

## **EFAMA response to the ESMA Consultation Paper on Draft Technical Standards under the Benchmarks Regulation**

### **A. GENERAL REMARKS**

The European Fund and Asset Management Association<sup>1</sup>, EFAMA, welcomes the opportunity to provide comments to the ESMA Consultation Paper on the draft technical standards under the Benchmark Regulation. EFAMA also welcomes a number of clarifications that ESMA is providing in this Consultation since its previous Discussion Paper.

Since the publication of the Proposal for a Regulation on Benchmark setting processes, EFAMA has been in favor of moving forward with a new regulatory framework ensuring that benchmarks provided to users have in place a robust framework to minimise conflicts of interest or structural weaknesses.

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 users of benchmarks ...) and combination of benchmarks (the later in the form of combination of regulated indices or regulated indices modified without the inclusion of new input data) are generally not involved in the production, calculation, and contribution of data on which benchmarks are based. Therefore, their role being clearly 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). 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 (ESMA/2014/937/EN<sup>2</sup>) foresee that only transparent indices are permitted for UCITS to use as a benchmark. These transparency requirements are very extensive covering calculation, re-balancing methodologies, as well as constituents and their respective weightings. In addition, indices used as performance evaluation tools need to be disclosed in advance

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<sup>1</sup> EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 61 corporate members EUR 21 trillion in assets under management of which EUR 12.6 trillion managed by 56,000 investment funds at end 2015. Just over 30,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 25,900 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit [www.efama.org](http://www.efama.org)

<sup>2</sup> [https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00\\_en\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf)

in the UCITS KIID. This existing Regulation complements existing industry practice around robust index selection necessary to perform to the highest fiduciary standards.

EFAMA wishes to repeat its strong belief that transparency has a key role to play for the main objectives of this Regulations to be addressed both for the users and for the end-investors. This would require transparency on all the main features of an index that should be publicly available if necessary with duly time delay conditions in order to address the intellectual property concerns. Such transparency would simultaneously have achieved three important goals: (a) limit interest in and the possibility for market and other financial abuses by the providers of such products; (b) promote investor confidence; and (c) avoid multiple pricing for the use of a single index by the end-user.

It is, therefore, regretful that the initial proposal for transparency on input data - as included in the Commission's Proposal - was modified to transparency of methodology, which we consider is not sufficient to address the main objectives of this Regulation.

Moreover, in the case of asset managers, who are covered by extensive disclosure requirements as to the indices they use and their input data (see the ESMA Guidelines for UCITS as stated above), the absence in the Benchmark Regulation of similar requirements for the administrators makes asset managers' own disclosure duties too difficult and onerous to be fulfilled in practice. There is clearly a policy choice to be made as to what type of input data should the end-investor of an index have access to, which EFAMA does not wish to pre-empt. Whether the right level of information is the one foreseen in the BMR or the one foreseen in the ESMA Guidelines, this final choice should not result being detrimental for one particular category of users, to the extent that such access to the necessary information is not ensured by the Regulation, but remains to the administrator's discretion.

**For that reason, EFAMA underlines that an alignment is necessary between the content of the disclosure requirements foreseen under Benchmark Regulation and under ESMA Guidelines on ETFs and other UCITS issues.**

EFAMA will be responding to the sections of this Consultation Paper that are relevant for users of benchmarks and in particular on the oversight function, the transparency of the methodology, the code of conduct for contributors, the compliance statement and the benchmark statement.

## B. RESPONSES TO THE QUESTIONS OF THE CONSULTATION PAPER

### Section 2 – Characteristics and procedures of the oversight function (Article 5 BMR)

**Q5: Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?**

EFAMA would like to stress that asset managers are an important category of benchmark users foreseen as supervised entities under BMR (Article 3 para 1 point 17e-f). Their representation in the oversight function committee of a benchmark is of an important added value for safeguarding the users' interests, the appropriate level of transparency, the better understanding of market reality the users are expecting the benchmark to reflect and the control of sound policies on conflicts of interest and fee policies.

