



Alternative Investment Management Association

European Securities and Markets Authority (ESMA)
103 Rue de Grenelle
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France

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Dear Sir,

ESMA Consultation Paper on the Benchmarks Regulation: AIMA response

The Alternative Investment Management Association (AIMA)¹ welcomes the opportunity to respond to ESMA's Consultation Paper² (the CP) on Draft technical advice under the Benchmarks Regulation³ (the BMR).

We support the policy goals that underlie the BMR, notably the desire to ensure the integrity of and confidence in key benchmarks that play a significant role in financial markets, and also the wider economy.

At the same time, however, we believe that it is vital that the regime be applied in a proportionate manner and would suggest that ESMA should further refine its approach to what constitutes an index being "made available to the public", such that it covers only situations in which an index is accessible by a large or potentially indeterminate number of recipients.

This would better respect the principle of proportionality as enshrined in recital 9 of the BMR, whilst ensuring that the regime is focused on those benchmarks that should most be protected from manipulation by virtue of their widespread use and significance for financial market activity.

We would be happy to discuss this submission further.

Yours faithfully,

Adam Jacobs-Dean
Director, Global Head of Markets Regulation
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¹ AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,600 corporate members in over 50 countries. AIMA works closely with its members to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides.

² See https://www.esma.europa.eu/sites/default/files/library/2016-723_cp_benchmarks_regulation.pdf.

³ See http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2016/04-28/0146/P8_TA-PROV%282016%290146_EN.pdf.

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Annex 1

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

ESMA refers in the CP to the responses to its prior Discussion Paper on the Benchmarks Regulation⁴ that stressed the viewpoint that the concept of “made available to the public” should be strictly limited to those indices that are made available to the general public in an open manner and for free. ESMA notes that this view has a precedent in the context of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

AIMA believes that this would form a reasonable basis for a definition of made available to the public, and would rightly focus the provisions of the BMR on those indices whose manipulation would have the most significant impact on financial markets. We therefore support the first limb of ESMA’s definition of “made available to the public”, which refers to an index that is “accessible by a large or potentially indeterminate number of recipients”.

On the other hand, we do not believe it would be appropriate to base the definition of “made available to the public” on whether an index is available to one or more supervised entities to allow for the use of the index, as further proposed in the CP and enshrined in the second limb of the draft definition of “made available to the public”.

In practice, many of the commercial indices used by investment managers are likely to fall with the first limb of the definition of “made available to the public”, such that they would be subject to the provisions of the BMR.

We do not, therefore, believe that the second limb of the definition is necessary or helpful and could unnecessarily broaden the scope of the regime to include indices that are not in practice made available to anything other than a small set of entities or investors. We would encourage ESMA to remove this limb of the definition from the technical advice.

We further note ESMA’s comments in respect of customised baskets of securities, which state that if “such baskets are not synthesized in one single value and are merely used for asset allocation purposes, with a view to physically or synthetically replicating its composition, it is dubious whether such ‘baskets’ may fall in the definition of an index...”. We believe that this provides a helpful clarification of ESMA’s intention in respect of the definition of “made available to the public” and should be incorporated into the language of the technical advice.

⁴ See https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf