



Date: 7 March 2013
ESA/2013/007

Mr. Michel Barnier
European
Commissioner for
Internal Market and
Services

**European
Commission**
BERL 10/034

BE-1049 Brussels

Ref: Possible Framework for the Regulation of the Production and Use of Indices Serving as Benchmarks in Financial and other Contracts

Dear Commissioner Barnier,

With its Consultation Document on the Regulation of Indices of 5 September 2012 the European Commission has expressed its concerns over the integrity of benchmarks and benchmark-setting processes in the EU.

The EBA, ESMA, and EIOPA share these concerns. With a view to bridging the gap until any formal regulatory and supervisory framework for benchmark indices in the EU comes into force, the EBA and ESMA have jointly provided a package of initiatives, published on 11 January 2013, consisting of

- a review of Euribor's administration and management and clear recommendations to the Euribor-European Banking Federation to improve the governance and transparency of the rate-setting process;

- formal EBA Recommendations to national authorities on the supervisory oversight of banks participating in the Euribor panel (the Recommendations); and
- a joint ESMA-EBA consultation on Principles for Benchmark Setting Processes in the EU (the Principles), aiming to establish a framework for the conduct of benchmark rate-setting and the activities of participants in the process.

In addition to these initiatives and, in particular, without prejudice to the outcome of the aforementioned consultation on the Principles, the ESAs together share the view of the European Commission that wider work is required to regulate how indices and benchmarks are compiled, produced and used.

To support the important work the Commission is undertaking in this field and in response to questions raised in its consultation, we would like to submit to you a number of key features the ESAs believe a future regulatory framework for benchmarks should be based on:

1. Regulation and supervision of benchmark activities

From the experience of conducting the Euribor Review – and in line with the position as reflected in the EBA-ESMA Consultation Paper on Principles for Benchmark Setting Processes in the EU – we believe that benchmark activities undertaken in the EU single financial market should be subject to formal regulation and supervision.

The authorisation and supervision of benchmark activities should cover areas that are also the focus of the Recommendations and Principles and include particularly sound governance, systems and controls, audit requirements, and conflict of interest issues.

Obligations regarding good governance and processes, sound methodology, conflict-of-interest mitigation, and transparency requirements should be addressed to the providers of benchmarks

rather than being requirements on the individual benchmarks. The regulated activity should also cover all stages of typical benchmark-setting processes, including benchmark data submission, benchmark administration, benchmark calculation, or publication of benchmarks, as well as the use of benchmarks. Regulation and supervision would thus cover all relevant institutions including submitting institutions, the benchmark administrator and related parties such as calculation agents.

The potential scope of benchmark activity is very wide, and care will need to be taken to ensure that the impact of detailed authorisation and supervision requirements is proportionate to the risks that individual activities pose. Building on recent experience, benchmarks based on reporting panels, such as inter-bank reference rates, should be fully within such a new regulatory regime, but benchmarks designed on other models may also be subjected to certain requirements.

Any regulatory requirements should ensure consistency of the regime and supervisory application across the EU, given the genuine cross-border nature of the benchmark industry and related institutions. Therefore, to minimise inconsistency through national implementation measures the regime should be set out in a regulation rather than a directive. Strong cooperation between regulators and supervisors will also be necessary, as the recent investigations around Euribor and Libor have shown.

2. Provision of benchmarks by private or public bodies

Whether benchmarks are provided by public or private bodies, it is imperative that there is sufficient distance between the ownership and control of the benchmark administrator and those that have an interest in the outcome of the rate setting process. In this regard the governance framework needs to clearly ensure appropriate separation of roles and avoidance of conflicts of interest in the governance mechanism. The

authorisation process should focus on these issues, which might lead to certain providers being ruled out in future as not offering sufficient independence.

3. Market liquidity and contingency

We submit that a future EU regulatory framework for benchmarks should not prejudice from the start the choice of the method for calculating benchmarks, in particular the choice between transactions-based and panel-based systems. Nonetheless, there should be regulatory requirements that recognise the importance of a minimum level of transactions or liquidity as an essential part of the set-up criteria for any benchmark. There should also be a requirement to regularly review benchmarks, based on on-going liquidity and number of transactions in the market concerned, number of contributors or submitters and overall usage of the benchmark in the financial markets. The level of minimum liquidity might need to be adjusted for new benchmarks, to avoid impeding the development of new benchmarks. In any case, there should be full transparency around the liquidity characteristics of any new benchmark product.

Especially in the area of inter-bank reference rates, dis-continuities in benchmarks may have incalculable consequences for financial market stability in the EU and elsewhere.

In order to ensure continuity, regulatory requirements should promote

- clearly defined contingency plans for administrators and contributing parties to ensure the generation of accurate benchmarks at every delivery point specified in the benchmark regime,

- contingency provisions in financial contracts referring to benchmarks which govern situations in which the referenced benchmark should not be available, and
- the continuity of panel participation, as recently recognised by your Statement of 8 February 2013 in which you express the expectation that the proposal for a regulatory framework for benchmarks will include the power to impose mandatory submissions for systemic benchmarks.

We hope the features specified here can serve to provide initial guidance to the Commission in its current work.

As the EBA and ESMA are in the process of finalising the Principles for Benchmark Setting Processes in the EU, based on a consultation of stakeholders, and as the ESAs are continuing their analysis of the market for benchmarks and other indices, we will inform your services of any additional findings.

Of course, our Authorities shall be pleased to be at your disposal for any issues in this matter you may deem useful raising with us.

Yours sincerely,

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