

**From:** Sonja Erica Väisänen  
**Sent:** 11 July 2018 16:32  
**Cc:** cmce@humbrophy.com  
**Subject:** CMCE - MEPs scrutinise BMR Level 2

Dear Member of the CMCE Benchmarks Working Group,

Please find the key takeaways and detailed discussion of the scrutiny of the level 2 measures of the benchmarks regulation which took place today in the ECON committee.

Key takeaways:

- The Commission has been delaying adoption of the draft RTS submitted by ESMA for more than a year and explained that they have made no changes in substance, only a number of redactions but the delay is mostly due to the fact that the BMR Level 2 measures have not been given priority by the translation services. ESMA and MEPs were applying pressure to the Commission to have this adopted and in the OJ.
- MEPs have had access to the Commission changes to the draft RTS and the rapporteur made remarks on two changes that the Commission had made to the draft RTS submitted to them by ESMA:
  - o The rapporteur argued that there is now a lack of clarity of the **definition of a regulated data benchmark** in art.3, as the Commission has included “entirely and directly” and the related conditions in outsourcing in art.10. The rapporteur argued that the Commission’s interpretation will result in higher compliance costs and does not meet what was agreed in trilogues. In order to fix this, there should be a change to the Level 1 text either to add a recital to express the spirit of the co-legislators or through amending the definition of regulated data benchmarks to include data feed operations. It is possible to amend the BMR via the ESAs review or the low-carbon benchmarks sustainable finance package.
  - o The Commission responded that this resulted from trilogues. The EP had wanted to broaden the scope of the definition to use intermediaries to get data but the Council was against it due to the risk of manipulation by non-regulated intermediaries. The Commission has tried to reconcile these views. Most intermediaries would be APAs, and if data comes from an APA, then which means that the same type of exemption would apply. Regulated data is strict, and if intermediaries are use, then they would be eligible data sources as they use approved publication requirements. This compromise should be looked at because we recall that there was some scepticism especially if the data comes from several regulated venues.
  - o The rapporteur noted that the Commission is more restrictive than ESMA on the option to include **contributors to benchmarks in the oversight function**, by changing “Consider to include” to “include” in art. 1(4) in the RTS on oversight.
  - o The Commission responded that they wanted to make it mandatory for representatives from other entities to participate in the oversight function, notably contributors of Net Asset Value of investment funds. The Commission considers this to be in line with good governance so the fundamental contributors are part of the oversight function and so the Commission changed the wording so that the data integrity of the main contributors is ensured as NAV data providers are very important.

## **European Commission - Tilman Lueder**

- Present 10 Regulatory standards under BMR covering institutional oversight function, quality controls on input data, methodology, transparency requirements for the methodology, code of conduct for contributors, criteria for significant benchmarks, benchmarks statement, cooperation statements, and third-country recognition. These are technical in nature, they mostly provide the templates set out in L1.
- We intend to adopt them without any material changes, but they have made purely redactional changes in nature.
- Apologises for the delay in adoption. The Commission wanted to change some of the redactional things, without changing the substance which was very time consuming but the largest bottleneck is the translation. Admits it's the Commission's fault. The translation services are under water, way beyond schedule. They aren't the utmost priority especially as they set out what already exists in the L1.

## **ESMA – Jakub Michalik**

- ESMA has supported the smooth implementation of this since Jan 1 2018. ESMA submitted 11 DRTS in March 2017 and then a second grouping in June 2017 and ESMA made a presentation to MEPs on 8 June 2017. ECON Secretariat also gave a good briefing.
- Aim at ensuring the robustness and integrity of benchmarks, and the determination process. They have also introduced of proportionality of significant and non-significant benchmarks.
- The Delayed adoption creates risks for all parties involved and asks the Commission to give certainty around this adoption
- ESMA has also been working on Level 3 – ESMA published a CP on the guidelines of non-significant benchmarks administrators. How they apply the oversight function, governance, supervised contributors
- The Content of the guidelines is tied up with the Level 2 on the same 4 topics so that's why they haven't published the final L3 because they want to see the L2 in OJ
- They want to promote common supervisory convergence and Aim to give investors certainty.
- ESMA also publishes the register of third-country benchmarks, which is important because supervised entities can use this. They will only be able to use a benchmark if it is in the register. There are now 14 on the website, which should double before year end 2018.
- 3 benchmarks are (EURIBOR, EONIA, LIBOR) included in the COM. They now have supervisory colleges, chaired by NCAs. ESMA is active in the supervisory colleges and this contributes to the harmonisation of supervisory convergence.
- ESMA published a methodological paper on selecting the mandatory contributors to benchmarks.
- In relation to interest rate benchmarks (ECB-ESMA-FSMA) has been set up. 4<sup>th</sup> WG taking place today and it set out a Consultation Paper on alternative risk free rates.

