Review (FEMR), recommendations[1] on the additional seven benchmarks[2] to be brought into regulatory scope and the Treasury's consultation on the recommendations[3], we consulted[4] on changes to our rules to accommodate these benchmarks. We subsequently published our policy statement (PS), PS15/6[5], implementing the regulatory and supervisory regime for the additional seven benchmarks coming into regulatory scope.

**1.2** In PS15/6, we noted that some respondents to our consultation paper (CP) had raised concerns regarding the unconstrained ability of administrators to set the prices of benchmarks. In our response, we stated that we would consider whether additions to the MAR 8 rules in this regard were necessary. We stated that we would consult if we proposed to introduce such rules.

**1.3** We have subsequently reflected on this issue further and determined that there is likely to be merit in additional rules. This consultation paper sets out our proposals for fair, reasonable and non-discriminatory (FRAND) access to regulated benchmarks by benchmark administrators.[6] These requirements would be contained in chapter 8 of the Market Conduct Sourcebook (MAR 8), specifically MAR 8.3.[7]

## Background

**1.4** We have, through the Wheatley Review[8], the Fair and Effective Markets Review recommendations and our involvement in international work, been at the forefront of developing and implementing benchmarks policy. We are one of the first regulators to start regulating major benchmarks formally. We started regulating the London Inter-bank Offered Rate (LIBOR) on 2 April 2013 and the additional seven benchmarks (see paragraph 1.1) on 1 April 2015.

**1.5** We have adapted our rules to ensure that we have an appropriate regulatory and supervisory regime for the regulated benchmarks. Our focus has been on ensuring the integrity, reliability and credibility of those benchmarks. However, there is one area that we have not addressed.

1 www.bankofengland.co.uk/markets/Documents/femraug2014.pdf.
2 The seven benchmarks are LBMA Gold Price, LBMA Silver Price, ICE Swap Rate, Sterling Overnight Interbank Average (SONIA), Repurchase Overnight Index Average (RONIA), ICE Brent Index and WMR London 4pm Closing Spot Rate.
3 www.gov.uk/government/consultations/fair-and-effective-market-reviews-benchmarks-to-bring-into-uk-regulatory-scope/implementation-of-the-fair-and-effective-market-reviews-recommendations-on-benchmarks-to-bring-into-uk-regulatory-scope
4 www.fca.org.uk/static/documents/consultation-papers/cp14-32.pdf.
5 www.fca.org.uk/static/documents/policy-statements/ps15-06.pdf.
6 See Appendix 1 of this consultation paper for the draft FRAND rules and guidance.
7 http://fshandbook.info/FS/html/FCA/MAR/8/3.
8 www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf.

While we referred to it in the Wheatley Review, our CP and our PS, we are now addressing in this consultation paper the issue of benchmark administrators' market power, with particular regard to our objective of promoting effective competition in the interests of consumers. Respondents' concerns in response to our CP highlighted the need to address this issue.

**1.6** Accordingly, we now propose to introduce FRAND requirements in MAR 8 in order to limit the ability of benchmark administrators to exploit their market power in a way that might hinder effective competition.

## Benchmark administrators' market power and its possible misuse

**1.7** Some benchmarks are so widely used that they have become industry standards in the markets to which they relate, for example, LIBOR.[9] The eight regulated benchmarks are the most widely used benchmarks in the markets to which they relate. Given the way that benchmark markets operate, market participants who use such an industry standard benchmark cannot easily switch to an alternative.[10] At the same time, a benchmark administrator, with general responsibility for the organisational and governance arrangements for the benchmark it administers, acquires control over 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 gain market power, so that it can vary the terms, including the price at which it offers that benchmark, with limited fear of customers switching to an alternative, or of other suppliers entering to provide an alternative.

