DANISH BANKERS ASSOCIATION

MEMO

ESMA Discussion Paper on Benchmarks Regulation

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The Danish Bankers Association in its capacity as representative of the Danish banking industry welcomes the opportunity to submit comments to the ESMA Discussion Paper on Benchmarks Regulation.

Initially the Danish Bankers Association would like to support the key issues addressed by the EBF in its response to the discussion Paper on Benchmarks Regulation.

Q1: Do you agree that an index's characteristic of being "made available to the public" should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?

It is important to the future possibilities to offer tailor-made financial contracts and financial contracts only issued to cover special needs from a limited number of customers or investors that the definition of "made available to the public" is interpreted as limited as possible. This is also the case when a customer has the need of a currency hedge or the need to enter into other financial contract for hedging purposes.

This is especially important if the benchmark itself is tailor-made for the use of a limited group of customers or investors.

Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?

There is some lack of clarity whether normal bank rates, which are determined by the individual bank, could be covered by the benchmark regulation. The mere lack of more than one submitter should keep these rates out of scope. That said the banking industry would welcome a clear clarification from ESMA on this point.

Q3: Do you agree with ESMA's proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator? Which other characteristics/activities would you regard as covered by Article 3(1) point 3(a)?

ESMA's suggestion seems to go further than the level I text. It doesn't seem in line with the level I text to widen the liabilities at level II.

Q4: Do you agree with ESMA's proposal for a definition of issuance of a financial instrument? Are there additional aspects that this definition should cover?

ESMA's suggestion seems to go further than the level I text. This could harm the options to issue financial contracts for hedging purposes.

Q5: Do you think that the business activities of market operators and CCPs in connection with possible creation of financial instruments for trading could fall under the specification of "issuance of a financial instrument which references an index or a combination of indices"? If not, which element of the "use of benchmark" definition could cover these business activities?

N/A

Q6: Do you agree with the proposed list of appropriate governance arrangements for the oversight function? Would you propose any additional structure or changes to the proposed structures?

In no 36 ESMA suggests that the oversight function oversees third parties. The level II should not go further than the rules laid out in the level I text aimed at reference rates. The main purpose should be control of the administrator and not supervision and inspection of the service provider(s). This could be the identification of appropriate rules and seems difficult to enforce according to e.g. Danish national law.

Especially if the service provider is already a supervised entity there is no need for this add-on supervision.

No 36 also suggests that the oversight function takes action for breaches of the code of conduct. The wording seems to go too far. The oversight function should call attention to any breaches and let the action be up to the requirement in the code of conduct itself.

It should be possible to compose an oversight function which could oversee at least one family of benchmarks. When defining a family of benchmarks it should be by a broad definition. The main objective must be that the members have sufficient insight into the benchmarks. This should be the case if e.g. one or more benchmarks are reference rates and others are not. Especially in smaller currency areas and countries there are only a limited number of people who have the necessary qualifications to be members of some oversight functions.

Q7: Do you believe these proposals sufficiently address the needs of all types of benchmarks and administrators? If not, what characteristics do such benchmarks have that would need to be addressed in the proposals?

The more complex a benchmark is the more important it is that the members have profound knowledge of the markets which reflects the benchmark.

Q8: To the extent that you provide benchmarks, do you have in place a pre-existing committee, introduced through other EU legislation, or otherwise, which could satisfy the requirements of an oversight function under Article 5a? Please describe the structure of the committee and the reasons for establishing it.

In Denmark we already have existing legislation on reference rates. The definition of reference rates is however much broader than in the Benchmarks Regulation.

The legislation requires that if the submitters of the benchmarks constitute more than half of the members of the oversight committee, the members must not be the actual persons responsible for the submissions nor their immediate superiors. This leaves room for members who have knowledge of the financial markets to be members. (Act no 1299 of 14/11/2013)

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

We agree that the administrator should be able to only have one oversight function for all the benchmarks it provides. But it might be appropriate to allow the administrator to have the option to have more oversight functions.
Q10: If an administrator provides more than one critical benchmark, do you support the approach of one oversight function exercising oversight over all the critical benchmarks? Do you think it is necessary for an oversight function to have sub-functions, to account for the different needs of different types of benchmarks?

