EFAMA

European Fund and Asset Management Association

EFAMA's REPONSE TO THE EUROPEAN COMMISSION's PUBLIC CONSULTATION ON THE REVIEW OF THE EU BENCHMARK REGULATION

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General Remarks

- **Asset managers represent an important group of benchmark users**, either in the case of index funds and exchange traded funds (ETFs) - where benchmarks are used as a target for index tracking 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. They are generally not involved in the production, calculation and contribution of data on which benchmarks are based.
- We very much **welcomed the BMR as a regulatory framework for the benchmark setting processes and methodologies**, which ensures the enhancement of the robustness and credibility of the financial indices used by asset managers in Europe.
- At the same time, it is important to **keep the right balance between the regulatory obligations for benchmark administrators to tackle potential conflicts of interest and risks for misconduct and avoiding excessive burden and costs** that will be ultimately passed over to users of benchmarks and end clients. We suggest reflecting on the need for a proportionate approach so that indices that present less risks for manipulation and market stability are not overly burdened with regulatory requirements that will necessarily also impact their users.
- A key point we would like to highlight is **the significant increase of costs related to the use of indices and the access to their underlying data/methodology.** In particular, the greatest contributors to the higher cost are **volume increase** and **change in pricing policies** mainly due to the introduction of fees by benchmarks providers previously offering the benchmark for free, and a strong price review). Over the past five years, our members have experienced the following trends from index providers:
  - A **general increase in prices** - most benchmark administrators having included in their offers new fees related to ad hoc services, such as re-distribution. Data collected by one of our members[2] from a representative sample of asset managers indicate that benchmark costs have tripled over the last ten years (in contrast with asset managers revenues which have stabilised since 2015). During the last five years, and also after the BMR came into force, costs increased according to the same source by 64% (13% on an annual average), a value much higher than the increase of assets under management over the same period. The price increases observed are transversal among all administrators (between 20% and 274% during the 5 years period) ; and
  - **Thorough audit procedures** conducted on the benchmark users to review the adoption and correct application of indices and benchmarks**.**

[1] The European Fund and Asset Management Association, EFAMA, is the voice of the European investment management industry, representing 28 member associations, 59 corporate members and 22 associate members. At end 2018, total net assets of European investment fund reached EUR 15.2 trillion. There assets were managed by almost 62,000 investment funds, of which more than 33,000 were Undertakings for Collective Investments in Transferable Securities (UCITS) funds, with the remaining funds composed of Alternative Investment Funds (AIFs).

[2] For further details, please see also the reply of Assogestioni to this consultation.

For the reasons outlined above, EFAMA calls for the following changes to address the cost issue:

1. **Price lists** – Similar to MiFID, benchmark administrators should be required to publish annual price lists of all products /services allowing also for multiyear comparisons and easy identification of product /service changes.
2. **Cost disclosure** – Similar to MiFID, BMR should provide for basic pricing rules for products and services stating that prices/revenues under BMR need to have a reasonable relationship with the cost of production. Therefore benchmark administrators need to publish in-depth cost disclosures allowing to compare the cost of (all) data products with their revenues / price development.
3. **Prohibition of certain licence practices** – In particular the (early) termination of data licenses by benchmark administrators in case of pricing policy or data policy changes should be prohibited until an arbitration tribunal or a regular court has adjudicated on the legality of the changes.
4. **Extension of FRANDT to non-critical benchmarks** - Currently, the BMR (Article 22, Recital 38) requires only the administrators of critical benchmarks, such as the major IBORs, to take adequate steps to ensure that licenses of, and information on, benchmarks are provided on a fair, reasonable, transparent and non-discriminatory basis to all users. We propose to extend this rule to all administrators of benchmarks/indices.

In conclusion, we call for a clear provision to be included in the BMR so that administrators of all benchmarks (and not only critical benchmarks) take adequate steps to ensure that licenses of, and information on, benchmarks are provided on a fair, reasonable, transparent and non-discriminatory basis to all users.