**1.8** 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.

**1.9** The most obvious way of exercising market power is to raise prices above the level that would prevail in a competitive market. But there are others: an undertaking with market power can charge discriminatory prices that favour certain firms over others in a way that might distort competition. A benchmark administrator or its affiliates could also be in a position where it competes with users of the benchmark, including in downstream activities that rely on the use of the benchmark. Where this is the case, they could use the market power they have in the upstream market for the provision of the benchmark by applying access rules or pricing schemes that disadvantage their competitors in the downstream market.

**1.10** Following recent misconduct involving manipulation of benchmarks and the subsequent regulatory actions, benchmark administrators and benchmark submitters are likely to incur increased costs relating to ensuring robust governance, systems and controls. They also manage legal and reputational risks related to administering a benchmark. While administrators must be able to recover these costs to remain viable, we are concerned to ensure that they do not earn excessive returns, or distort competition in other ways, as a result of any market power that administering the benchmark may give them.

9 The Wheatley Review states that LIBOR is the most frequently utilised benchmark for interest rates globally, referenced in transactions with a notional outstanding value of at least $300 trillion.

10 For example, market participants wishing to hedge a risk position calculated by reference to a particular benchmark, will likely want their hedging transactions to refer to the same benchmark.

## Our powers, statutory objectives and FRAND

**1.11** Under FSMA, we have the strategic objective of ensuring that the relevant markets function well.[11] We also have three operational objectives: the consumer protection objective, the market integrity objective and the competition objective.[12] Our competition objective is to promote effective competition in the interests of consumers in the markets for regulated financial services (including administering a regulated benchmark), or services provided by a recognised investment exchange in carrying on regulated activities.[13] We also have a competition duty which means that when we act to pursue our objectives of consumer protection and market integrity, we should seek to do so in a way that promotes effective competition in the interests of consumers.[14]

**1.12** We became a concurrent regulator on 1 April 2015. This means that we have powers to enforce against breaches of the prohibitions on anti-competitive behaviour set out in the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU) in relation to the provision of financial services. We also have the ability to carry out market studies, and make market investigation references to the Competition and Markets Authority (CMA) under the Enterprise Act 2002 (EA02), in relation to the provision of financial services.

**1.13** Our regulatory and competition powers give us a broad range of legal tools to address competition concerns relating to access to regulated benchmarks. Introducing a FRAND pricing obligation rule will be an effective instrument to ensure that benchmark administrators' terms of access remain fair. By putting in place a rule and guidance in advance, we intend to reduce uncertainty as to what price a benchmark administrator may charge. This should enable benchmark administrators and users to agree amongst themselves what amounts to a FRAND price without the need for further regulatory intervention.

**1.14** Our FRAND proposals are in line with the Markets in Financial Instruments Regulation (MiFIR), which will introduce FRAND requirements for benchmark provision in 2019.[15] The forthcoming EU Benchmarks regulation may also introduce FRAND requirements (see paragraphs 1.17 to 1.19). Therefore, rather than face regulatory dislocation at that point, we think continuity and certainty would be best served by a FRAND requirement in line with MIFIR now, rather than interim reliance on the Chapter 2 prohibition and Article 102 TFEU.

**1.15** The proposed FRAND rules and guidance will apply to existing and future pricing and licensing arrangements. They will not apply retrospectively. That is, we will not be requiring adjustment to fees already paid.

**1.16** We will take a transparent and proportionate approach to using the enforcement powers available under FSMA in relation to possible breaches of the FRAND rules and/or in relation to anti-competitive behaviour under CA98, consistent with our publicly stated policies.[16]

11 Under section 1B(2) FSMA as amended by the Financial Services Act 2012.

12 See sections 1B(3) and 1C – 1E FSMA.

13 See also http://fca.org.uk/about/what.

14 See section 1B(4) FSMA.

15 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN.

16 See chapter 2 of the Enforcement Guide (EG), and any guidance which may be published in relation to the exercise of competition Enforcement powers.

## Proposed EU regulations

**1.17** MiFIR Article 37 will give central counterparties (CCPs) and trading venues a non-discriminatory right of access to benchmark information and licences. These must be provided at a 'reasonable commercial price' that differs between customers only to the extent that that can be objectively justified. This article will come into effect in 2019.