It should be possible to establish one single oversight function for all critical benchmarks. This oversight function should also be able to cover other benchmarks. The most important thing is that the members should have insight in the related markets.

Q11: Where an administrator provides critical benchmarks and significant or non-significant benchmarks, do you think it should establish different oversight functions depending on the nature, scale and complexity of the critical benchmarks versus the significant or non-significant benchmarks?

No. It could be much too difficult to find that many experts to establish more than one oversight function.

Q12: In which cases would you agree that contributors should be prevented from participating in oversight committees?

It could be the case if more than half of the members are contributors to a critical benchmark or if the oversight function only consists of the physical persons who are submitting the data of the benchmark.

Q13: Do you foresee additional costs to your business or, if you are not an administrator, to the business of others resulting from the establishment of multiple oversight functions in connection with the different businesses performed and/or the different nature, scale and type of benchmarks provided? Please describe the nature, and where possible provide estimates, of these costs.

It is beyond doubt that there will be extensive additional costs, but it is not possible to give an exact estimate of the costs at this point. If will be difficult to find the right members without paying them a substantial remuneration for their services and the liability that they would be exposed to. The only persons who could be persuaded to participate pro bono would be the contributors.

Q14: Do you agree that, in all cases, an oversight function should not be responsible for overseeing the business decisions of the management body?

ESMA's suggestion would make the oversight function part of the management team. This composition is known in e.g. Danish law where the management typically is too stringent.

If the oversight function is to add value, it should only be by overseeing the benchmarks.

Q15: Do you support the proposed positioning of the oversight function of an administrator? If not, please explain your reasons why this positioning may not be appropriate.

N/A

Q16: Do you have any additional comments with regard to the procedures for the oversight function as well as the composition and positioning of the oversight function within an administrator's organisation?

N/A

Q17: Do you agree with the proposed list of elements of procedures required for all oversight functions? Should different procedures be employed for different types of benchmarks?

It should be possible to employ different elements for different types of benchmarks.

Q18: Do you agree with the proposed treatment of conflicts of interest arising from the composition of an oversight function? Have you identified any additional conflicts which ESMA should consider in drafting the RTS?

Possible conflict of interest should be disclosed but cannot be avoided at all times because some conflicts of interests could be the reason why the person has the necessary knowledge and insight of the benchmark or benchmarks.

Q19: Do you agree with the list of records to be kept by the administrator for input data verification? If not, please specify which information is superfluous / which additional information is needed and why.

The elements in no 70 are out of proportion. The administrative burden of these requirements is unnecessary. This information should be recorded by the contributor and not the administrator. To have a double record keeping at the administrators gives no added value. Some of the information will not be possible for the administrator to record because the administrator has no access to this information such as indicated in bullet no 4. This information would be possible to keep on a contributor level. The administrator could then get this information on request. Especially if the contributor is a supervised entity the NCA will have access to the information when on inspection. The benchmark could benefit from this.

Q20: Do you agree that, for the information to be transmitted to the administrator in view of ensuring the verifiability of input data, weekly transmission is sufficient? Would you instead consider it appropriate to leave the frequency of transmission to be defined by the administrator (i.e. in the code of conduct)?

Se Q19.

Q21: Do you agree with the concept of appropriateness as elaborated in this section?

It should be possible by the administrator to tailor the controls to each benchmark’s code of conduct/methodology and the data available.

The list should be an inspiration and not an exhaustive list to which controls could be made.

Q22: Do you see any other checks an administrator could use to verify the appropriateness of input data?