We would, therefore, propose the following change to the 1<sup>st</sup> paragraph of the Annex to the draft RTS on oversight function:

An independent oversight committee consisting of a balanced representation of stakeholders including **users of benchmarks in particular** supervised entities **such as UCITS and AIFs representatives** ~~that use the benchmark~~, contributors and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;

### Section 4– Transparency of methodology (Article 13 BMR)

**Q8: Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark's methodology is traceable and verifiable?**

As stated in the general remarks, EFAMA considers that transparency on methodology is not sufficient to ensure meeting the objectives of this Regulation, which would require a further transparency on the input data of an index. In our previous response to the ESMA Discussion paper we have argued for the following key elements to be included: definition of the benchmark, including its objective, the universe of the benchmark components and the basis on which they are selected. Also, in the case of period changes to the composition, the rebalancing frequency, maximum/minimum weightings and names of the individual components.

At the same time, EFAMA has urged ESMA to consider the disclosure requirements for the benchmark methodology in alignment with the ones that are imposed to asset managers under the ESMA Guidelines on ETFs and other UCITS issues<sup>3</sup> regarding financial indices they are using.

As stated in our general remarks, in the case of UCITS, the ESMA Guidelines on ETFs and other UCITS issues foresee that UCITS are permitted to use only transparent indices. These transparency

<sup>3</sup> See footnote 2

requirements are very extensive covering calculation, re-balancing methodologies, as well as constituents and their respective weightings. To the extent that those rules are related to disclosure of information on the indices settings to the end-investors (via the UCITS KIID), these disclosure requirements mean that the asset manager needs to get hold of those data to then be able to disclose them (which is not an easy exercise). In addition, if it is the ESMA Guidelines that are requesting the asset manager to have access to concrete data of the setting processes of an index (hence regulatory requirements), it should be mandatory via the BMR to allow access to that data.

Up until today collecting the information and data requested under the ESMA Guidelines has been a rather onerous and burdensome exercise for UCITS managers as each benchmark administrator has different disclosure policies and practices in place. In order to simplify things and improve the situation, EFAMA has drawn up a Questionnaire with standardised information request which members of EFAMA as well as other stakeholders may use in order to obtain the right information in line with the ESMA Guidelines<sup>4</sup>. Still, this is depending on the willingness of the benchmark administrator and so far it was not able to generate the extensive results and the improvement that we would have hoped for.

For that reason, EFAMA considers it fully appropriate and legally consistent to align the requirements coming from the ESMA Guidelines with the Benchmarks Regulation transparency requirements for administrators. Therefore proposing that all the main following elements foreseen in title XIII (Guidelines 49 to 62) of the ESMA Guidelines are included in the list of the minimum elements that should be disclosed or as an alternative to delete them:

- For leveraged indices, information on the leverage contained, the volatility target (if any) and its recognition by an authority (if any), as well as if the index is subject to independent valuation and/or audit
- The composition and the underlying assets of the index, whether this composition complies with the UCITS diversification rules, the cap on the individual component weight (if any) and the inclusion of commodities and sub-categories of them.
- The market that the index represents and the percentage of the market or the underlying components, the performance of the representative group of underlying components in the case of an index measuring the performance, the sufficient liquidity of the underlying asset if the index is regularly reviewed or rebalanced and the sufficient liquidity of the underlying asset that can allow to replicate the index.
- The way index components are selected and on what basis these components are selected
- If the index strategy is partly based on cash payment
- How frequently is an index rebalanced and whether the method used to select index constituents and to rebalance its composition are based on predefined rules
- If the index is published and the way that this is done (website, media, the frequency of the publishing) as well as the publication includes information on the index calculation methodology, the pricing procedure for individual components, the constituents and their weighting, any operational difficulties.
- Index rebalancing, its frequency, costs and method

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<sup>4</sup> EFAMA Questionnaire: Index information to be requested from index providers.  
<http://www.efama.org/Lists/Topics/form/Displtem.aspx?ID=49>

- If the weightings of the index components are published before the next rebalancing of the index
- Whether the index provider is permitted to accept payments from potential index components for inclusion in the index.

There is a policy option to be taken here and EFAMA certainly doesn't wish to pre-empt the outcome of that decision, which can go to one or the other direction (i.e. further and more granular transparency under BMR level 2 or deletion of disclosure requirements in ESMA Guidelines that go beyond BMR level 2). Still, any choice made should not lead to two uneven disclosure regimes for administrators and asset managers and therefore to due diligence requirements which asset managers will have important difficulties to comply with.

