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Answers of the European Financial Congress[1] in relation to the European Securities and Markets Authority's consultation paper on Draft Regulatory Technical Standards under the Benchmarks Regulation[2]

Methodology for preparing the answers

The answers were prepared in the following stages:

Stage 1
A group of experts from the Polish financial sector were invited to participate in the survey. They received the ESMA's consultation document and a form with consultation questions. The experts were guaranteed anonymity.

Stage 2
Responses were obtained from experts representing:
- banks,
- consulting firms
- law firms,
- the academia.

Stage 3
The survey project coordinators from the European Financial Congress prepared a draft synthesis of opinions submitted by the experts. The draft synthesis was sent to the experts participating in the survey with the request to propose modifications and additions as well as marking the passages they did not agree with.

Stage 4
On the basis of the responses received, the final version of the European Financial Congress' answers was prepared.

[1] European Financial Congress (EFC – www.efcongress.com). The EFC is a think tank whose purpose is to promote debate on how to ensure the financial security and sustainable development of the European Union and Poland.
[2] https://www.esma.europa.eu/sites/default/files/library/esma70-156-1464_consultation_paper_benchmarks_rts.pdf

Answers of the European Financial Congress to the consultation questions

Re: Section 2: Governance arrangements (Article 4 BMR)

Q1: *Do you agree with the governance arrangements set above? Do you have any additional suggestions?*

Yes, the direction of changes proposed by ESMA is right. Most significantly, we agree with the application of the principle of adequacy and proportionality that will result in higher requirements being imposed on the administrators of critical benchmarks.

At the same time, we are of the view that the principle of adequacy and proportionality should also apply to administrators of interest rate benchmarks. In the consultation paper, ESMA points out that "the future provisions on "robust governance arrangements" should not jeopardise the operation of smaller administrators with limited resources". Furthermore, the interest rate benchmarks must not be non-significant; therefore, even when an administrator provides a benchmark that is of limited significance but it is an interest rate benchmark, the administrator may bear an excessive administrative burden. It is particularly divergent from the principle of proportionality, when a benchmark is created automatically only and does not include expert judgment. Consequently, we believe that the principle of adequacy and proportionality should also account for the benchmark methodology as it may determine the risk level and it may require a special approach from the administrator. In case of benchmarks determined on the basis of transaction data, the principles applying to benchmarks based on data from regulated markets should also be applied to interest rate benchmarks. The current requirements in regard to interest rate benchmarks make it generally impossible to create new benchmarks (which is visible on the market).

Q2: *Do you agree that administrators should have in place a remuneration framework?*

We believe that the establishment of a remuneration framework should be optional for the administrators, provided the establishment of such rules is an element of managing conflicts of interest. In our opinion, a remuneration framework is not the only solution that may be applied in order to avoid a conflict of interest, as per Article 4 point 5 of BMR. In this context, we request that administrators are able to adopt other solutions, depending on the scale and specific nature of their business. Such a solution would enable the application of the principle of adequacy and proportionality.

Q3: *Do you agree that the same requirements should apply to an administrator that is a natural person?*

Yes, we are of the view that the requirements towards administrators should be the same, regardless of their organisational form. There are no premises for the adoption of different requirements and standards towards natural persons. Such an approach equalises the responsibility on the administrator and it allows for mitigating the risk of regulatory arbitrage. An entity that applies a benchmark should have certainty as to the administrator's transparency, regardless of its organisational form. If different provisions are applied to legal persons and natural persons, it may be concluded that certain benchmark types may be more or less risky. Consequently, rather than the legal form, you should use the nature of the benchmark, including its complexity and materiality, as the criterion determining the application of different requirements. Such an approach would be in alignment with the proportionality principle.

Re: Section 3: Methodology (Article 12 BMR)

Q4: *Do you think that other conditions should be taken into account to ensure that the methodology complies with the requirements of the BMR?*

We think that the consultation paper has all features that a methodology should have to be in compliance with the BMR requirements. The principles clearly specify the priority in terms of transaction data on the underlying market, the circumstances under which transaction data from related markets are used and discretion may be exercised.