Especially where the contributors are supervised entities, the administrators could request a compliance report or a report from the internal audit. This could replace some of the daily controls made by the administrator. The contributor could document the submissions in a log book. This documentation could also be made available to the NCA.

Q23: Would you consider it useful that the administrator maintains records of the analyses performed to evaluate the appropriateness of input data?

N/A

Q24: Do you see other possible measures to ensure verifiability of input data?

It should be possible to tailor the measures to each benchmark.

In some cases outlier or the highest and lowest submission could be disregarded or other measures especially designed to meet the specific design to the benchmark. Measures like this would minimize the need for a daily in depth scrutiny.

Q25: Do you agree with the identification of the concepts and underpinning activities of evaluation, validation and verifiability, as used in this section?

Se Q24.

Q26: Do you agree that all staff involved in input data submission should undergo training, but that such training should be more elaborate / should be repeated more frequently where it concerns front office staff contributing to benchmarks?

It is important that all persons involved in the benchmark setting receive education. There is no evidence that front office staff are more likely to forget what they have learned than others.

Q27: Do you agree to the three lines of defence-principle as an ideal type of internal oversight architecture?

N/A

Q28: Do you identify other elements that could improve oversight at contributor level?

The code of conduct could define the requirements.

Q29: Do you agree with the list of elements contained in a conflict of interest policy? If not, please state which elements should be added / which elements you consider superfluous and why.

The suggestions in no 97 should not go further than the requirements in the level I text, annex I. To impose the requirements in annex I to all benchmarks seems not to be in line with the level I text.

Physical separation between submitters and approvers will in most cases make it impossible to get the data submitted within a reasonable timeframe. It will also be difficult to find staff having the necessary insight to perform a qualified control of the submission.

To make the conflict of interest policy publicly available would possibly not add value to the benchmark. These policies could more appropriately be made available to the NCA and the administrators.

Q30: Do you agree that where expert judgement is relied on and/or discretion is used additional appropriate measures to ensure verifiability of input data should be imposed? If not, please specify examples and reasons why you disagree.

It is important not to impose a regime which de facto prohibits benchmarks based on expert judgments to continue. If the rules are not manageable in practice, the administrators will have to make material changes to the benchmarks or cease to publish them. Either way, all existing financial contracts will have to be renegotiated.

Q31: Do you agree to the list of criteria that can justify differentiation? If not, please specify why you disagree.

It should be possible for the administrator to define which criteria are the most appropriate, e.g. physical separation is not always possible and such a requirement could discharge relevant contributors. Instead it should be possible to have other measures to prevent physical closeness to be a major problem.

Some of the suggestions in no 111 could be unnecessary if the staff is thoroughly educated, e.g. the exchange of information is not necessarily prevented by physical separation. Education can often be much more effective than physical separation during working hours.

The suggestion on remuneration of staff seems to go much further than level I. However remuneration of staff involved in submitting data for benchmarks should be that they are able to get a bonus for not making mistakes and other similar matters.

Q32: Do you agree to the list of elements that are amenable to proportional implementation? If not, please specify why you disagree.

If the requirements listed are only guiding principles, they would be manageable. It is important to leave room to make a distinction between large and smaller markets and for small and few contributors.

Q33: Do you agree to the list of elements that are not amenable to proportional implementation? If not, please specify why you disagree.

We agree. Proportionality is important.

Chapter 5:
As a general remark to chapter 5: If the contributors are supervised entities the NCA's should be the ones who have the main supervisory authority and not the administrators. It is therefore important the NSA's role is highlighted.

In our view, transparency is the most important measure to ensure the confidence in benchmarks.

Q34: Do you consider the proposed list of key elements sufficiently granular "to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts"?

Yes.

Q35: Beyond the list of key elements, could you identify other elements of benchmark methodology that should be disclosed? If yes, please explain the reason why these elements should be disclosed.

N/A

Q36: Do you agree that the proposed key elements must be disclosed to the public (linked to Article 3, para 1, subpara 1, point (a))? If not, please specify why not.