**1.18** The EU benchmarks regulation is also currently in the process of negotiation. It is possible that the regulation will contain a provision regarding benchmark licences similar to FRAND. If that is the case, the proposals set out in this paper, like our other benchmarks rules, will be superseded by the EU regulation when it comes into force.

**1.19** As previously stated, MiFIR Article 37 would not be in force until 2019. And the precise timing and content of the EU benchmarks regulation are not yet clear. Given the importance of avoiding abuse of market power in the intervening period before the EU regulations come into force, we do not see a case for delaying the establishment of a clear FRAND obligation in the regime applying to UK benchmark administrators. While making our FRAND proposals consistent with MiFIR Article 37, our competition objective appears best served by applying the FRAND obligations across the full range of benchmark users. We discuss this approach further in chapter 2.

## Equality and diversity considerations

**1.20** We have assessed the likely equality and diversity impacts of the proposals in this consultation paper and do not think they give rise to any concerns in this area.

## Are you affected by these changes?

**1.21** The proposals set out in this consultation paper affect the administrators of the eight regulated benchmarks. They will also affect users and potential users of these benchmarks. These changes may also be of interest to other financial institutions with a significant profile in global markets referencing benchmarks. They may be of indirect interest to consumers.

## Next steps

**1.22** Please send us your comments by 3 August 2015.

**1.23** Please use the online response form on our website or write to us at the address on page two of this paper.

**1.24** We will consider any responses before we finalise our provisions, with a view to publishing our Policy Statement and final Handbook text by the fourth quarter of 2015.

# 2. FRAND requirements

**2.1** In this chapter, we explain what the FRAND requirements would entail. We discuss what we consider they should cover and their granularity. In developing the FRAND proposals, we carefully considered a number of factors including the following:

- The effectiveness of the proposals in advancing the objective of promoting competition.
- Other impact on the market of the proposals.
- Consistency with expected EU rules.
- The practicality of the proposals.
- The time required to implement the proposals.
- The costs to firms and to us of implementing the proposals.
- The business models of the eight regulated benchmarks

**2.2** We discuss the FRAND rules and guidance in further detail below.

## FRAND rules

**2.3** FRAND requirements should be designed to ensure that benchmarks remain accessible to users on fair, reasonable and non-discriminatory terms and conditions. In particular, the FRAND rules can prevent benchmark administrators from exploiting their market power, for instance by refusing to grant access to a benchmark, by demanding unfair or unreasonable fees, or by charging discriminatory fees in a way that distorts competition (where the differences in fees between particular users cannot be objectively justified).

**2.4** Although the FRAND rules would have certain implications for benchmark administrators, notably on their ability to set the level of their fees, 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. As a result, the new administrator should be permitted to explore the commercial viability of LIBOR and this will be reflected in the design of the tender process'.

**2.5** The FRAND rules we are proposing to introduce are consistent with MiFIR Article 37 that will apply to access to benchmarks by CCPs and trading venues for the purposes of clearing and

trading. Considering the diverse users of benchmarks, we are proposing a rule that has a wider scope than just CCPs and trading venues. The FRAND rules and guidance we are proposing will be applicable to all users and potential users of the eight regulated benchmarks.

**2.6** We are proposing rules which state that benchmark administrators must ensure that access to and licences to use benchmarks are made available on fair, reasonable and non-discriminatory terms and conditions (including price), and that access should be provided within three months following a written request. The proposed FRAND rules will also state that different fees can 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.

## FRAND guidance

**2.7** The guidance we are proposing is set out in terms of (non-exhaustive) factors that we may consider when assessing whether a benchmark administrator is complying with the FRAND requirements.

**2.8** Our expectation is that pricing and licensing structures are not arbitrarily determined and do not discriminate in a way that disadvantages competitors of the benchmark administrator in the provision of benchmarks or in downstream services that rely on the benchmark.

