

Cora van Nieuwenhuizen, MEP  
European Parliament  
60 Rue Wiertz  
B-1047 Brussels

Brussels, 6 November 2014

Dear Ms van Nieuwenhuizen,

AmCham EU would like to congratulate you on your appointment as rapporteur on the Benchmarks dossier. We had a very constructive dialogue with the former rapporteur, Sharon Bowles, on this issue and we are hopeful that we can continue to have a good dialogue with you on this important file over the coming months.

Following the adoption of the International Organization of Securities Commission's (IOSCO) Principles for Financial Benchmarks, the IOSCO Principles for Price Reporting Agencies and the European Commission's legislative proposal for a Regulation on Indices and Benchmarks, we would like to share our position on the Commission's Benchmarks proposal (outlined below).

### **AmCham EU position on Benchmarks**

The Commission's proposal, through its broad scope, will impact all 162 members of AmCham EU, many of whom are not financial services firms. The proposal reaches well beyond capital markets. We therefore urge the European co-legislators to adopt a cautious approach, that includes due regard of the impact on the non-financial markets, including the real economy, the energy and raw material markets and the shipping industry. The characteristics of these markets, and the suppliers of benchmarks to those markets, are very different from capital markets. We would therefore encourage policy-makers to take care to avoid unintended damage to these markets.

By their very nature many benchmarks and indices are used globally. Any European regulation should be fully aligned with the G20 commitments and the principles developed by the relevant international organisation, including IOSCO, the International Energy Agency and the International Energy Forum. AmCham EU is particularly concerned about any extra-territorial application of EU rules affecting European Union users of benchmarks, such as corporates, who may no longer be able to rely on using certain benchmarks, or financial instruments that reference certain non-EU benchmarks.

## **1. Financial Benchmarks**

### **a. Scope**

AmCham EU welcomes reforms to significant benchmarks (such as Libor and Euribor) to restore market confidence. We support a targeted and specific scope for a European regulation on financial benchmarks that should be developed to reflect a consistent international approach. Clarity on scope as well as on the varying levels of regulatory requirements that apply to different types of benchmarks is critical for all stakeholders, including regulators.

Any significant global benchmark must have an impartial governance framework in place and a scrutiny mechanism able to identify manipulation. As a first step, those involved in the governance must be free from conflict of interest and the structures and decision-making process must be transparent and auditable. The governance, scrutiny and enforcement regimes for a global benchmark must satisfy regulators globally.

Where a benchmark sponsor or participant is already being regulated by a financial regulator, then that regulator should oversee the implementation of the standards in a manner that reflects the significance of the benchmark being regulated. The level of regulation of benchmarks should also remain proportional to their relative importance to the financial system and any framework must be carefully calibrated<sup>1</sup>. In addition, it is important to take account of the distinction between key critical benchmarks that are primarily used for purposes of pricing a broad range of financial instruments or contracts and benchmarks in the broader sense (including proprietary indices). In short, not all indices should be regarded as “public goods” and this should be reflected in the design of the regulation.

AmCham EU supports establishing trust in benchmarks through a targeted regulation. Nevertheless, we are concerned about maintaining the freedom of the press and the right to freedom of expression. The European Commission’s proposal does refer to those key principles in the explanatory memorandum, however we think that mentioning of the freedom of expression in the recitals would guarantee that media activities remain outside the scope of the Regulation. This is important as the potential regulation of media sources could also bring to an end the publication of prices and some financial data reporting, which would negatively impact increased transparency in financial markets.

### **b. Accurate and sufficient data as a solid base for robust benchmarks**

AmCham EU believes that suitability, transparency, reliability, predictability and appropriateness of data are all critical to financial benchmarks. We welcome the fact that the European Commission’s proposal reflects the IOSCO principle 8 guidelines on hierarchy of data inputs and expert judgement used for the determination of benchmarks. Provided that data sufficiency and an active, highly liquid market exist, live prices (i.e. committed bid-offer quotes) and/or traded rates and observable transactions would be the best inputs. Other market information or expert judgment may be more

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<sup>1</sup> An example of this approach are the GFMA Updated Benchmark Principles of 20 November 2012, <http://www.gfma.org/Initiatives/Market-Practices/GFMA-Provides-its-Updated-Principles-for-Financial-Benchmarks-to-the-Global-Regulatory-Community/>

suitable in low liquidity markets where transactions may not be consistently available each day. The value of data on previously-executed transactions can quickly become stale and even illiquid assets must be priced on a regular basis. Habitually or spasmodically illiquid markets which are priced from transactions can exhibit high levels of volatility which might not be regarded as representative of the value of underlying assets. Therefore, it is essential that Art 7.1 of Commission proposal explicitly recognises, as IOSCO has done, the importance of expert judgment in the context of non-transactions based input. Moreover, many liquid markets, for example in equities, are valued on an unweighted last trade basis where unrepresentatively small retail trades can give an unrepresentative view of the market. Thus there are exceptions which again demonstrate the principle that the most appropriate approach (in the case of defining input data) needs to be determined on a benchmark by benchmark basis.