- Regarding the provisions on supervision of climate-related benchmark we believe that **BMR should not overlap/conflict with the UCITS and AIFMD related regulatory frameworks.**
- **As regard non EEA Benchmarks, it might lead to a serious disruption if FX rates are not out of scope of BMR.** Asset managers are indirectly affected by BMR as they manage financial instruments that refer to an index or whose amount's payable refers to an index to implement their investment objective and strategies. Exchange traded derivatives and derivatives traded via systematic internalisers (which includes most of the major banks) for which the FX rate is not provided by a central bank may no longer be tradable, as supervised entities will not be allowed to use benchmarks provided by unauthorised administrators. If most European banks would not be able to provide financial instruments exposed to a particular non-EEA "currency" this would be a problem for the market because asset managers would have no counterparties to trade with OTC for example for hedging purpose.
- While the ESMA Register represents a good start, **there are still a number of issues, in particular related to the inability to identify which benchmarks are produced by EU benchmarks administrators authorised or registered.** In addition, until now more than 80.000 non-EU indices endorsed by EU benchmark administrators are listed and the list could be much longer in the future. A centralised hub where a user might find all reliable information in an easy and searchable way would better fit the scope.
- L**egal certainty is crucial from a user perspective** and needed in case a benchmark administrator ceases to be authorised/a benchmark ceases to be produced. The same fallback provisions being considered for the IBORs might be included in the review of market indices, in order to automatically amend existing agreements.

- **Under BMR and UCITS framework, asset managers have a double burden of information to obtain in order to comply and this should be avoided**. The current regulation does not consider in the benchmark disclosure all the additional set of requirements for the use of benchmark requested by the UCITS framework, among them the availability of a full transparency on constituents and their respective weightings.

Critical Benchmarks

Question 1: To what extent do you think it could be useful for a competent authority to have broader powers to require the administrator to change the methodology of a critical benchmark? Very useful – not useful at all (5 categories).

{Useful}.

The reliability of a benchmark in measuring the economic reality that it is intended to measure depends on the methodology used by the administrator, which is reviewed on a periodic basis in order to identify shortcomings and possible improvements. Given the importance of the methodology to sustain the accuracy and reliability of the benchmarks, **competent authorities need to be vested with broader power to ensure the provision of the relevant benchmarks according to BMR requirements**.

Currently, Art. 26 (6) provides the competent authority with the power to require changes in the benchmark methodology if the representativeness is put at risk. There is however no further detail in terms of what those changes can be. **The review could be more explicit in allowing competent authorities to modify the methodology, provided that the underlying economic reality measured by the benchmarks remains the same after the relevant modifications**. However, the circumstances under which those powers would be activated need to be clear (i.e. as a matter of last resort). In addition, any change required by the relevant authorities is based on the understanding that the benchmark continues to measure the relevant underlying economic reality.

Question 2: Do you consider that such corrective powers should apply to critical benchmarks at all stages in their existence or should these powers be confined to (1) situations when a contributor notifies its intention to cease contributions or (2) situations in which mandatory administration and/or contributions of a critical benchmark are triggered? Yes / no? Please explain.

{Yes}.

Given the importance of critical benchmarks, powers should not be confined to a specific timeframe but available for application by competent authorities throughout all stages of the benchmarks existence. However, it is important to adopt legal solutions to beef up the contribution process without the need of reverting to the mandatory contribution tool. In this regard, the continuity of benchmarks based on contributions under a BMR compliant methodology will only be possible to the extent that a minimum number of contributors is ensured. In this sense, the determination, reliability and representativeness of such type of benchmarks is fully dependent on the submissions made by a large number of contributors and the sufficiency of the data they provide.

However, as is well known, recent experience has shown that the number of panel banks in relation to certain European critical benchmarks (e.g. EURIBOR or LIBOR) has decreased and it is not an unlikely scenario that new withdrawal requests may take place in the near future. Also, the contribution process to critical benchmarks is now voluntary, meaning that panel banks can leave the submission process at their discretion at any time. In addition, the number of panel banks may decrease due to other circumstances, such as mergers between panel banks or resolution processes affecting a panel bank.

Although there are mandatory contribution provisions laid down in BMR, their application is currently limited in time and its triggering would send a negative signal to the market about the representativeness and reliability of the affected benchmark. Moreover, the application of the mandatory contribution powers, in their current form, could be seen as the start of the countdown for the discontinuation of the affected benchmark.

