



## Alternative Investment Management Association

European Securities and Markets Authority (ESMA)  
103 Rue de Grenelle  
75007 Paris  
France

Submitted online via [www.esma.europa.eu](http://www.esma.europa.eu)

31 March 2016

Dear Sir,

### ESMA Discussion Paper on the Benchmarks Regulation: AIMA response

The Alternative Investment Management Association (AIMA)<sup>1</sup> welcomes the opportunity to respond to ESMA's Discussion Paper<sup>2</sup> (the DP) on the Benchmarks Regulation (the BMR).

We support the policy goals that underlie the BMR<sup>3</sup>, 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. We are concerned that the approach put forward by ESMA in the DP, particularly when it comes to matters of scope, is overly broad and potentially unworkable.

In the Annex to this letter we therefore make specific proposals in respect of the concept of an index being "made available to the public", suggesting that this should only cover situations where an index is made available without charge to the general public.

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,

Jiří Król  
Deputy CEO  
Global Head of Government Affairs  
The Alternative Investment Management Association Limited

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<sup>1</sup> Founded in 1990, the Alternative Investment Management Association (AIMA) has over 1,700 corporate members and over 10,000 individual contacts in over 50 countries. Members include hedge fund managers, fund of hedge funds managers, prime brokers, legal and accounting firms, investors, fund administrators and independent fund directors. AIMA's manager members collectively manage more than \$1.5 trillion in assets.

<sup>2</sup> ESMA/2016/288

<sup>3</sup> Available online at: <http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf>

The Alternative Investment Management Association Limited  
167 Fleet Street, London, EC4A 2EA

Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: [info@aima.org](mailto:info@aima.org) Internet: <http://www.aima.org>



## Annex 1

**Q1: Do you agree that an index's characteristic of being "made available to the public" should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?**

In the DP ESMA cites Recital 8 of the BMR, which states that "[t]he scope of this Regulation should be as broad as necessary to create a preventive regulatory framework". ESMA concludes that this calls for a broad approach to what constitutes an index being "made available to the public" and that "an exercise of precise and strict conditions for the wider diffusion of an index would neither conform to the empowerment [of Article 3 of the BMR] nor it would be useful for the purpose of contributing to setting the scope of BMR, as it could entail the risk of narrowing down the number of benchmarks in scope".

We do not agree with ESMA's conclusions in relation to the matter of how it should interpret being "made available to the public", as we believe this will risk making the regime so expansive as to be unworkable, whilst conflicting with the statement in Recital 9 of the BMR that "[T]his Regulation should also provide for a proportionate response to the risks that different benchmarks pose".

Specifically, we believe that the approach being proposed by ESMA would create a risk that entities could be deemed to be providing a benchmark by virtue of routine communications with their clients or investors, even in situations where those communications could not in any meaningful way be considered to involve the provision of a benchmark.

At the same time, it would entail an unhelpful shift in attention away from those publically available benchmarks for which the adverse consequences of manipulative behavior would be greatest.

Accordingly, we strongly believe that being "made available to the public" should only cover situations where an index is made available without charge to the general public.

A parallel already exists in the "ESMA Guidelines for competent authorities and UCITS management companies: Guidelines on ETFs and other UCITS issues".<sup>4</sup> These state that:

"A UCITS should not invest in financial indices that do not publish their constituents together with their respective weightings. This information should be easily accessible, free of charge, by investors and prospective investors, for example, via the internet."

This language could be used in the context of the BMR to define "made available to the public".

**Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?**

As noted in our response to Question 1, we believe that being "made available to the public" should only cover situations where an index is made available without charge to the general public. The publication process might be either electronic (e.g. via a website) or in printed medium. The key test is whether the index is made available without charge.

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<sup>4</sup> ESMA/2014/937