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Dear Sir

RE: Consultation Paper - Draft technical advice under the Benchmarks Regulation

The Investment Association is delighted to provide input to your consultation.

We are particularly concerned that the final technical advice include a recognition of the 'use' of benchmarks by investment funds, especially those that, while listed on an exchange, are not traded on it.

We would also like to highlight the fact that UCITS listed, but not traded, on an exchange, should not be treated as being 'issued'. This is reflected in the definition of issuance in 2.6, which we support.

Yours faithfully

Adrian Hood

Regulatory and Financial Crime Expert



ANNEX I

CONSULTATION RESPONSE

ABOUT THE INVESTMENT ASSOCIATION

The Investment Association is the trade body that represents UK investment managers, whose 200 members collectively manage over £5.5 trillion on behalf of clients.

Our purpose is to ensure investment managers are in the best possible position to:

- Build people's resilience to financial adversity
- Help people achieve their financial aspirations
- Enable people to maintain a decent standard of living as they grow older
- Contribute to economic growth through the efficient allocation of capital

The money our members manage is in a wide variety of investment vehicles including authorised investment funds, pension funds and stocks & shares ISAs.

The UK is the second largest investment management centre in the world and manages 37% of European assets.

More information can be viewed on our [website](#).

CHAPTER 2: TECHNICAL ADVICE ON SOME ELEMENTS OF THE DEFINITIONS IN ARTICLE 3

Q1: Do you agree with the conditions on the basis of which an index may be considered as made available to the public?

While we agree with 1(i) of the draft technical advice, subsection (ii) seems unusual. It refers to an index being made available to the public when it is provided to one or more supervised entities to use in the meaning of Article 3(1)(5) of the BMR. Article 3(1)(5) of the BMR is not concerned with the administrator allowing a supervised entity to use the index, but with the administrator producing the index.

It is Article 3(1)(7) which is concerned with the ways in which supervised entities 'use' an index, such that an indeterminate number of people gain access to it.

Secondly, the concepts set out in paragraph 23 should be reflected in the technical advice, e.g. that whenever an index is produced to accommodate tailor-made needs and used as a reference for a contractual relationship which does not fall within 'use of the benchmark' as defined in Article 3(1)(7), that index should not fall within the scope of the BMR.

We would also appreciate it if the final advice made reference to the fact that using a combination of benchmarks (in accordance with Article 3(1)(7)) does not amount to the creation of a new benchmark, and so the making public of the combination would not be caught within the scope of this consultation.

Q2: Do you agree with the proposed specification of what constitutes administering the arrangements for determining a benchmark?

While we, generally, have no comments to make on the draft technical advice, I would note that the IOSCO Principle 1, referred to in paragraph 32, includes 'development of the methodology' as part of the benchmark determination process, so this should be included under Article 3(5)(c) rather than 3(5)(a).

However, given that activities under both of these sub-articles can be outsourced, this should not make too much difference.

Q3: Do you agree that the 'use of a benchmark' in derivatives that are traded on trading venues and/or systematic internalisers is linked to the determination of the amount payable under the said derivatives for any relevant purpose (trading, clearing, margining, ...)?

No comment

Q4: Do you have any comments on the proposed specification of issuance of a financial instrument?

We agree that ESMA should be cautious of widening the concept of issuance.

The draft technical advice seems reasonable, although it would be worthwhile making it clear that the proposed definition of issuance is valid only for the BMR, and should not be applied more widely.

It should also be made clear that UCITS are not, generally, issued. The selling and redeeming of units or shares in UCITS by the fund (or fund manager) to and from investors, should not be caught by the definition of 'issuance'.

It should be clear from the draft advice that those UCITS which are listed on an exchange (e.g. those of Luxembourg or Ireland) purely for the purposes of gaining the advantages of being a listed security (e.g. being within scope of those who are only allowed to invest in listed securities), with no intention that they are traded on that exchange, should not be treated, for the purposes of the BMR as 'issued'. These UCITS are distinct from ETFs which are listed on an exchange with the intention that their shares are traded on that exchange. We welcome the fact that the draft advice defines issuance as requiring the offering of financial instruments to third parties through negotiation on trading venues or systematic internalisers – this is clearly not the case in the situation of the Dublin-listed UCITS.

The 'use' of benchmarks by investment fund managers for their investment funds is caught by Article 3(1)(7)(e), and should not be extended by also applying sub-section (a) to these activities.

We would suggest that it might be helpful if the advice makes it clear that the issuer of an ETF, for example, is the fund rather than the fund manager.



CHAPTER 3: TECHNICAL ADVICE ON THE MEASUREMENT OF THE REFERENCE VALUE OF A BENCHMARK

Q5: What are your views on the transitional regime proposed to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds when regulatory data is not available or sufficient?

The transitional provisions seem reasonable.

Q6: Do you agree with the measurement performed at a specific point in time for assessing whether a benchmark hits the thresholds specified in Article 20(1) to be considered as critical?

No comment.

Q7: What are your views on the use of licensing agreements to identify financial instruments referencing benchmarks? Would this approach be useful in particular in the case of investment funds?

As a benchmark administrator will have records of all those to whom it licences use of its benchmarks, it should be able to use this list to enable it, either to go directly to its clients for the relevant information (e.g. annual or half-yearly NAV in the case of UCITS) or to source this information from publicly available information, rather than needing to involve its relevant authority.

CHAPTER 4: TECHNICAL ADVICE ON THE CRITERIA REFERRED TO IN ARTICLE 20(1)(C) SUBPARAGRAPH (III)

Q8: Do you agree with the criteria proposed? Do you consider that additional criteria should be included in the technical advice?

No comment.

Q9: Do you think that the concept of “*significant share of*” should be further developed in terms of percentages or ranges of values expressed in percentages, to be used for (some of) the criteria based on quantitative data? If yes, could you propose percentages of reference, or ranges of values expressed in percentages, to be used for one or more of the proposed criteria?

No comment.



CHAPTER 5: TECHNICAL ADVICE ON ARTICLE 33 BMR (ENDORSEMENT)

Q10: Do you agree with the suggested indicators for objective reasons for endorsement of third-country benchmarks?

The draft technical advice seems comprehensive and persuasive. We agree with the objective reasons as they are set out.

CHAPTER 6: TECHNICAL ADVICE ON “TRANSITIONAL PROVISIONS”

Q11: Do you agree with the criteria, included in the draft technical advice, that NCAs should use when assessing whether the transitional provisions could apply to a non-compliant benchmark? Could you suggest additional criteria?

We agree with the draft technical advice, other than suggesting that paragraph 5 should require the published assessment, of why a non-compliant benchmark is to be permitted, to include an indication of the life-cycle of the investment funds referencing the non-compliant benchmark where this is used to define the duration of the transitional period.

It is noted that paragraph 1 refers only to benchmarks located in a Member State. There may well be benchmarks located outside the EU, the cessation or changing of which may lead to a force majeure event, frustrate or otherwise breach in relevant financial instruments, contracts or funds. It would be appreciated if the <http://www.theinvestmentassociation.org/members-area/member-updates/archive/2016/225-16.html> transitional provision for such benchmarks could be set out.