Yes.

Q37: Do you agree with ESMA's proposal about the information to be made public concerning the internal review of the methodology? Please suggest any other information you consider useful to disclose on the topic.

Information to the public is important for the users to have confidence in the benchmark.

Q38: Do you agree with the above proposals to specify the information to be provided to benchmark users and, more in general, stakeholders regarding material changes in benchmark methodology?

Not necessarily, but transparency is the key element. The intermediate results are not always important, but can confuse more than benefit the users.

Q39: Do you agree, in particular, on the opportunity that also the replies received in response to the consultation are made available to the public, where allowed by respondents?

Se Q38.

Q40: Do you agree that the publication requirements for key elements of methodology apply regardless of benchmark type? If not, please state which type of benchmark would be exempt / which elements of methodology would be exempt and why.

Yes.

Q41: Do you agree that the publication requirements for the internal review of methodology apply regardless of benchmark type? If not, please state which information regarding the internal review could be differentiated and according to which characteristic of the benchmark or of its input data or of its methodology.

N/A

Q42: Do you agree that, in the requirements regarding the procedure for material change, the proportionality built into the Level 1 text covers all needs for proportional application?

Yes.

Q43: Do you agree that a benchmark administrator could have a standard code for all types of benchmarks? If not, should there be separate codes depending on whether a benchmark is critical, significant or non-significant? Please take into account your answer to this question when responding to all subsequent questions.

The administrator should be able to have a standard code of conduct, but should also have the possibility to differentiate the code of conduct.

It should also be allowed for the code of conduct to encompass the methodology.

Q44: Do you believe that an administrator should be mandated to tailor a code of conduct, depending on the market or economic reality it seeks to measure and/or the methodology applied for the determination of the benchmark? Please explain your answer using examples of different categories or sectors of benchmarks, where applicable.

Yes.

Q45: Do you agree with the above requirements for a contributor's contribution process? Is there anything else that should be included?

The particular order of the elements in no 154 is not important. This is especially the case if there has only been one single trade in the market. One trade cannot and should not be decisive for a benchmark.

Q46: Do you agree that the details of the code of conduct to be specified by ESMA may still allow administrators to tailor the details of their codes of conduct with respect to the specific benchmarks provided?

It is important that the administrator can tailor a code of conduct to one particular benchmark.

Q47: Do you agree that such information should be required from contributors under the code of conduct? Should any additional information be requested?

N/A

Q48: Are their ways in which contributors may manage possible conflicts of interest at the level of the submitters? Should those conflicts, where managed, be disclosed to the administrator?

N/A

Q49: Do you foresee any obstacles to the administrator's ability to evaluate the authorisation of any submitters to contribute input data on behalf of a contributor?

N/A

Q50: Do you agree that a contributor's contribution process should foresee clear rules for the exclusion of data sources? Should any other information be supplied to administrators to allow them to ensure contributors have provided all relevant input data?

N/A

Q51: Do you think that the listed procedures for submitting input data are comprehensive? If not, what is missing?

The procedures should only be regarded if they are relevant, e.g. if data is submitted on the basis of trades, it should be possible to send this data electronically from the bookkeeping system without a daily 4-eyes check. A manual procedure could be the source of mistakes.

Q52: Do you agree that rules are necessary to provide consistency of contributors' behaviour over the time? Should this be set out in the code of conduct or in the benchmark methodology, or both?

It could be both, but only one place ought to be sufficient.

Q53: Should policies, in addition to those set out in the methodology, be in place at the level of the contributors, regarding the use of discretion in providing input data?

N/A

Q54: Do you agree with the list of checks for validation purposes? What other methods could be included?

If the 4-eyes principle requires a senior manager this could delay the benchmarks or be the basis of inconsistency in submitting data. The 4-eyes check should be performed by someone with sufficient insight in the market to make the control relevant. (No 165)

Q55: Do you agree with the minimum information requirement for record keeping? If not would you propose additional/alternative information?

In principle yes, the submitted data should be recorded. But if the data is recorded by a service provider of the administrator, this should be sufficient.
Q56: Do you support the recording of the use of expert judgement and of discretion? Should administrators require the same records for all types of benchmarks?

It should be possible to differentiate between which records to use depending on the specific benchmark. The contributor could keep a log book where the data is documented. This is an especially good solution if the contributor is a supervised entity.

Q57: Do you agree that an administrator could require contributors to have in place a documented escalation process to report suspicious transactions?

N/A

Q58: Do you agree with the list of policies, procedures and controls that would allow the identification and management of conflicts of interest? Should other requirements be included?

N/A

Q59: Do you have any additional comments with regard to the contents of a code of conduct in accordance with Article 9(2)?

N/A

Q60: Do you agree with the above list of requirements? Do you think that those requirements are appropriate for all benchmarks? If not what do you think should be the criteria we should use?

The current Danish law has a balanced approach and could easily be copied. (Act no 1299 of 14/11/2013)

Q61: Do you agree that information regarding breaches to the BMR or to Code of Conduct should also be made available to the Benchmark Administrator?

We agree if it is not a continuous requirement, but only on a less frequent basis – for instance 4 times yearly.

Q62: Do you think that the external audit covering benchmark activities, where available, should also be made available, on request, to the Benchmark Administrator?

Yes.

Q63: Do you agree with the proposed criteria for the specific elements of systems and controls as listed in Article 11(2)(a) to (c)? If not, what should be alternative criteria to substantiate these elements?

N/A

Q64: Do you agree that the submitters should not be remunerated for the level of their contribution but could be remunerated for the quality of input and their ability to manage the conflicts of interest instead?

Yes.

Q65: What would be a reasonable delay for signing-off on the contribution? What are the reasons that would justify a delay in the sign off?

It seems undesirable to delay the contribution, which is especially the case in respect to reference rate, where the time factor is crucial.

Q66: Is the mentioned delay an element that may be established by the administrator in line with the applicable methodology and in consideration of the underlying, of the type of input data and of supervised contributors?

N/A

Q67: In case of a contribution made through an automated process what should be the adequate level of seniority for signing-off?

If the contribution is automated the sign-off action seems unnecessary.

Q68: Do you agree with the above policies? Are there any other policies that should be in place at contributor's level when expert judgement is used?

Yes, we agree with the suggested polities. We do not have any additional suggestions.

Q69: Do you agree with this approach? If so, what do you think are the main distinctions – amid the identified detailed measures that a supervised contributor will be required to put in place - that it is possible to introduce to cater for the different types, characteristics of benchmarks and of supervised contributors?

Yes.

Q70: Do you foresee additional costs to your business or, if you are not a supervised contributor, to the business of others resulting from the implementation of any of the listed requirements? Please describe the nature, and where possible provide estimates, of these costs.

Yes. The costs will be substantial, but it is not possible to give an exact estimate of the costs.

Q71: Could the approach proposed, i.e. the use of the field total issued nominal amount in the context of MiFIR / MAR reference data, be used for the assessment of the "nominal amount" under BMR Article 13(1)(i) for bonds, other forms of securitised debt and money-market instruments? If not, please suggest alternative approaches

The task of calculating the nominal amount of financial contracts related to benchmarks is truly a difficult one. It is only possible to make a correct calculation when it comes to listed securities with a fixed issue size.

When it comes to all other financial instruments, the calculations will never be exact no matter which method is used. The main task is to make the calculations as correct as possible.

One method could be to only take the major banks' net value into the calculation or only look at the sell side. This would "clean" the data from a number of financial contracts, which are sold and bought several times on one single day. In addition to this, ESMA could consider to limit the financial contracts which are to be considered to be limiting to CCP cleared instruments.

