FESE's additional considerations to its response to the Commission's targeted consultation on the regime applicable to the use of benchmarks administered in a third country

Brussels 12th August 2022

While the current consultation focuses mainly on the BMR third-country regime, FESE Members would like to take the opportunity to underline that there are still a number of issues encountered in the implementation of BMR that should be addressed as soon as possible.

1. Non-significant benchmarks

BMR categorises benchmarks as critical, significant or non-significant, based on the value of instruments, contracts and or funds referencing them. FESE considers that the regulatory framework applying to non-significant benchmarks is not proportional and that most of the governance and control requirements would not have to be applied to these benchmarks.
A review of the regime is required not only in terms of more proportionate governance requirements but first and foremost with a view to revise the calibration criteria and thresholds themselves as well as the technical preconditions required for the proper classification of benchmarks. FESE therefore supports an open-ended assessment of the regime which may lead to different conclusions/options on how to proceed, with special emphasis on the need for proportionality on non-significant benchmarks as these are less prone to manipulation. We encourage the Commission to observe the regulatory regime for these benchmarks remaining attentive of their usage and implications for both users and for administrators in terms of compliance with requirements.

2. Transparency of methodology and benchmark statements

2.1 Transparency of methodology

BMR includes detailed requirements regarding transparency of methodology and these requirements have been further strengthened by the Climate Benchmarks Regulation. However, some stakeholders are calling for further disclosure requirements. In this context, it is important to consider that disclosures need to be well-suited to the respective target groups, whether it is information to be made public or to be provided to customers of benchmark providers. While benchmark providers are already very transparent and publicly disclose their methodologies - including information on the respective third-party data sources - certain proprietary data are usually disclosed only to customers with whom administrators have contractual arrangements. However, data owned by third parties, such as data vendors and research providers, may usually not be disclosed at all.

2.2 Benchmarks statements

Further disclosure requirements are included in the provisions governing benchmarks statements. These are not very useful and there are overlapping requirements between information that should be included in the benchmarks statement and the provisions related to transparency of methodology. We consider that the requirement to publish a benchmark statement should be removed as the information is already available via other means. To clarify, in relation to the new ESG requirements introduced by the Climate Benchmark, FESE fully supports these. However, rather than these provisions referring to benchmark statements, we consider that the requirements could be included in the overall provisions regarding transparency of methodology.

3. Definitions and data clarification

FESE members have encountered some issues in relation to the application of the BMR definitions. These are outlined below.

3.1 Definition of "index"

There is a lack of clarity regarding the definition which we think has led to indices originally not intended to be in scope becoming regulated. 'Made available to the public' could benefit from more guidance. Alternatively, the definition could be narrowed down, e.g. to refer to indices that are in widespread use within financial instruments/contracts.

3.2 Definition of "financial instrument"

The definition is drafted very widely. This has caused significant challenges in identifying with certainty what instruments are within scope of the BMR. In particular, the SI component of the financial instrument definition seems unintentionally to have brought within scope certain OTC derivatives. This does not seem consistent with recital 9 of BMR. Determination of in-scope SI use is further hampered by the lack of a comprehensive SI register data (in particular in relation to commodity-related instruments). On this basis, it would be appropriate to remove the reference to "via an SI" from the scope of the BMR "financial instrument" definition.

3.3 Availability of data on exposure towards benchmarks

It would be useful to receive clarification regarding whether BMR is intended to apply to supervised entities when transacting with non-EU counterparties or being used by an investment fund that is distributed solely outside the EU. Financial products and the associated trading venues or systematic internalisers are listed in FIRDS and are in scope of the BMR. It would be beneficial if those trading venues and systematic internalisers could be incentivised to be transparent about exposure towards benchmarks and make the information about the volume, notional and open interest available to the benchmark provider. An example is traded derivatives contracts on reference rates (swaps). These are of high interest due to the LIBOR transition.

4. Third country FX spot rates

FESE would support sensible legislation which allows the use of FX spot rates for not fully convertible currencies as reference rates for non-deliverable forward contracts.

5. Commodity benchmarks

FESE does not consider that current conditions for commodity benchmarks are appropriate. There is a lack of clarity between provisions for regulated data benchmarks and commodity benchmarks and how these overlap for benchmarks that fit into both frameworks. FESE would, therefore, see benefits in clarifying the applicable provisions. There should also be a proportionate approach to regulate commodity benchmarks that fall under Annex II, taking into account the size of the benchmarks and the data sources. The calibration of thresholds for commodity benchmarks should also be re-considered.