We focus in our suggestions on IBORs – however we acknowledge that those are only a potential subset of critical benchmarks and there are other types of benchmarks that may operate differently in terms of calculation versus panel bank contribution:

1) Amendment of the mandatory contribution tool – this might ensure the publication of the benchmarks in the short and medium term. One suggestion could be the obligation on supervised entities which are reporting agents under Regulation 333/2014 to contribute to a relevant critical benchmark, provided that they use the relevant benchmark in contracts above certain threshold. This proposal aims at avoiding the discontinuation risk and ensuring an adequate number of panel banks contributing to the relevant critical benchmark, the sufficiency of the data provided and the robustness and reliability of the benchmark, whilst achieving a balance between use of the benchmark among EU entities and their contribution in its determination.

2) Reinforcing powers to facilitate transition from a contribution based benchmark to a non-contribution based benchmark – The regulatory framework should support the transition from a contribution based benchmark to a benchmark calculated with data from sources other than contributions. In particular, the substitution of an existing rate calculation methodology based on contributions with one based on robust proxy rate would be a manner to tackle this issue. Using a methodology based on a rate that authorities recognise as meeting the requirements of the BMR and appropriate for circumstances is a credible and useful solution where a critical benchmark becomes fragile (for example in line with replacing EONIA with ESTR plus a spread). At the moment, the transition is driven by industry initiative-led working groups, which certainly facilitates exchange of views as to best practices, however it isn't sufficiently tackling the lack of legal clarity for users as to the transition process. We believe it would be beneficial to cater for the substitution with a replacement rate more overtly via a provision in the Regulation. This could give each of the competent authority, the administrator and end-users more comfort in the solution.

3) Permitted use of a non-compliant critical benchmark in legacy contracts – the BMR review should address one of the overarching systemic concerns with the discontinuation of a critical benchmark, namely what happens to long-dated legacy contracts. The transitional provision in Art. 51 (4) provides a 'safety net' that permits ongoing use of a benchmark that doesn't meet BMR requirements but doesn't extend its use to new contracts. However, this safety net will not be available once the transitional provision expires. Art. 35 (3) contemplates a similar power. However, it may be applicable in the context of a potential

suspension of authorisation/registration of an administrator, rather than in the context of an individual benchmark becoming non-compliant with applicable rules. It would be useful to have a power which would expressly operate in circumstances where an administrator provides a number of benchmarks, and only one or few are fragile.

Inserting a safety net provided by Art. 51 (4) also in Art. 29 of BMR applicable on a general basis (not only during the transitional period) where a benchmark no longer meets the BMR requirement would be welcomed. Therefore we also suggest the requirements related to the register (Art. 36) to be amended so that the register can be updated to reflect decisions limiting use of a benchmark to legacy contracts only (i.e. those made under the proposed new Art. 29 (1A) and well as Articles 35 (3) and 51 (4). The objective would be to make benchmark users aware and (given the current wording of Art. 29 (1)) ensure compliance with the relevant limitations.

Question 3: Are there any other changes to Article 23(6)(d) BMR relative to the change of methodology for critical benchmarks that might be desirable to improve the robustness, reliability or representativeness of the benchmark? Yes / no? Please explain

{Yes}.

It is crucial to **enhance the existing provisions to make sure that information on changes in methodology is made available to the public, including the concerned users of such benchmarks**.

Also, changes of methodology used for critical benchmarks should be made to ensure that the underlying economic reality measured is the same before and after the change.

Finally, the required changes in methodology should be assessed by competent authorities for them not to activate pre-cessation triggers (relating to the lack of representativeness and which are currently under discussion by certain industry associations) provided by the relevant contracts/documents.

Question 4: To what extent do you think that benchmark cessation plans should be approved by national competent regulators? Agree completely – not agree at all (5 categories) + explain

{ Agree/ Not Agree }.

The answer is different for Art. 28 (1) and 28 (2).

In relation to Art. 28 (1) we believe that **the existence of benchmark cessation plans for administrators approved by competent authorities** would be beneficial for market stability in general and for users in particular since **there would be clarity on the steps to be followed by administrators upon the occurrence of the relevant trigger events**. Furthermore, the authorities would have the power of reviewing the adequacy of the plans and the fact that such plans were approved by competent authorities would constitute important information for users. Besides, the adoption of decisions by the college in this respect would ensure that potential particular considerations of the different countries are taken into account.