**2.9** We consider the guidance to be adaptable, sufficiently universal and high-level to ensure that it could be applied to the eight regulated benchmarks.

**2.10** In developing the guidance, we have taken into consideration the following:

- Finding the right balance between the need to provide sufficient guidance for benchmark administrators to be able to make a judgement as to whether their pricing structures are FRAND, and the freedom of administrators to determine a pricing structure suitable to their business model.
- The need to ensure that innovation is not stifled and that benchmark administrators are not constrained in making improvements to their benchmarks and their business models that may involve investment.
- The need to ensure that such guidance is relevant, proportionate and adaptable to the requirements of the eight regulated benchmarks and any other benchmark that may be brought into regulatory scope.
- The need to keep the guidance concise.

## Compliance with the FRAND rules

**2.11** While we are setting out FRAND rules and related guidance, we will not approve benchmark administrators' pricing structures in advance. Neither will we provide individual guidance that may effectively be regarded as FCA 'sign-off' on pricing structures. Benchmark administrators are expected to comply with the letter and the spirit of the FRAND rules and related guidance by themselves, ensuring their pricing structures satisfy the provisions of the rules and the accompanying guidance.

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

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

# Annex 1
# Cost benefit analysis

1. Sections 138I and 138L of the Financial Services and Markets Act 2000 (FSMA) require us to perform a cost benefit analysis (CBA) of our proposed requirements and to publish the results, unless we consider that the proposals will not give rise to any costs or to an increase in costs of minimal significance. This Annex:

   - provides a high level market failure analysis, and
   - describes the costs and benefits of these proposals.

## Market failure analysis

2. As we have stated in this CP, some benchmark administrators are likely to have a degree of market power, especially when the benchmark is widely used. For example, where firms have a substantial outstanding market position in financial instruments whose value depends on a particular benchmark, they are likely to need to continue trading in instruments based on the same benchmark if they are to manage and hedge their evolving position without introducing basis risk. At the same time, benchmarks administrators and/or related firms may own intellectual property rights in respect of their benchmarks, potentially allowing them to prevent competitors from launching similar alternatives. The benchmark administrator therefore may enjoy substantial control over the terms and conditions for access to the benchmark because customers need to continue using the same benchmark but no other firm can provide that benchmark.

3. 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.

4. The presence of such market power has the potential to result in negative market outcomes, including excessive pricing and pricing arrangements that distort or restrict competition.

### Excessive pricing relative to costs, risks and a reasonable return on capital

5. If left unchecked, a benchmark administrator could exercise its market power by charging prices that are excessive relative to costs and risks, including a reasonable return on capital. This is because the benchmark administrator has control over the terms and conditions for access to the benchmark and is not effectively constrained by other potential benchmark providers. The benchmark administrator can therefore vary the price at which they offer the benchmark, with little fear of customers switching to an alternative, or of other suppliers entering the market to provide an alternative. It is reasonable, however, for revenues to cover not only realised costs, but also to provide reasonable compensation for the risks involved in administering a benchmark.

### Distortion or restriction of competition

**6.** Where a benchmark administrator or its affiliates competes with users of the benchmark, including in downstream activities that rely on the use of the benchmark, they can use the market power they have in the market for the provision of the benchmark by access rules or pricing schemes that disadvantage their competitors. The administrator could, for example, deny a competitor access to the benchmark, charge excessive prices to competitors or classes of firms with which they compete, or discriminate between firms or classes of firms with which they compete, and those with which they do not compete. For instance if an administrator were active in the market for derivatives trading that use the benchmark as a reference, the administrator could discourage competition in the trading of such derivatives by refusing to supply the benchmark to competitors, charging excessive prices to those using the benchmark in trading activities. (Even if these charges were also levied on their own affiliates, they would be an intragroup transfer for the benchmark administrator but an outright cost for the competitor.)

## Costs

### Costs to the FCA

**7.** There will be ongoing costs to the FCA (for example, supervision) that we intend to absorb into our existing budget for benchmark related activities.

