

Brussels, 23 January 2024

RECALIBRATING THE BENCHMARKS REGULATION

The proposal by the European Commission to amend the Benchmarks Regulation represents an overall welcome development in this field, seeking to introduce greater proportionality in the regulation of index providers. While we support the spirit of the proposal, EFAMA advocates retaining certain minimum safeguards applicable to non-significant benchmarks for the protection of users and end investors.

A. Supporting Increased Proportionality

EFAMA supports adopting a more proportionate approach to regulating benchmarks. This ensures the integrity of indices without disproportionately increasing costs for investors and hampering investment strategies. It would address the issue that motivated the current revision of the Benchmark Regulation, i.e. that the requirement to obtain recognition or endorsement and comply with organizational rules could deprive EU market participants of their current use of non-EU benchmarks, on which they rely heavily, thereby hindering product innovation and diversification. However, this issue seems mainly pertinent to small and mid-sized non-EU index providers, whereas the benchmark proposal goes much further by removing all non-significant benchmarks from the scope of the text. **Fully excluding non-significant benchmarks does not strike, in the view of our members, the correct balance:**

- Certain minimum safeguards regarding conflicts of interest and disclosure obligations are necessary to protect investors and should not be left to commercial negotiation. Where non-significant benchmark administrators are removed from the scope of the Regulation, important obligations such as the requirement to provide a benchmark statement and provide information on the methodology used will no longer be required as a matter of law. Instead, these obligations would only apply if the administrator agrees to them as a matter of contract between non-significant benchmark administrators and users. Where an imbalance in bargaining power between an administrator and user exists, this risks creating a gap making it difficult for the users to comply with legal disclosure obligations regarding their own, benchmarks-based products. This is true not only in areas such as disclosure obligations but also regarding minimum safeguards against conflicts of interest, particularly relevant as we see an increase in index providers also acting in the capacity of data providers (most notably with respect to ESG data). We strongly believe this would benefit the market without representing an excessive compliance burden.
- Users' and administrators' disclosure obligations should be aligned. Asset managers are required to disclose information on the benchmarks they use under, for example, the Sustainable Finance

Disclosure Regulation (SFDR) and Financial Index Eligibility Tables.¹ The current disclosures on methodology regarding ESG factors made by administrators under the Benchmark Regulation remain insufficient for asset managers to make their disclosures under the SFDR, being subject to a different set of metrics. Also in many other areas, managers still need to fill data gaps, which are often sourced either internally or from a third party, sometimes at considerable additional cost and creating operational, regulatory and reputational risk for managers. Not only must the disclosures by benchmark administrators on the methodology of their benchmarks be retained, as explained above, but they must be aligned with the disclosures which their users must in turn make to investors and authorities – we suggest via ESMA Regulatory Technical Standards.

- We therefore propose **introducing a lighter regime for non-significant benchmarks**, ensuring minimal compliance burden whilst still providing important protection to end investors. This would at a minimum include the benchmark statement and methodology disclosure requirements and minimum safeguards on conflicts of interest, as well as ensuring reliability of input data and record keeping.
- We also propose **distinguishing between small and mid-sized administrators on the one hand**, for whom the full suite of obligations represents a disproportionate burden, **and much larger administrators on the other hand**, who would fall out of scope of the revised rules by virtue of administering only non-significant benchmarks, albeit a very large volume thereof. We would recommend aggregating the value of financial instruments, financial contracts and investment funds referencing all non-significant indices provided by a single administrator, such that where such aggregate value exceeds a given threshold, the regular set of obligations applies with respect to all those benchmarks. This aligns with the rationale behind the review, which is to create a more proportionate compliance system for those administrators for whom the Regulation represents a disproportionate burden. We recommend aligning this threshold for assessing the aggregate value of non-significant benchmarks with the existing quantitative threshold for assessing the significance of a single benchmark.

B. User obligations

Changes made to the scope of obligations relating to benchmarks have not, under the Commission proposal, been reflected in the corresponding obligations of users. Specifically, users are still obliged to make disclosures in their prospectuses as to whether the benchmark is provided by an administrator included in the register referred to in Article 36 (per Article 29(2)). User obligations must be amended in light of the proposed changes to the compliance obligations of benchmark administrators.

C. ESG naming convention and EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks

In order to combat the risk of greenwashing and ensure consumer protection overall, ESMA is working on the guidelines regarding the appropriate naming of investment funds. However, where funds track an index, they must mention the name of the index in the name of the fund. Therefore, the requirements applicable to index names must be aligned with those applicable to funds.

- In its mandate(s) to draft the relevant guidelines ESMA should be given a task of aligning the naming conventions applicable to index providers with those applicable to investment funds.

¹ per ESMA Guidelines on ETFs and other UCITS issues ESMA/2014/837.

We also support the approach of the Council and Rapporteur to ensure that third country administrators will be permitted to administer EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks.

D. Costs

In recent years, our members have reported significant cost increases with respect to the granting of licenses and, in particular, costs charged to access the underlying data. However, there is no requirement to have a transparent price and cost policy with respect to the many, often complex licensing models. Currently, the requirement to ensure licenses and information relating to benchmarks are provided in a fair, reasonable, transparent and non-discriminatory basis applies only to critical benchmarks. In light of observed market practices, and the fact that supervised entities such as asset managers require access to the underlying data in order to adhere to their own regulatory obligations, this must be extended to licenses of benchmarks in general.

- We recommend extending the provision on the mitigation of market power of critical benchmark administrators to significant benchmarks and EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks.
- We recommend requiring the publication of annual prices' lists of products and services which would permit multiyear comparisons, as well as disclosure of costs to ensure that prices charged bear a reasonable relationship with the cost of underlying services.

E. Spot FX Benchmarks

For good measure, we note that we advocate retaining the existing Commission exemption process for spot foreign exchange (FX) benchmarks. Currently, spot FX benchmarks may not need to be subject to an equivalence assessment. This permits companies to continue using such benchmarks for the purposes of hedging against foreign exchange risks when calculating contractual payouts in financial instruments. The current exemption should be explicitly retained rather than it be assumed that such benchmarks will always fall below the significance threshold.

F. Improvements to the Register

We are of the view that improvements can be made to the ESMA Register to enhance its transparency and usability. This register should be a centralised log, meaning that benchmarks should be listed in addition to the administrator, so that users could search for either the administrator or the benchmark. They should also be able to see all the benchmarks being provided by a specific administrator. Therefore, rather than maintain two different registers, which makes it more difficult for supervised entities to identify the necessary indices, we propose to merge these registers into one to increase transparency and usability.

G. Public Notice

To ensure a level playing field, a supervised entity which uses a benchmark to measure the performance of an investment fund which is subject to a public notice under Article 24a(5) should also be able to replace that benchmark with an appropriate alternative within 6 months following the publication of that notice, or issue and publish a statement on its website informing clients of the absence of an appropriate alternative. We note that the scope of the provision in the Commission proposal is limited only to supervised entity that use a benchmark in existing financial contracts or financial instruments.



ABOUT EFAMA

EFAMA is the voice of the European investment management industry, which manages EUR 28.5 trillion of assets on behalf of its clients in Europe and around the world. We advocate for a regulatory environment that supports our industry's crucial role in steering capital towards investments for a sustainable future and providing long-term value for investors. Besides fostering a Capital Markets Union, consumer empowerment and sustainable finance in Europe, we also support open and well-functioning global capital markets and engage with international standard setters and relevant third-country authorities. EFAMA is a primary source of industry statistical data and issues regular publications, including Market Insights and the EFAMA Fact Book. More information is available at www.efama.org

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