The answer is opposite for Art. 28 (2). **It is not reasonable to apply the same level of obligations for supervised entities taking into account, among others, that administrators have more influence on the methodology and process of construction of a benchmark.** Supervised entities should have room to establish their own cessation plans without the need of approval from competent authorities since they may have different approaches considering the nature of their contracts, clients, fallbacks to be applied, defined courses of action and internal proceedings to comply with in a benchmark cessation scenario.

Question 5: Do you consider that supervised entities should draw up contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market?

{No}.

Users are obliged to draw contingency plans under Art. 28 (2) to cover instances where a benchmark (incl. a critical one) materially changes or ceases to be provided. **Individual users often do not have the means to assess where a critical benchmark ceases to be representative of its underlying market and even less so to monitor this on an ongoing basis**.

We believe that benchmark's material changes would capture most instances of it ceasing to be representative of its underlying market. As such, we would suggest that it is not necessary making such changes.

Question 6: To what extent do you consider the system of supervision by colleges as currently existing appropriate for the supervision of critical benchmarks? Very appropriate – not appropriate at all (5 categories). If not, what changes would you suggest?

{Appropriate}

We consider the existence of colleges appropriate because it is the effective and efficient way to address the risks that the critical benchmarks pose. Colleges ensure harmonisation in the application of the rules throughout the EU but at the same time serve as forum where national competent authorities are allowed to share their views and advocate positions in respect of supervision activity so that particular concerns of the jurisdictions are taken into consideration.

Authorisation and Registration

Question 7: Do you consider that it is currently unclear whether a competent authority has the powers to withdraw or suspend the authorisation or registration of an administrator in respect of one or more benchmarks only? Very unclear – very clear (5 categories)

{ Very unclear}

It appears clear that the suspension or withdrawal of authorisation applies to all benchmarks provided by a particular administrator. **It would be useful to clarify that competent authorities may withdraw authorisation or registration on a benchmark by benchmark basis**. Otherwise, in the case of administrators of thousands of benchmarks, like MSCI, either minor irregularities will lead to a major disruption due to a sudden need to replace benchmarks for huge volumes of transactions and/or large number of investment funds or the NCA will need to apply a more lenient treatment that they would ideally have applied to avoid such market disruption. Indeed, a supervised entity should be able to continue using a benchmark provided by an administrator located in the Union if the administrator is included in the ESMA Register with the exception of those benchmarks for which the authorisation has been withdrawn (Art. 29).

Question 8: Do you consider that the current powers of NCAs to allow the continued provision and use in existing contracts for a benchmark for which the authorisation has been suspended are sufficient? Totally sufficient – totally insufficient (5 categories). Please explain

{Insufficient}

We would strongly support necessary changes for competent authorities to allow the continued use of benchmarks provided by benchmark administrators who have had their authorisation or registration withdrawn and not only suspended. This is particularly important for UK administrators in the context of Brexit.

In addition, Art. 35 (3) BMR is confined to legacy agreements only, which could create important problems for entities. In fact, the prohibition to enter into new contracts would cause that entities would no longer be able to risk-manage their existing exposures with new contracts referencing such benchmarks (e.g. back to back swaps). Therefore, they might have no ability to decrease their exposure to such benchmarks (except by exiting positions) and it might create significant losses for entities and place them in a competitive disadvantage in comparison with other jurisdictions. They might also have no fallback reference rate if the benchmark is prohibited from use.

Question 9: Do you consider that the powers of competent authorities to permit continued use of a benchmark when cessation of that benchmark would result in contract frustration are appropriate? Very appropriate – not appropriate at all (5 categories). Please explain

{Very appropriate}

We consider it is appropriate for competent authorities to have the power to allow the continued use of such benchmarks. We would welcome clarity on the operation of this power. It would be of assistance to those supervised entities that use such a benchmark if the competent authority worked with the benchmark administrator and the users of the benchmark concerned to identify whether use of the benchmark should continue to be allowed.

We would consider that the default position should be that **the benchmark continues to be available to those supervised entities that already reference the benchmark**. It should only cease to be available to them where there would be an obvious substitute benchmark available, and even then, a suitable time period should be allowed, for supervised entities to transfer to the new benchmark. The length of this time should be determined by the competent authority working with the supervised entities that use the benchmark.

Scope of the BMR

Question 10: Do you consider that the regulatory framework applying to non-significant benchmarks is adequately calibrated? Which adjustments would you recommend? Completely adequately calibrated – not well calibrated at all (5 categories). Please explain.

{Not well calibrated}

EFAMA members consider that the main objective, which needs to be reflected also in the scope of this Regulation, is **to efficiently tackle risks of conflicts of interest and misconduct that can jeopardise the robustness of a benchmark or create risks for the overall market stability**. We believe, this has been at the "heart" of the goals of the legislators and should continue being the main objective. Given that EFAMA members are users of benchmarks and not providers of indices – even less of critical benchmarks – it would not be appropriate for us to propose concrete quantitative thresholds that should be met when designating benchmarks under different categories.

We do consider however that a proportionate approach is necessary so that indices that present less risks for manipulation and market stability are not overly burdened with regulatory requirements that will necessarily also impact their users. In that sense, we consider it important that regulated data benchmarks remain out of the scope of the critical benchmarks. Also, that "susceptibility to manipulation" remains a key criterion and therefore a qualitative "check" in combination with the quantitative threshold. There may also be merits to further calibrate the current threshold system to ensure proportionality and in these terms consider a simpler distinction between critical and non-critical benchmarks only, allowing a lighter regime for the later.

There is certainly scope for ESMA to put efforts into achieving more supervisory convergence among how regulatory framework applying to non-significant benchmark is interpreted by NCAs, in particular taking into account the proportionality principle.

Question 11: Do you consider quantitative thresholds to be appropriate tools for the establishment of categories of benchmarks (non-significant, significant, critical benchmarks). If applicable, which alternative methodology or combination of methodologies would you favour? Completely appropriate – not appropriate at all (5 categories). Please explain.

We do not have specific comments on the quantitative thresholds. We believe there should be mechanisms contemplated in the Regulation for the competent authorities to review periodically the thresholds in order to assess their appropriateness.

However, as outlined in the question above, it is important to consider qualitative criteria so that indices that present less risk for manipulation and market stability are not overly burdened with regulatory requirements that will also impact end users.

Question 12: Do you consider the calculation method used to determine the thresholds for significant and critical benchmarks remains appropriate? If applicable, please explain why and which alternatives you would consider more appropriate. Completely appropriate – not appropriate at all (5 categories). Please explain.

Please see answer 11.

Question 13: Would you consider an alternative approach appropriate for certain types of benchmarks that are less prone to manipulation. If so, please explain for which types. Completely appropriate – not appropriate at all (5 categories). Please explain.

We understand that the scope of the BMR should be narrowed by reference to the concepts of 'use of discretion' and 'risk of manipulation'. Critical benchmarks should be the key focus and the specific obligations should depend on the importance and susceptibility of index to manipulation.

ESMA Register of Administrators and Benchmarks

Question 14: To what extent are you satisfied with your overall experience with the ESMA register for benchmarks and administrators? If not, how could the register be improved? Completely satisfied – not satisfied at all (5 categories). Please explain.

While the ESMA Register represents a good start, **there are still a number of issues, in particular related to the inability to identify which benchmarks are produced by benchmarks administrators authorised or registered under Art. 34**. This is especially problematic where there is a global benchmark group, some firms of which do appear on the ESMA register – it is then not possible to identify whether a specific benchmark is produced by the firm on the register, or by another firm in the group. This causes real practical problems for users of benchmarks.

It would also be useful if, for those benchmark administrators endorsed under Art. 33, the details of the endorsing entity were stated on the register. Similarly, **it could be good if the register**

showed if a benchmark administrators' application was rejected to ensure that users were able to seek an alternative benchmark in a timely manner.

In addition**, controls on the completeness and accuracy of the information included in the register should be enhanced**. Web links of the administrators included in the register are not accurate and lead to the generic URL to the administrator's website. It would be more useful to require administrators to give a URL to a page specific to the benchmark which includes the BMR related documentation, such as the benchmark statement.

It would also be good to include a **'search tool' in the Register** to enable users to easily identify individual benchmarks provided by EU and non-EU "authorised/endorsed administrators. An identification code of such benchmarks such as a "ISIN" would be welcomed.