### Costs to firms

**8.** Benchmark administrators may need to obtain an expert and/or legal opinion on whether their pricing and licensing structures are FRAND. As discussed below, we expect these costs to be relatively small compared to the total benefits of these proposals. We estimate costs to be approximately £85,000 to £250,000.[17]

**9.** We do not anticipate that the proposed introduction of these rules would impose material costs on benchmark users. However, there would be costs to users and to benchmark administrators in the event of a dispute. We consider that it is difficult to estimate how much a dispute would cost the disputing parties. Costs would vary depending on the complexity of the dispute, the length of time it takes to resolve and the willingness of the disputing parties to resolve the dispute.

## Benefits

**10.** The benefits from having FRAND rules would result from addressing the market failure identified in this Annex. The rules are aimed at preventing (or at least make it more difficult) for benchmark administrators to charge excessive prices to users and/or to maintain access rules and pricing schemes that disadvantage their users. In part this may represent a potential transfer from benchmark administrators to other market participants who will pay lower prices. However, by making prices more reflective of the underlying costs, it will also reduce the costs of downstream services that rely on the benchmark, making these services available to more consumers, and benefitting consumers. Further, if the rule prevents distortion or restriction of competition between the benchmark administrator or its affiliates and competitors in markets for benchmarks or downstream services, that competition could lead to lower prices and greater efficiency.

17 We have estimated the lower range by using a legal hourly rate of £850, (which is a top rate) for an estimated 100 hours' work. The upper range is to take into account an expert (for example, regulatory economist) opinion, should such an opinion be sought.

**11.** The FRAND obligation on benchmark administrators may also give users and potential benchmark users greater confidence that they can continue to use the benchmark without unacceptable risk of access being denied or becoming uneconomic for them or their counterparties in the future. This may increase market confidence in the benchmarks and encourage more users to make appropriate use of the benchmark.

**12.** It is difficult to estimate quantitatively the benefits that such a policy would bring about, but the quantity and total nominal value of contracts referencing the eight regulated benchmark is high (we estimate that the notional outstanding value of contracts relying on these benchmarks is in excess of US$400 trillion). This means that the costs of ensuring compliance with the FRAND standard are likely to be small relative to total fees, and small relative to the potential benefits of greater efficiency and more competition in markets relying on these benchmarks.

**Q3: Do you have any comments on the CBA?**

# Annex 2
# List of questions

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

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

**Q3:** **Do you have any comments on the CBA?**

# Annex 3
# Compatibility statement

## Introduction

1. This Annex explains how we satisfy the requirements set out in section 138I of FSMA.

2. When consulting on new rules, we are required by FSMA to include an explanation of why we consider making the proposed rules is compatible with our strategic objective, advances one or more of our operational objectives, and has regard to the statutory principles in section 3B of FMSA.

3. This Annex also sets out our view of how the proposed rules are compatible with our duty to carry out our general functions (which include rule making) in a way that promotes effective competition in the interests of consumers (section 1B(4)). This duty applies so far as promoting competition is compatible with advancing our consumer protection and/or integrity objectives.

4. This Annex must be read in conjunction with the rest of this consultation paper and the cost benefit analysis (in Annex 1) in demonstrating that we meet our statutory duties and objectives.

## Compatibility with our statutory objectives

5. In discharging our general functions, our duty is, as far as is reasonably possible, to act in a way that is compatible with our strategic objective – to ensure that the relevant markets function well – and to advance one or more of our operational objectives. Our proposals aim to protect consumers by redressing the balance of power regarding benchmark pricing, which if not addressed could ultimately result in poor outcomes for consumers.

6. We consider that these proposals are appropriate and proportionate in comparison with relying solely on our competition enforcement powers. These proposals also support our integrity objective by ensuring that the eight regulated benchmarks can be accessed on a FRAND basis, thereby ensuring market stability given the widespread use of these benchmarks and their important role in the markets to which they relate. The proposals set out in this consultation paper would also ensure that access to, and pricing of, benchmarks is organised in a way that is not anti-competitive.

