

ESMA'S CONSULTATION PAPER ON BENCHMARKS REGULATION

AMAFI's response

Introduction

Please make your introductory comments below, if any:

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI has been following closely the Benchmarks Regulation particularly concerning the non-significant benchmarks and welcomes the opportunity to answer ESMA's discussion paper on Benchmarks Regulation (DP).

AMAFI considers that it is essential to ensure that constraints on non-significant benchmarks are proportionate and not unnecessarily too cumbersome. Indeed, too many constraints on non-significant benchmarks could affect European investment firms' service offering and could profit to non-European investment firms.

The implementation of monitoring measures is difficult and it's going to take a long time. In order to be ready at time, the final draft of the Benchmarks regulation should be published as soon as possible.

Questions

Question 1

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?

AMAFI would be in favor of a clear definition of "made available to public" with some consistency with other existing regulation like Prospectus Directive.

If the index is available without any restriction on the website of the producer of the index or in any mass media / well known financial provider, the information is deemed to be public.

Question 2

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?

AMAFI proposes that “publication” of a benchmark would mean the disclosure by an administrator, either through print or electronically, in a freely available and unrestricted manner.

Question 3

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)?

The only point we would like to emphasise is that the responsibility regarding the dissemination should be restricted to the dissemination for which the administrator has a direct control.

Question 4

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?

We strongly support aligning definitions to comparable standards as in MiFID II.

Question 6

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?

The principle of proportionality should be reinforced in the way the administrators can implement all appropriate arrangements. In particular where control organization – under the supervision of compliance or independent risk management - is strong enough for the concerned risk, it should be able to replace formal dedicated committees and to use existing governance bodies

Question 8

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.

As far as we are aware, most of the investment firms have pre existing committee in accordance the IOSCO principles

Question 9

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?

AMAFI considers that an administrator could establish one oversight function for all the benchmarks it provides. It is not possible for administrators to have different oversight functions by type of benchmarks, methodologies or users. Rather than to have multiple oversight functions, we should have one oversight function which shall adjust its monitoring system for each different benchmarks, users, methodologies.

Question 10

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?

NA

Question 11

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?

NA

Question 12

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

AMAFI considers that contributors shall not participate in oversight committees except if they are directly interested in the functioning of the indices; e.g. a contributor providing direct contribution to the administrator (euribor/libor contribution).

Question 13

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.

The implementation of a new regulation automatically generates additional economic costs for the business. In general, these costs are incurred by the clients at some point in the future.

It also involves spending time to implement new cumbersome measures. However, this cost is difficult to quantify. This is why the regulation must remain proportionate to the risk it intends to cover.

Question 14

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

AMAFI agrees.

Question 15

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.

AMAFI agrees.

Question 19

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.

We do not understand why we will have to keep record of “substantial exposures of individual traders or trading desks to benchmark related instruments, as well as changes therein”. Such information are not requested in the level one text and we do not understand the link with the verification of input data...

Question 21

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

AMAFI agrees.

Question 23

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

AMAFI rather considers it optional that the administrator maintains records of the analyses performed, as long as it stands ready to provide timely to the regulator a satisfactory explanation of such analyses.

Question 26

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?

Training should be adequate to be able to perform relevant duties and implement processes. No further guidance needed.

Question 27

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

AMAFI agrees.

Question 29

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.

AMAFI considers that the conflict of interest policy should follow existing requirements and be enhanced if necessary to address specific conflicts related to benchmarks. However, to avoid duplicates and ensure that information remains centralized, there should not be a separate conflict of interest policy dedicated to benchmarks. Indeed, when the firms are already subject to conflict of interest policy under other regulations, conflicts related to benchmarks shall fall under general policy of conflict of interest.

Question 30

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.

AMAFI agrees only if such measures are suggested and not imposed.

Question 34

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”?

While we agree that the list of elements is generally relevant, we think that only the methodology of benchmarks based on contributions should entail the minimum quantity and quality of input data and describe the verification procedures on input data. For other indices, such verification procedures on input data are part of an overall review process, per the IOSCO principles, and not relevant to each index methodology.