The calculations made on the basis on this will still not be accurate, but more accurate than other methods. The aim should be to limit the number of times one financial contract is counted, because it could be traded more than once a day.

It is also important to only take financial contracts, which are in scope, into consideration when calculating the nominal value.

Q72: Are you aware of any:

i) shares in companies,
ii) other securities equivalent to shares in companies, partnerships or other entities,
iii) depositary receipts in respect of shares,
iv) emission allowances
for which a benchmark is used as a reference?

N/A

Q73: Do you have any suggestion for defining the assessment of the nominal amount of these financial instruments when they refer to a benchmark?

N/A

Q74: Do you agree with ESMA proposal in relation to the value of units in collective investment undertakings? If not, please explain why

N/A

Q75: Do you agree with the approach of using the notional amount, as used and defined in the EMIR reporting regime, for the assessment of notional amount of derivatives under BMR Article 13(1)(i)? If not, please suggest alternative approaches.

N/A

Q76: Which are your views on the two options proposed to assess the net asset value of investment funds? Should you have a preference for an alternative option, please provide details and explain the reasons for your preference.

The latest available net asset value would be the most accurate.

Q77: Which are your views on the two approaches proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of an investment fund referencing a benchmark within a combination of benchmarks? Please provide details and explain the reasons for your preference. Do you think there are other possible approaches? If yes, please explain.

N/A

Q78: Do you agree with the 'relative impact' approach, i.e. define one or more value and "ratios" for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

N/A

Q79: What kind of other objective grounds could be used to assess the potential impact of the discontinuity or unreliability of the benchmark besides the ones mentioned above (e.g. GDP, consumer credit agreement etc.)?

N/A

Q80: Do you agree with ESMA's approach to further define the above criteria? Particularly, do you think that ESMA should develop more concrete guidance for the possible rejection of the NCA under Article 14c para 2? Do you believe that NCAs should take into consideration additional elements in their assessment?

N/A

Q81: Do you think that the fields identified for the template are sufficient for the competent authority and the stakeholders to form an opinion on the representativeness, reliability and integrity of a benchmark, notwithstanding the non-application of some material requirements? Could you suggest additional fields?

N/A

Q82: Do you agree with the suggested minimum aspects for defining the market or economic reality measured by the benchmark?

N/A

Q83: Do you think the circumstances under which a benchmark determination may become unreliable can be sufficiently described by the suggested aspects?

N/A

Q84: Do you agree with the minimum information on the exercise of discretion to be included in the benchmark statement?

N/A

Q85: Are there any further precise minimum contents for a benchmark statement that should apply to each benchmark beyond those stated in Art. 15(2) points (a) to (g) BMR?

N/A

Q86: Do you agree that a concise description of the additional requirements including references, if any, would be sufficient for the information purposes of the benchmark statement for interest rate benchmarks?

N/A

Q87: Do you agree that the statement for commodity benchmarks should be delimited as described? Otherwise, what other information would be essential in your opinion?

N/A

Q88: Do you agree with ESMA's approach not to include further material requirements for the content of benchmark statements regarding regulated-data benchmarks?

N/A

Q89: Do you agree with the suggested additional content required for statements regarding critical benchmarks? If not, please precise why and indicate what alternative or additional information you consider appropriate in case a benchmark qualifies as critical.

N/A

Q90: Do you agree with the suggested additional requirements for significant benchmarks? Which of the three options proposed you prefer, and why?

If any then option one.

Q91: Do you agree with the suggested additional requirements for non-significant benchmarks? If not, please explain why and indicate what alternative or additional information you consider appropriate in case a benchmark is non-significant.

If any then option one.

Q92: Are there any further contents for a benchmark statement that should apply to the various classes of benchmarks identified in this chapter?

N/A

Q93: Do you agree with the approach outlined above regarding information of a general nature and financial information? Do you see any particular cases, such as certain types of providers, for which these requirements need to be adapted?