7. We have a duty, so far as is compatible with acting in a way that advances our consumer protection objective or integrity objective, to discharge our general functions in a way which promotes effective competition in the interests of consumers.

8. Given the widespread use of benchmarks in financial contracts, it is important that consumers and market participants are given access to and are able to obtain licences for these benchmarks on a fair, reasonable and non-discriminatory basis.

**9.** We consider that our proposals set out in this consultation paper would facilitate access and licensing of the benchmarks on a FRAND basis.

### Compatibility with the principles of good regulation

**10.** Section 1B (5) of FSMA requires that, in carrying out our general functions, we have regard to the principles of good regulation. In formulating these proposals, we have had regard to the following relevant principles set out in Section 3B of FSMA.

### The need to use our resources in the most efficient and economic way

**11.** In developing these proposals, we took a number of factors into account. We also considered the alternative of relying solely on our competition enforcement powers. One of the factors we took into account was the cost to us of implementing these proposals. We consider that the proposals set out in this CP are the most efficient and effective way of proceeding with FRAND rules and guidance. We also consider that the proposals set out in this CP are proportionate and adaptable to the eight regulated benchmarks and any other benchmark that may be brought into regulatory scope.

### The principle that a burden or restriction which is imposed should be proportionate to the benefits

**12.** Requiring benchmark administrators to provide access to, and licensing of, benchmarks on a FRAND basis will ensure that benchmark administrators do not take advantage of their dominance to extract economic rents from users. We expect the benefits of ensuring FRAND pricing of benchmarks to accrue to the market as a whole through greater scrutiny of benchmark pricing leading to increased confidence in pricing structures. We expect these benefits to outweigh any costs in the event of a FRAND pricing and licensing dispute between a benchmark administrator and a licensee.

### The desirability of sustainable growth in the UK economy in the medium or long term

**13.** Given the widespread use of the eight benchmarks in regulatory scope, it is important that users of the benchmarks have access to, and are licensed the benchmarks on terms that provide for continuity of contracts, proper functioning of markets and market stability. This is particularly so given the volume and number of financial contracts linked to these benchmarks and the way these financial contracts in turn underpin the real economy.

### The principle that we should exercise our functions as transparently as possible

**14.** We have set out our proposed FRAND rules in this consultation paper. We will continue to engage with stakeholders and welcome comments on our proposals during the consultation

period, running until 3 August 2015. We will then publish a Policy Statement, including feedback on responses, and confirming final rules or any alternative approach if relevant.

## Expected effect on mutual societies

**15.** Section 138K of FSMA requires us to state whether in our opinion our proposed rules have a significantly different impact on authorised persons who are mutual societies, in comparison with other authorised persons. We do not think that our proposed rule changes will impact on mutual societies differently.

# Appendix 1
# Draft Handbook text

**Appendix 1**

# BENCHMARKS (AMENDMENT NO 2) INSTRUMENT 2015

## 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 [*date*].

## Amendments to the FCA Handbook

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

## Citation

E. This instrument may be cited as the Benchmarks (Amendment No 2) Instrument 2015.

By order of the Board of the Financial Conduct Authority
[ ] 2015

## Annex

## Amendments to the Market Conduct sourcebook (MAR)

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

### 8.3 Requirements for benchmark administrators

…

**Fair, reasonable and non-discriminatory access to benchmarks**

8.3.19 R A *benchmark administrator* of a *specified benchmark* must ensure non-discriminatory access to:

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

(2) licences or other arrangements to use that *specified benchmark*.

8.3.20 R A *benchmark administrator* must grant access to the *specified benchmark* it administers (including access to information):

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

(2) within 3 months following a written request by the user.

8.3.21 R (1) Where a *benchmark administrator* charges fees for access to the *specified benchmark*, it must grant 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 users.

(2) Different fees can 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.

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 fees charged 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;

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

Financial Conduct Authority


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