Question 35

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.

Discretion should be left to the administrator to meet its overarching duty for transparency.

Question 36

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.

AMAFI does not agree. For proprietary indices such key elements must only be disclosed to clients but in any case not to the general public. In the methodology there are intellectual properties and those methodologies cannot be disseminated to everyone. It is very important to consider that making available important parts of methodologies to the general public for proprietary indices would create an intellectual property leak and a competitive disadvantage for European based administrator compared to others.

Question 37

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.

We consider that the information to be made public should be limited to the existence of a review process and its general characteristics and we do not consider it necessary to make public the names and titles of individuals involved in the review process.

Question 38

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?

We consider that the information to be made public should be limited to the existence of a procedure to address material changes in benchmark methodology, and its general characteristics. In addition, the relevant stakeholders should be interpreted as the index licensee and not the general public.

Question 39

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?

AMAFI does not agree.

Question 40

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.

As per above, the methodologies of benchmarks that are not based on contribution of input data should not have to entail the minimum quantity and quality of input data or to describe the verification procedures on input data.

Question 41

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.

As per above, we consider that, regardless of benchmark type, the information to be made public should be limited to the existence of a review process and its general characteristics.

Question 81

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?

The identified fields seem to be sufficient, however we want to stress ESMA's statement that the statement can refer to a family of benchmarks (DP § 258).

Question 82

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

We agree with the suggested description of the type of market. However, the description of the market access and of the market participants cannot be established in absolute terms. Rather, the administrator should provide a description of the type of market (as detailed in the DP § 264) which is sufficient for stakeholders to assess the market access and the market participants at a given point in time, hence the circumstances under which the market or economic reality measured by the benchmark may become unreliable.

Question 83

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

While aspects such as size and number of participants, or liquidity, are relevant to the above-mentioned review process, it is our understanding that such aspects are not always relevant and therefore they do not have to be described in each benchmark's methodology.

Question 84

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

AMAFI considers that only the applicability element should be required. It should be left to the discretion of the administrator to justify that the discretion is necessary, or to describe the body which evaluates the exercise of discretion.

Question 85

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?

We do not see other minimum contents for the benchmark statement. Rather we question the possibility to describe in absolute terms the minimum data needed to determine the benchmark, or the controls and rules that govern the exercise of discretion, if any. Also, as per above, the disclosure of the existence of discretion should suffice, at least for administrators of non-significant benchmarks which are supervised entities: controls and rules that govern discretion are addressed in an administrator's conflict of interest policy.

Question 86

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?

Such description should not apply to Regulated Data benchmarks, nor to benchmarks using different inputs, amongst which an interest rate component which is in fact merely an existing regulated interest rate benchmark. In fact such interest rate component should be viewed as a market data rather than an input data.

Question 87

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

Such statement for commodity benchmark should not apply to non significant benchmarks.

Question 88

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

AMAFI agrees and furthermore, as described above, in application of the proportionality principle, we would even differentiate further between different types of benchmarks, and exempt certain categories of benchmarks from the requirements previously described.

Question 91

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.

We appreciate the flexibility for administrators of non-significant benchmarks not to apply certain requirements, and we suggest that administrators disclose in the benchmark statement the elements of information described in option one.

Question 93

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?

We consider that much of the required information will be already well know by national competent authorities of Supervised Entities. Hence the requirements need to be adapted for such entities.

Question 97

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

We agree with the general approach and, as described in § 307 of the DP, we encourage ESMA to avoid any overlap between the information needed for authorization and that needed for registration.

Question 100

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

ESMA should ensure that there is no disadvantaged competitive consequences for the EU financial industry compared to non EU competitors, possibility to use a non EU & not approved benchmarks.

Question 101

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.

ESMA should ensure that there is no disadvantaged competitive consequences for the EU financial industry compared to non EU competitors, possibility to use a non EU & not approved benchmarks.

Question 102

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?

ESMA should ensure that there is no disadvantaged competitive consequences for the UE financial industry compared to non EU industries, possibility to use a non EU & not approved benchmarks.