Since it has been already difficult for asset managers to acquire the ESMA Guidelines-related input from benchmark providers at the time prior to the BMR, it is rather reasonable to anticipate that once the BMR level 1 and 2 will be in place, the treatment of any transparency request going beyond what is foreseen as mandatory will be very difficult if not upon a very onerous basis.

The draft RTS proposed in this Consultation Paper and the key elements foreseen as to the transparency of the methodology are very high level and not on an equal granular basis as the ESMA Guidelines requirements (the full list of data as shown above). Therefore, such an alignment is not yet in place.

**Q9: Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?**

Please see our response to previous question.

**Q10: Do you agree with the procedure for consultation on material changes to the methodology?**

EFAMA agrees with ESMA's approach and the need for a consultation as the general rule prior to any material change being applied to the methodology.

<b>Section 5 – Code of Conduct for Contributors (Article 15 BMR)</b>
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**Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?**

EFAMA agrees with the proposed RTS related to the code of conduct for contributors. In particular concerning policies, procedures and controls related to conflicts of interest, we consider that it is indeed for the contributor to implement and the administrator to have the appropriate oversight and verification process in place. In contrast to that, ESMA Guidelines on ETFs and other UCITS issues are also requiring asset managers to conduct an assessment on conflicts of interest on the indices they are

using, a task which they are unable to conduct given that they are third party users having no control over or interference in the benchmark setting processes. Given that the BMR is now clearly setting processes related to the conflicts of interest, EFAMA would urge ESMA to acknowledge that for any benchmark authorized or registered in the ESMA register the BMR rules are fully respected and that therefore no further assessment is necessary. Hence, the corresponding rules in the ESMA Guidelines on ETFs and other UCITS issues related to financial indices used by asset managers should be deleted.

<b>Section 8 – Compliance Statement for administrators of significant and non-significant benchmarks (Article 25 and 26 BMR)</b>
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**Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.**

EFAMA regrets the fact that in contrary to the proposal in its initial Discussion Paper for a statement to refer to a single benchmark/family of benchmarks, the current consultation paper opts for a single compliance statement composed of multiple core sections referring to identifiable group of benchmarks (either belonging to the same family or not).

The previous version of a statement per benchmark/family of benchmarks is user-friendlier as it allows for a direct reading and understanding of the core characteristics of a benchmark rather than requiring for a more complicated exercise and understanding if any provisions dis-apply and for which benchmarks. This will end up contradicting the notion of transparency from the end-investor perspective that the compliance statement is here to serve.

For those reasons EFAMA would urge for the compliance statement to refer to a single benchmark or family of benchmarks at a time.

<b>Section 9 – Benchmark Statement (Article 27 BMR)</b>
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**Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?**

As explained in our response to Q8 on the transparency of the methodology, UCITS have concrete requirements deriving from the ESMA Guidelines as to the financial indices they can use. Those requirements come on top as they are additional to the requirements of this Regulation. In order to evaluate the suitability of an index according to these ESMA Guidelines, the manager of the fund needs to have access to a number of data related to benchmarks, the collection of which has been proven to be very difficult. And we have good reasons to believe that this will continue to be the case if the benchmark administrators will have no regulatory obligation to provide these data based on BMR level 2.

For that reason, EFAMA urges the appropriate alignment between BMR level 2 and ESMA Guidelines on ETFs and other UCITS issues that is necessary for asset managers to perform their disclosure duties and for end-investors to be duly informed.

In order to obtain this type of alignment, the use of the Benchmark Statement can also be opted. That would mean that the Benchmark Statement can include the confirmation of the administrator that the Benchmark is (or is not) UCITS Directive-compliant.

EFAMA is supporting this declaration of compliance (or not) with the UCITS Directive (and therefore also with the ESMA Guidelines), as this is the least burdensome for both sides, as well as the most easily to assess for national competent authorities.

Another point EFAMA wishes to underline is the need for a simple and therefore easy to assess document of benchmark statement. In that regard, the use of further links and cross-references would ensure only the material information is included and seems to be the most helpful and user-friendly way.

**Q22: Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.**

EFAMA would suggest to also include the date of publication so that any update can be easily traced.

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