Finally, **a new field stating the typology of benchmark could be included** (e.g. interest rates, equity benchmarks, FX benchmarks) so that the information provided is enhanced and more helpful for users and a notifications email service could be set up by means of which subscribers to such service would receive any information or update relating to the register.

Question 15: Do you consider that, for administrators authorised or registered in the EU, the register should list benchmarks instead of/in addition to administrators? Agree completely – do not agree at all. (5 categories)

{Agree}

The ESMA Benchmark register should be a centralized benchmark log. Benchmarks should be listed in addition to the administrator, so that users could search for either the administrator or the benchmark. They should also be able to see all the benchmarks being provided by a specific administrator. However, should this prove too difficult to implement, a second best option could be that the respective administrators be required to maintain a list of all the benchmarks provided by the approved legal entity on their website with a direct link to the ESMA Register. This would be of utmost of importance if the authorisation or registration of an EU administrator included in the benchmark register could be withdrawn or suspended in respect of only specific benchmarks (see answer to question 7, when one or more benchmark provided by an administrator become non-compliant with the BMR).

Benchmark Statement

Question 16: In your experience, how useful do you find the benchmark statement?

Very useful – not useful at all (5 categories)

While some benchmarks statements have been useful for end users in terms of identifying whether a benchmark is provided by an approved benchmark administrator, others have not been as useful as they lack the same level of detail.

The practise so far has shown that format and content of benchmark statements vary hugely between administrators. **Competent authorities should ensure that benchmark statements are to some extent produced in a standardised manner**. The benchmarks

statement (or a direct link to it) should be included in the ESMA Register to facilitate access to it.

Question 17: How could the format and the content of the benchmark statement be further improved?

The practice in relation to the format and content of benchmark statements seem to vary hugely between administrators. **Whilst we do not think that a very prescriptive and detailed template should be imposed on administrators, we would suggest some level of harmonisation** (e.g. by prescribing a general layout of the benchmark statement, ideally following the order of the required information set out in Commission Delegated Regulation 2018/1643 supplementing the 2016/1011 Regulation with regard to regulatory technical standards specifying further the contents of, and cases where updates are required to, the benchmark statement to be published by administrator of benchmark).

The standardisation performed for the ESG factor could be extended to the remaining content of the benchmark statement. The current content of benchmark statements at family level brings little information on the economic reality of an individual benchmark or the actual risk attached to the benchmark.

Question 18: Do you consider that the option to publish the benchmark statement at benchmark level and at family level should be maintained?

If maintained, the benchmark statement at family level should be more specific and should include the list of all benchmarks covered by the statement, and for each benchmark covered the specific information related to the individual benchmark.

Also, in relation to non-significant benchmarks administrators should continue to be allowed to publish the benchmark statement at entity level.

Supervision and Climate Related Benchmarks

Question 19: Do you consider that competent authorities should have explicit powers to verify (1) whether the chosen climate-related benchmark complies with the requirement of the Regulation and (2) whether the investment strategy referencing this index aligns with the chosen benchmark? Agree completely – do not agree at all (5 categories). Please explain.

While we agree that competent authorities should have explicit powers to verify that climate related benchmarks comply with the requirements of the Regulation, as amended, **this should not apply when supervised entities used the benchmark**, **but when the benchmark administrator is applying for authorisation or registration for a particular benchmark as an EU Climate transition Benchmark or an EU Paris-aligned Benchmark (the 'Climate Benchmarks') by the competent authority.** Supervised entities should be able to use, for the purposes set out in section 7 of the consultation paper, any benchmark which is on the ESMA register. Compliance of the benchmark with the standards to be set out in the BMR under the

amended articles 19a(2), 19b and 19c should be determined when the benchmark administrator is applying for authorisation or registration, not when a firm decides to use it.

It should be left to investors to assess if they are happy with a particular investment strategy and the way a Climate Benchmark is used as part of such a strategy. It is the same for other investment strategies referencing ESG criteria, including ESG benchmarks not fulfilling the criteria of a Climate Benchmark. Enabling an NCA to verify if a particular investment strategy aligns with a given Climate Benchmark would amount to investment product regulation within the framework of Benchmark Regulation **leading to undesirable overlap with the UCITS, AIFMD and MiFID related regulatory frameworks.**

Question 20: Do you consider that competent authorities should have explicit powers to prevent supervised entities from referencing a climate-related benchmark, if such benchmark does not respect the rules applicable to climate-related benchmarks or of the investment strategy referencing the climate-related benchmark is not aligned with the reference benchmark? Agree completely – do not agree at all (5 categories). Please explain.

