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| 29 September 2017 |

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| Response form for the Consultation Paper on  draft guidelines on non-significant benchmarks |
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| Date: 29 September 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

* respond to the question stated;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all responses received by 30 November 2017.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in the form “Response form\_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper ([www.esma.europa.eu](http://www.esma.europa.eu) 🡪 ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).
* Please do not remove tags of the type <ESMA\_QUESTION\_GBMR\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
* When you have drafted your response, name your response form according to the following convention: ESMA\_ GBMR \_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_GBMR\_ABCD\_RESPONSEFORM.
* Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Data protection’.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to administrators of benchmarks, contributors to benchmarks and users of benchmarks as well as to any market participant who is affected by the Benchmarks Regulation.

# General information about respondent

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| Name of the company / organisation | EFAMA |
| Activity | Investment Services |
| Are you representing an association? |  |
| Country/Region | Europe |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_GBMR\_1>

The European Fund and Asset Management Association , EFAMA, welcomes the opportunity to provide comments to the ESMA Consultation Paper for Draft Guidelines on non-significant benchmarks. EFAMA considers proportionality as a key element of the Benchmark Regulation (hereafter BMR) and for that reason is in principle in favour of applying it when necessary and appropriate to administrators of non-significant benchmarks, as well as to their contributors.

Asset managers are users of benchmarks and are not involved in the production, calculation, and contribution to data on which benchmarks are based. They 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.

This is fully in line with the definition of “use” of the BMR article 3 para 1 point 7(e), which foresees that an investment fund is deemed to make use of an index in three concrete cases: (a) when measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, (b) when defining the asset allocation of a portfolio, or (c) when computing the performance fees. There are other ways investment funds use indices, mainly as a simple reference that permits investors to have an external element of performance comparison that refers to the universe of investment of the fund. In which cases, this is no to be considered as “use” according to the BMR.

Asset managers’ role as users does not make it possible for them to have direct access and control over the benchmark setting processes, or contribute to their determination. On the later point, EFAMA wishes to clarify that the Net Asset Values (NAV) of a fund being part of the underlying data of an index, doesn’t and shouldn’t result into asset managers being deemed as contributors to those indices. NAVs of funds, which are regulated data under BMR article 3 paragraph 1 point 24(b), are publicly available data that are not produced with the purpose to determine a benchmark. In that context, NAVs, are “readily available” data and, therefore, under BMR article 3 paragraph 1 point 8 when such data are used for the calculation or the determination of a benchmark there is no contribution on behalf of the asset managers.

Moreover, EFAMA would like to highlight that UCITS and AIFs/AIFMs are supervised entities, which are not only regulated as to the use of indices by BMR, but are also already subject to extensive requirements and conditions under which they may use financial indices as benchmarks. Concretely in the case of UCITS, the ESMA Guidelines on ETFs and other UCITS issues (ESMA/2014/937/EN) 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 in the UCITS KIID. This complements existing industry practice around robust index selection necessary to perform to the highest fiduciary standards.

We would, therefore, consider it of high importance that there is further clarification as to how the ESMA Guidelines should apply once the BMR provisions also become applicable. We consider there is currently an important discrepancy between the disclosure requirements asset managers need to fulfil and the transparency requirements deriving from the BMR for benchmark administrators, the first ones being significantly more extensive than the second ones. EFAMA has recently presented a list of proposals to ESMA to ensure consistency between the two types of requirements and we would strongly encourage ESMA to take urgent action at this early stage of the implementation of the BMR toward this direction.

<ESMA\_COMMENT\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_1>

As outlined in our preliminary remarks, asset managers are users of benchmarks and do not have any direct access, control or contribution to the benchmark setting processes. We also highlighted the fact that funds’ NAVs are readily available data and their inclusion in the input data of a benchmark is not “contribution” on behalf of the asset managers.

EFAMA would like to stress that the reference in section 1 paragraph 2 of the Guidelines referring to “entities contributing net asset values of investments to regulated-data benchmarks” could be misleading, unless it is sufficiently clarified this is not related to asset managers.

The proposal for supervised entities such as UCITS and AIFs participating as oversight function members, is welcome as users’ further participation is appropriate and necessary. Still, we consider this is fully addressed in paragraph 3 and there is no need to make the previous reference in paragraph 2, unless there is a clarification as to the fact that this doesn’t refer to asset managers.

In section 3 on the minimum areas that the oversight function procedures should cover, there is a reference under (f) to “access to all documentation necessary” for the administrator to carry out its duties. We believe this request is disproportionate and can cause important confidentiality and liability issues to contributors to those benchmarks. A less far-reaching proposal mentioning the type of documentation the administrators can have access to, would be better.

<ESMA\_QUESTION\_GBMR\_1>

1. : Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_2>

In section 2 point paragraph 3b we believe the word “potential” is missing in letter (v) in the phrase “the actual or material conflict”, as right after, under No 1, the same reference reads “actual or potential material conflict”.

<ESMA\_QUESTION\_GBMR\_2>

1. : Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GBMR\_3>

1. : Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_4>

EFAMA considers transparency of the methodology as a key factor for users to be able to make informed indices selection decisions, as well as to comply with their own regulatory requirements. As mentioned in our preliminary comments, asset managers of UCITS are already subject to extensive requirements and conditions under which they may use financial indices as benchmarks and they need to disclose to their investors that they comply with these requirements. This is the case for both significant and non-significant benchmarks. For that reason, we urge ESMA to ensure that the right level of transparency will apply in the case of non-significant benchmarks, as well as that this transparency is consistent with the data asset managers need to have access to in order to comply with their regulatory requirements.

<ESMA\_QUESTION\_GBMR\_4>

1. : Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GBMR\_5>

1. : Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA\_QUESTION\_GBMR\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GBMR\_6>

1. : Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

<ESMA\_QUESTION\_GBMR\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GBMR\_7>