## **Caroline Nagnetaal (ALDE, NL)**

- The final reports were submitted by ESMA to the Commission in March & June 2017, but the Commission has gone well beyond the timeline foreseen for the Commission to adopt which doesn't really make sense if they haven't made any substantive changes.
- 2 weeks ago the Commission gave the EP a draft to scrutinise. There are limited changes. However, one change is that the Commission is more restrictive is using "include" instead of "Consider to include" in art. 1(4) in the RTS on oversight. She asked what the reasoning is for implementation only 2 months after entry into force.
  - o The Commission explained that they made it mandatory for representatives from other entities notably contributors of Net Asset Value of investment funds. This is good governance so the basic contributors are part of the oversight function and so the wording was changed so considering them as we took the view that they are main contributors and their data integrity should be ensured as NAV data providers are very important. They should be sitting on the oversight committee.
- **Regulated data benchmarks** – she noted a lack of clarity of the definition in art.3, including "entirely and directly" and the related conditions in outsourcing in art.10. She commented that the Commission's interpretation will result in higher compliance costs due to a limited supply in such benchmarks. Commented that this doesn't meet what was agreed in trilogues. The solution should reflect the fact regulated data benchmarks are already subject to so many regulations such as market to market abuse regulations MAR. The data should be unquestionable, and NCAs should be able to act.
  - o ESMA responded that the use of the words entirely and directly precludes entirely the involvement of any third party in the data collection process. There is another notion Art.1(1)24a – if an administrator obtains data from a third-party data vendor which meets the outsourcing requirements in art.10) this would meet the standard of regulated data benchmarks.
- She suggested that in order to fix this issue on regulated data benchmarks, changes should be made to the Level 1 text. This amendment could be included as a recital to express the spirit of the co-legislators or through amending including data feed operations in the inclusion of the definition of regulated data benchmarks. It is possible to amend the BMR via the ESAs review or the low-carbon benchmarks sustainable finance package.
  - o The Commission responded that they are aware of this issue. It was discussed during 7<sup>th</sup> trilogue at the end of 2015. The EP then wanted to broaden the scope of the definition to use intermediaries to get data but the Council was against this because there could be manipulation by non-regulated intermediaries. The Commission has tried to reconcile. Most intermediaries would be APAs, and if data comes from an APA, then which means that the same type of exemption would apply. Regulated data is strict, and if intermediaries are use, then they would be eligible data sources as they use approved publication requirements. This compromise should be looked at because we recall that there was some scepticism especially if the data comes from several regulated venues.
- Timelines are difficult but it should be possible finalise them by Jan 1 2020. If not, ESMA should use any instrument they have at their disposal.
- This would respect the wish of the co-legislators and respect market stability.
- Concerned that timeline of EURIBOR reform and EONIA transition. They will expire by 2020 and the EONIA alternatives might not be ready by then. What does the COM think about the timelines for this and what are the feasible alternatives if they aren't ready on time which will affect trillions of contracts?

- The Commission responded that they are aware of the issue. They pointed to the work of the joint working group including FSMA-ECB-COM which is looking at alternative and risk-free rates. One straightforward solution to create legal certainty is that these two benchmarks would get authorisation, there is still time to do this as transition ends at 1 Jan 2020.

The EPP supported the rapporteur and made no further comments

#### **Jonas Fernandez (S&D, ES)**

- Too much time is going by in developing various measures which ESMA needs to take. Its been 3 years since this text was adopted. We stood in the EP elections at a difficult time for the economy and at a time when there was a lot of manipulation going on in financial markets.
- We needed transparent governance with financial indicators which previously weren't being regulated. I promised my constituents that LIBOR and exchange rate fraud wouldn't happen. 3 years later, it still isn't being implemented fully and we are taking too long to apply the various DAs and regulations and there is resistance from industry to switch over to indicators which are covered by this legislation.
- There is a risk of manipulation as benchmarks could be derived from other benchmarks. Reference indicators used in regulated data could be regulated a bit less. There is a possibility for manipulation. We need to move beyond that. These legal doubts could be a reason to allow for the massive use of regulated data. We have elections and he wants to be able to say to constituents that LIBOR isn't being manipulated again.

Please do not hesitate to let us know if you have any questions.

Best regards,

Sonja

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Senior Account Executive

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