EFAMA response to the Commission Delegated Regulation supplementing Regulation (EU) 2016/1011 on

Specifying technical elements of the definitions laid down in paragraph 1 of Article 3

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Calculation of total values of references to benchmarks

A. GENERAL REMARKS

The European Fund and Asset Management Association[1], EFAMA, welcomes the opportunity to provide comments to the European Commission's draft Delegated Regulations supplementing the Benchmark Regulation. EFAMA has participated in the previous consultations and hearings organized by ESMA on the preparation of the draft delegated acts and RTS and considers it important to continue contributing to the ongoing work on the Level 2 measures of the Benchmark Regulation, in terms of representing the asset management industry's position.

Asset managers represent an important group of benchmarks users, either in the case of passive managed funds and exchange traded funds (ETFs) - where benchmarks are used as a target for index linked funds - or in the case of the evaluation of an active manager's performance - where the fund performance is measured against a selected index or a set of indices. Asset managers as benchmarks users are generally not involved in the production, calculation, and contribution to data on which benchmarks are based. Therefore, their role being limited to the use of a benchmark – for which they are called to pay high and multiple fees – does not make it possible for them to have direct access or control over the benchmark setting processes, as a benchmark administrator does.

Moreover, investment funds are highly regulated financial products through the UCITS and AIFM Directives, which complement existing industry practice around robust index selection necessary to perform to the highest fiduciary standards of asset managers. In particular, in the case of UCITS, asset managers are already subject to extensive requirements and conditions under which UCITS may use financial indices as benchmarks. The ESMA Guidelines on ETFs and other UCITS issues

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 28 member associations and 62 corporate members close to EUR 23 trillion in assets under management of which EUR 14.1 trillion managed by 58,400 investment funds at end 2016. Just over 30,600 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 27,800 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org

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(ESMA/2014/937/EN)[2] foresee that only transparent indices are permitted for UCITS to use as a benchmark. In addition, indices used as performance evaluation tools need to be disclosed in advance in the UCITS KIID.

The EU asset management industry considers that a comprehensive legal framework for benchmarks is an important step for restoring market credibility and confidence in financial indices and rates. Ensuring the continuity and robustness of benchmarks offered to users is critical for the asset managers' ability to perform according to their own fiduciary duties. For that, EFAMA believes that the publication of the Benchmark Regulation can allow for further consistency and transparency on the processes of setting methodologies, calculation, governance and supervision of benchmarks and hopefully a level playing field for all market participants. We urge the Commission to ensure that the Level 2 measures will also take this approach of further transparency and legal certainty for the users of financial indices and benchmarks.

EFAMA considers that the requirements for users of benchmarks and supervised entities, such as UCITS and AIFs, are clearly set in articles 28 and 29. These are the main provisions related to the use of benchmarks, requiring firstly users to ensure that the benchmark or a combination of benchmarks they use is provided by an administrator included in the ESMA register. Therefore, the reference in the Benchmark register is rendering a benchmark compatible with this Regulation and appropriate for use. Secondly, the relevant provisions foresee that in the case of a public offer of an investment product referencing a benchmark, the Prospectus should include clear and prominent information stating whether the benchmark is complying with the Regulation. Lastly, users are required to produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided.

Given these clear requirements deriving from the Level 1 legislation concerning users of benchmarks, we would certainly consider that no additional or indirect burden for users and supervised entities should derive from the Level 2 legislation.

In this regard, EFAMA has a few suggestions to make related to the measures foreseen in the Delegated Regulations proposed by the Commission, in particular concerning the definition of the indices "made available to the public" and the NAV of an investment fund to be considered for the calculation of the underlying value of a benchmark.

As a general remark, we welcome that the Commission seems to have stayed close to the Technical Advice published by ESMA on those concrete points. We consider that ESMA has included in its final advice a number of clarifications and improvements– in comparison to some previous discussion papers – as a result of the exchange of views with the relevant stakeholders, including the asset management industry. In that context, EFAMA supports the proposed measures by the European Commission and stresses that the users' perspective and need for legal clarity along with avoiding any additional burden, is key for the successful implementation of the Benchmark Regulation.

[2] https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf

B. RESPONSE TO THE CONSULTATION OF THE EUROPEAN COMMISSION ON DRAFT DELEGATED ACTS

Specifying technical elements of the definitions laid down in paragraph 1 of Article 3: Definition on "making available to the public"

EFAMA would like to recall that the scope of the Benchmarks Regulation clearly covers only those indices that are public or made available to the public and, thus, is a precise one not covering all future or existing indices offered and used in the financial markets. In that context, we welcome the reference in recital 3 of the Delegated Regulation that a clear distinction is to be made so that "*a narrowly defined number of recipients should not qualify as the public*", as "*otherwise there would not be any difference between "making available" and "making available to the public""*. We, indeed, consider that such a distinction is in line with the Level 1 text of the Benchmark Regulation.

The recipients having access to an index constitute the key element. In addition, when assessing the recipients having access to an index, the focus should not be on a concrete number/threshold of recipients. The critical point is whether the recipients are a non-precise group of persons or whether there are already defined recipients outside the group of which no other person can have access to the index.

The Delegated Regulation foresees in article 1 paragraph 1 that *"a figure shall be considered to be made available to the public …where the figure is made accessible to a potentially indeterminate number of legal and natural persons other than the index provider…".* We welcome this definition and the fact that the Commission chose to base the definition not on concrete thresholds as to the number of recipients rather on substantial (qualitative) criteria of whether the access involves a determinate or not number of natural or legal persons. The term "determined number of recipients" refers to concrete/ defined persons that can have access to the index (other than the index provider). We share the Commission's approach that an index available to an indeterminate number of recipients is much closer to the notion of the access to the public, whereas this is not the case for an index that is only accessible to a determined number of persons.

Moreover, paragraph 2 of article 1 refers to indirect ways of having access to an index, among others via a supervised entity using an index to measure the performance of an investment fund. We can agree that such a use may give an indirect access to the index. However, such access will not be enough when considering the public nature of an index, the remaining key element being that the access must refer to an indeterminate number of natural or legal persons. Therefore, the mere reference of an index by an investment fund cannot suffice per se to render a benchmark made available to the public. We consider, however, that this is what paragraph 2 refers to when stating that the figure "may be accessed by such persons", i.e. such persons referring to the potentially indeterminate number of persons mentioned in the previous paragraph. For that reason, we can agree with what is proposed in paragraph 2.

Finally, we have the same point as regards the references in paragraph 3 on the various forms in which access may take place. Indeed, there is a variety of media and modalities to have access to an index, however it is not the form of access, but the indeterminate group of recipients that makes the index

"available to the public". We consider it important that both paragraphs 2 and 3 are read in combination with the definition of paragraph 1.

Calculation of total values of references to benchmarks

EFAMA agrees with the European Commission's proposals as regards the Net Asset Values of investment funds that are to be taken into consideration when calculating the total values of reference to benchmarks. We also agree with the use of alternative amounts and values, provided that they are sufficiently reliable and of sufficient reputation.

At the same time, EFAMA would like to stress, as it did in the previous consultations with ESMA, that no additional burden and costs should result for the users related to the collection of the information on NAVs or their frequent update. We indeed welcome that in the Delegated Regulation there is no explicit or implicit requirement to disclose notional or net asset values to the index provider – this is in line with the Level 1 text of the Regulation that does not foresee any such requirements for investment funds as supervised entities. It is important that this will also be safeguarded in practice by making sure that there is sufficient flexibility for benchmark administrators to use all available sources, including proxies, to gather the relevant data.

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