If the benchmark does not comply with the requirements for it to claim to be a Climate Benchmark, then it should not be labelled as such. Competent authorities should have the power to verify such compliance and if so the permitted use of such credential. The onus of compliance in respect of the rules applicable to climate-related benchmark should not be on supervised entities. In any case, If the benchmark does not respond to the climate-related characteristics, it may still be compliant with BMR, so that the administrator (or the benchmark itself) can be authorised or registered and appear on the ESMA Register. If it is on the ESMA Register then the supervised entity can use it. They merely may not claim that it is an EU Climate Transition Benchmark or an EU Paris aligned.

On the second element of the question, we believe that supervised entities should ensure that they are using administrator/ benchmark which are on the ESMA Register, and are suitable for their investment strategy. **We do not believe that under BMR the NCA should have a power to prevent supervised entities from referencing climate-related benchmarks if the reference benchmark is not aligned with the investment strategy. This would restrict the flexibility of the investment manager and turn the Benchmark Regulation into a product legislation. In line with the answer to question 19, we believe that this supervision is out of scope of BMR.**

Non EEA Benchmarks

Question 23: To what extent would the potential issues in relation to FX forwards affect you? Very much – not at all (5 categories) If so, how would you propose to address these potential issues?

In our understanding, the **issue could be broader than just in NDF**, if FX rates in third country currencies are in scope in the BMR. In this case, if the FX rate is provided by a private provider and not by a central bank, such data provider should have the right authorisation under BMR.

Therefore, it might be a serious disruption to the market if exchange traded derivatives and derivatives traded via systematic internalisers (which includes most of the major banks) for which the FX rate is not provided by a central bank are no longer tradable, as supervised entities are not allowed to use benchmarks provided by unauthorised administrators. If most European banks would not be able to provide financial instruments exposed to a particular non-EEA currency this would be a problem for the market because asset managers would have no counterparties to trade with OTC, for example for hedging purpose.

We therefore believe that FX rates should be out of scope of BMR.

Question 24: What improvements in the procedures for equivalence, endorsement and recognition do you recommend?

At a high level point, what is crucial for asset managers is maintaining access to the wide range of indices that they have today. This will ensure that the index used reflects the exact segment of the market reality that corresponds to the investment fund's strategy. We obviously agree that the extension of the transitional provision offers some relief but we still do not anticipate that by end of 2021 there will be many equivalent jurisdictions. This means that administrators in non-equivalent jurisdictions will need to fulfil the endorsement or recognition requirements in order for EU users to be able to continue using their benchmarks. And we are particularly concerned that for small and medium sized non-EU administrators the price to pay for fulfilling these requirements will be onerous and therefore a disincentive.

Additional /more specific points:

1) **Territorial scope of the BMR in relation to AIFMs should be clarified**. In our view, given the objectives of the BMR to ensure a level playing field, it would make sense for EU AIFMs to have to comply with the BMR only in relation to AIFs marketed in the EU, regardless of whether such AIFs are EU AIFs or Non-EU AIFs. Once the AIFMD passport gets extended to third country AIFMs, the same rule should apply to them (e.g. they should have to ensure compliance with the BMR for all the AIFs they manage, which are marketed in the EU) regardless of whether such AIFMs are EU or non-EU AIFs). Consequently managers should not be obliged to ensure compliance with the BMR for EU AIFs non marketed in the EU, even if such managers are themselves EU AIFMs.
2) It is important that pragmatic solutions are found in respect of the third country regime, for instance excluding from these requirements non-significant benchmarks coming from non-EU administrators until the equivalence designation is completed. And if a country has not been deemed equivalent, then supervised entities should be granted a suitable period of time to identify and transfer to alternative benchmarks, unless they are able to take advantage of a process akin to that set out in Article 51(4) – i.e. showcase that there is force majeure justifying the continuation of the use of the non-complying benchmark.

XXX