AmCham EU also highlights the need for further clarity around the transparency of the input data regime (Article 16). Provisions to publish the input data used to determine benchmarks immediately after publication of the benchmark should take into account that administrators in many cases do not own the intellectual property for prices. Such ownership is often held by exchanges, which may bar administrators from immediately publishing the transaction data by their licensing agreements and contracts. In certain cases, publication of input data should be delayed with the option to withhold it indefinitely to avoid contractual disputes. Any provisions to publish input data should also be carefully calibrated to ensure the viability of benchmarks, without jeopardising their intellectual property rights and data sufficiency.

### **c. Methodologies**

AmCham EU believes that investor protection is crucial in restoring trust to financial benchmarks. Nevertheless, we are concerned that the proposal requires administrators to identify circumstances when their benchmarks become unreliable. Some have argued that this may be an invitation to litigation against administrators and contributors.

Administrators are not able to control who uses their information and for what purpose, unless extremely strict restrictions are placed on how the data may be accessed. Once data is in the public domain, administrators cannot track who is viewing it and how it is being used. This is why data carried by data vendors is subject to extensive disclaimers.

## **2. Equivalence & transitional provisions**

Many benchmarks are of a truly global nature. AmCham EU is concerned that the European Commission proposal effectively bans third country administrators from providing benchmarks to EU customers until the EC has adopted an equivalence decision in respect of that third country. For example, market actors may require hedging Yen or Renminbi floating- or fixed rate loans using third country benchmarks to manage their risks. There is a risk (supported by many of the submissions made by AmCham EU in recent years) that equivalence determinations will not be made in time. Indeed, all signs are that third countries will move at a slower pace than the European Union in introducing benchmark regulation, if they will introduce any regulation at all. This may have highly disruptive implications for EU users of third country benchmarks, preventing them from managing risk. Moreover, the application of a restrictive equivalence approach could provoke retaliatory

reciprocal measures. Therefore, AmCham EU believes it is essential that an appropriate transitional framework is in place that provides for continuity until such determinations are made.

The transitional provisions (Article 39) present certain risks of market disruption. In particular, the use of benchmarks not complying with the requirements of the Regulation is prohibited unless changing the benchmark would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which reference that benchmark. While this provision is welcome, we note that it will be very difficult to demonstrate beyond doubt ex-ante that contract frustration would occur if the benchmark were changed. Also, no transitional period seems to be offered for benchmarks established outside of the Union.

### **3. Commodity Benchmarks**

AmCham EU supports international initiatives to ensure robust and reliable commodity benchmarks and support confidence. We are committed to the IOSCO principles for Price Reporting Agencies (PRAs) of 5 October 2012, as reaffirmed by IOSCO in its report of 11 September 2014, which paid due regard to the specificities of the oil and wider commodity markets. European legislation should fully reflect and not exceed these IOSCO principles for PRAs.

By way of example, AmCham EU is concerned by the restrictions on the use of front office data (Annex I, 8), imposed by the proposal, on administrators of commodity and other specialist benchmarks. These restrictions would impair the administrators' ability to access data and may even force a number of benchmarks to be shut-down, as some contributors will find it difficult and economically unviable to comply with the requirement<sup>2</sup>.

Additionally, the PRA Principles were calibrated with immense care to encourage the voluntary provision of information by market sources in commodity markets to journalists working for the PRAs. There was an active dialogue between all the stakeholders involved, including the IEA, IEF and OPEC. The PRA Principles have also undergone an 18 month review process. IOSCO, again in collaboration with the International Energy Agency (IEA), the International Energy Forum (IEF) and the Organization of Petroleum Exporting Countries (OPEC) concluded that no further modification was required at this stage. Importantly, IOSCO made clear the PRA Principles should apply for all commodities and should remain distinct from the IOSCO Financial Benchmark Principles.

We would like to draw your attention to the work already undertaken in the field by national or international regulatory or expert, including the Agency for the Cooperation of Energy Regulators (ACER), to gain an understanding of the distinctive characteristics of commodity markets. Both IOSCO and the Office of Gas and Electricity Markets (Ofgem), the UK energy regulator, have drawn

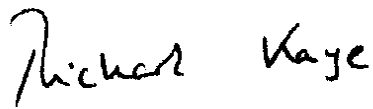
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<sup>2</sup> This could potentially affect all non-financial benchmarks, as key contributors are often not able to separate front and back office functions. This includes: airlines, refining companies, small importers, petrochemical companies, power stations, shipping companies and shipping brokers, and even large oil majors.

particular attention to the voluntary nature of contributions and the risk that inappropriate regulatory intervention could decrease contributions by market sources, leading to reduced market transparency.

We look forward to our continuing dialogue with you on this important dossier; please do not hesitate to contact us if we can be of any further assistance.

Yours sincerely,



Richard Kaye  
Chair  
Financial Services & Company Law Committee  
AmCham EU

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.*

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