When an investment company applies for an authorisation from the NCA, the NCA should be able to use the information which is already has. This would limit unnecessary administrative burdens.

Q94: Do you agree with ESMA's approach to the above points? Do you believe that any specific cases exist, related either to the type of provider or the type of conflict of interest, that require specific information to be provided in addition to what initially identified by ESMA?

N/A

Q95: Do you agree with the proposals outlined for the above points? Do you see any areas requiring particular attention or adaptation?

N/A

Q96: Can you suggest other specific situations for which it is important to identify the information elements to be provided in the authorisation application?

N/A

Q97: Do you agree with the proposed approach towards registration? How should the information requirements for registration deviate from the requirements for authorisation?

N/A

Q98: Do you believe there are any specific types of supervised entities which would require special treatment within the registration regime? If yes, which ones and why?

N/A

Q99: Do you have any suggestions on which information should be included in the application for the recognition of a third country administrator?

N/A

Q100: Do you agree with the general approach proposed by ESMA for the presentation of the information required in Article 21a(6) of the BMR?

N/A

Q101: For each of the three above mentioned elements, please provide your views on what should be the measures to determine the conditions whether there is an 'objective reason' for the endorsement of a third country benchmark.

N/A

Q102: Do you consider that there are any other elements that could be taken into consideration to substantiate the 'objective reason' for the provision and endorsement for use in the Union of a third country benchmark or family of benchmarks?

It is important that the investors, who own financial contract which are changed, know what they should do in case of a change or cease of a benchmark. The current ISDA agreements are probably not sufficient. A guideline on how to behave in these situations would be essential.

Q103: Do you agree that in the situations identified above by ESMA the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references a benchmark? If not, please explain the reasons why.

Yes, and because of this the procedures should be as open as possible to secure the investors.

Q104: Which other circumstances could cause the consequences mentioned in Article 39(3) in case existing benchmarks are due to be adapted to the Regulation or to be ceased?

N/A

Q105: Do you agree with the proposed definition of "force majeure event"? If not, please explain the reasons and propose an alternative.

It is not evident that the change or cease of a benchmark would be considered as force majeure. This would probably be different from one jurisdiction to another.

Q106: Are the two envisaged options (with respect to the term until which a non-compliant benchmark may be used) adequate: i.e. either (i) fix a time limit until when a non-compliant benchmark may be used or (ii) fix a minimum threshold which will trigger the prohibition to further use a non-compliant benchmark in existing financial instruments/financial contracts?

N/A

Q107: Which thresholds would be appropriate to foresee and how might a time limit be fixed? Please detail the reasons behind any suggestion.

N/A

Q108: Is the envisaged identification process of non-compliant benchmarks adequate? Do you have other suggestions?

N/A

Q109: Is the envisaged procedure enabling the competent authority to perform the assessment required by Article 39(3) correct in your view? Please advise what shall be considered in addition.

N/A

Q110: Which information it would be opportune to receive by benchmark providers on the one side and benchmark users that are supervised entities on the other side?

N/A

Q111: Do you agree that the different users of a benchmark that are supervised entities should liaise directly with the competent authority of the administrator and not with the respective competent authorities (if different)?

N/A

Q112: Would it be possible for relevant benchmark providers/users that are supervised entities to provide to the competent authority an estimate of the number and value of financial instruments/contracts referencing to a non-compliant benchmark being affected by the cessation/adaptation of such benchmark?

This might be possible. It would however require that the request for this information is very specific and the manner of how the estimates should be calculated is perfectly clear. Otherwise the estimates will not be made in the same way and will therefore be useless.

Q113: Would it be possible to evaluate how many out of these financial contracts or financial instruments are affected in a manner that the cessation/adaptation of the non-compliant benchmark would result in a force majeure event or frustration of contracts?

It would probably be most financial contracts. The assumption is that only the financial contract which clearly states what will happen in these cases will stay in the clear.