Q5: *Do you consider that additional requirements are needed to ensure that the methodology is traceable and verifiable?*

No, we do not think that it is necessary to add any additional requirements in that regard. All requirements needed to ensure that the methodology is traceable and verifiable have been defined in the consultation paper in an exhaustive manner. However, should additional requirements appear, we believe that they should depend on the benchmark's nature.

Q6: *Do you think that the back-testing requirements are appropriate?*

Where back-testing is not the right validation method, the Regulation should permit other methods that may be applied to check that the operation is correct. In our opinion, back-testing is not appropriate for benchmarks that are based on transactions only and that are determined in a fully automated manner.

Re: Section 4: Reporting of infringements (Article 14 BMR)

Q7: *Do you agree with the requirements set out above? Do you have any additional suggestions?*

We believe that the requirements in that respect should be aligned with the nature and complexity of the benchmark. Since there is no possibility of assigning the non-significant benchmark status to the interest rate benchmark, it may mean an excessive burden for the local benchmarks based on interest rate for which the data are generated in a fully automated manner.

Q8: *Do you agree with the systems suggested for the surveillance of market manipulation? In particular, do you think that an automated system should be required only when it appears to be adequate according to the nature, scale and complexity of the benchmark?*

While we believe that the automated system should be the preferred one for all benchmarks, we agree that the system should be required only if it appears adequate according to the nature, scale and complexity of the benchmark. Critical benchmarks should be examined with special care which may only rely on automated systems. Automated surveillance systems should not be mandatory for non-significant benchmarks. In case of those benchmarks, administrators should have the right to opt out of those solutions. We also believe that in certain instances it may be reasonable to recommend that administrators combine automated surveillance with non-automated surveillance. It applies to a situation where transaction data are accompanied by expert judgment, e.g. in the case of the cascade methodology.

Re: Section 5: Mandatory administration of a critical benchmark (Article 21 BMR), Section 5.2: Content of the draft RTS

Q9: *Do you think that other criteria should be considered in relation to the transition of the provision of the critical benchmark to a new administrator?*

In general, we agree with the criteria presented in relation to the transition of the provision of the critical benchmark to a new administrator. We also believe, however, that benchmark methodology continuity should be emphasised while transitioning the critical benchmark to a new administrator. We also believe that the criteria should clearly specify the requirement for the transfer of historical data gathered by the present administrator. Moreover, in order to ensure the same level of safety and operation method, the criteria should also account for the technology aspect. Most significantly, they should account for the new administrator's ability to gather and

process all historical data in the appropriate manner and for the transfer of the processing/ calculation models (where appropriate) from the current administrator. Furthermore, the criteria should also account for the requirement to test the correct operation of any technologies required for the new administrator to serve the function.

Re: Section 5.2: Content of the draft RTS, Assessment of how the benchmark ceases to be provided

Q10: *Do you think that other criteria should be considered in relation to the cessation of the provision of a critical benchmark?*

In general, the conditions referred to in the consultation paper describe the cessation of the provision of a critical benchmark in an exhaustive manner. We believe, however, that in case of critical benchmarks, where the dynamics of the economic reality indicated that the underlying market was about to become inactive, in order to ensure macroeconomic stability, and especially to continue the service of the existing portfolio of loans based on the benchmark, it would be preferred to reinforce the critical benchmark with transaction data from related markets.
Furthermore, we also believe it is necessary to indicate all crucial elements that a clause ought to contain should a benchmark no longer be provided. Such an approach would also provide an additional opportunity to solve the issue of fallback clauses that the market participants have been tackling for several years now.

Re: Section 6: Non-significant benchmarks (Article 26 BMR)

Q11: *Do you agree with the criteria under which competent authorities may require changes to the compliance statement?*

Yes, we agree with the criteria under which competent authorities may require changes to the compliance statement. At the same time, we wish to emphasise that competent authorities should be empowered to decide on the exemption from certain requirements relating to conflict of interest and the description of organisational structure.

Q12: *Do you agree with the criteria under which competent authorities may require changes to the control framework requirements?*

Yes, we think that the criteria under which competent authorities may require changes to the control framework requirements are sufficient. Competent authorities should be

empowered to decide on the exemption from certain requirements relating to input data, public consultations and comparative data in case of a material change.

We are also of the view that the possibility of expanding the said criteria should be considered during the BMR review, while considering the market practice and the regulatory policy in that respect to date.