Frankfurt am Main,
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BVI's position on the Consultation Document on Review of the EU Benchmark Regulation

BVI[1] welcomes the opportunity to respond to the consultation on the review of the Benchmark Regulation. We support the goal of the EU Benchmark regulation (BMR) to establish a regulatory framework for indices and benchmarks. The BMR strengthens the confidence in the financial markets and helps to prevent manipulation of financial indices.

Investment funds are highly regulated and transparent financial products under the UCITS/AIFM regime. Investment funds have not contributed to the manipulation of (systemically important) financial indices (e.g. Libor, Euribor). Fund management companies do not provide input data for the calculating of (systemically important) benchmarks. Asset Managers are mainly users of benchmarks/market indices. Fund management companies do not have access or the ability to influence the process of creating (systemically important) benchmarks or financial indices provided by index providers. Asset Managers are not able to manipulate these benchmarks, even if they can be used to measure the performance of an investment fund.

During the past years our members have observed significant increase of costs related to the use of indices, especially the access to the underlying data. Over the couple of years our members have witnessed double digit price increases directly by benchmark administrators and through the making available of the data by market data distributors (MDD).

Major parts of benchmark data are originated and provided by EU regulated benchmark administrators (or affiliated group companies) such as prices, values, composition, weightings and traded data. Benchmark data are often procured not directly from data providers but from MDDs who collect, catalogue and distribute them. One point to note is that MDDs – such as Bloomberg, Refinitiv, Rimes, or Six Financial – are not regulated as financial services providers under the BMR.

In practice, the use of benchmark data have considerably changed and increased over the past decades largely driven by regulation and automation along the whole value chain of asset management industry. There is now more benchmark data to consume and the use of them has changed with the drive towards technical process improvement compared to the nineties when users largely consumed financial market data on screen ("display") and downloaded "locally" into individual user's applications.

However, the screen based "pair of eyes" use of data is receding due to the massive growth of data sources to process and the speed of data delivered to the fund management companies has drastically increased as it now mainly used in programmatic (Non Display Usage) processes in the IT systems throughout the value chain of asset management. Data sources, benchmark administrators and market data distributors have reacted to the growth in data usage by developing since 2006 new data strategies. In this context our members have experienced the following trends:

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 111 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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- A significant increase in prices: Index providers have introduced a significant price increase for their products which are clearly above the inflation rate without any additional value for Asset Managers.

- A general increase of the administration of license agreements: Due to the growth of data usage index providers have refined their licensing models and cover now each step along the whole value chain of an Asset Manager. The data license practice ranges from internal applications support to external regulatory reporting as well as ETF production and brand licenses. Benchmark administrators also do not hesitate to charge market participants (e.g. Buy-Side) for separate "created works", "manipulated data" or "derived data" licenses based on use of trading venue, ratings or index data to create (e.g., through mathematical or other manipulations or processes) new data points.

  For example, benchmarks providers also called historically "index sponsors" today impose in excess of 50 different licenses to "nickel and dime" the Buy Side community. Index providers do not have a transparent price and cost policy for the different and complex license models. Further adding to the licenses complexity, there is no standardization of how license concepts are defined (Taxonomy). There is also an intentional purpose to increase the complexity in the diversification of the type and variety of data policies and price policies to allow for each index sponsor unique selling point (USP) and make it harder for investors to compare the cost of different index services in the index license manager (ILM) contract management tool. Due to a lack of standardization for license concepts fund management companies do not have the possibility to compare the license models across different index providers.

- Stringent audit procedures: Audit procedures are conducted on the benchmark users to review the adoption and correct application of indices and benchmarks.

- „Slicing and Dicing" of license models**:** Existing licenses are (further) split along the whole value chain of an Asset Manager. Existing license agreements which were previously priced only for one Asset Manager are now often licensed several times for several companies (custodian, outsourced asset manager, investor). Licensing models have become more fragmented which means that the rights of use of data are more restrictive differentiating between the circumstances of the use of the same data. For example, multiple licensing fees may apply for the same data if used for internal analysis, client reporting and also regulatory purposes. Therefore, the increase of prices along the whole value chain in the fund industry goes further on. This will also be the case for climate-related benchmarks which the Buy-Side needs also to take into consideration.

For the reasons outlined above, we strongly encourage the EU Commission to take the following proposals into consideration to address the cost issue:

- 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.

- 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 and to allow for cost-based pricing of benchmark data.

- Prohibition of certain license 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.

- 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 encourage for a clear requirement to be incorporated 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 cost-based, fair, reasonable, transparent and non-discriminatory basis to all supervised entities (e.g. Asset Managers).

We would like to make the following specific comments:

2. 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). Please explain.

Competent authorities could be principally empowered with legal tools to modify the methodology (limited usefulness), provided that the underlying economic reality measured by the benchmarks remains the same after the relevant modification. However, the possibility to amend the methodology of critical benchmarks by competent authorities should be carefully calibrated and activated only as matter of last resort. In such cases competent authorities should be provided with clear legal rules which are made transparent to the contributors, administrators and users of benchmarks (e.g. Asset Manager).

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, competent authorities could be principally allowed to apply such a power during the existence of critical benchmarks. However, in such a context it is important to acknowledge that 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 are ensured. The determination, reliability and representativeness of such type of benchmarks are fully dependent on the submissions made by a large number of contributors and the sufficiency of the data they provide.

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 needs to be ensured that all changes in the methodology are made transparent to the public (e.g. supervised entities). Changes of methodology used for critical benchmarks should be limited to such which ensure that the underlying economic reality measured is the same before and after the change.

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

- **Supervised entities (Article 28 (2))**

We strongly disagree with the proposal that cessation plans provided by supervised entities (e.g. Asset Managers) should be approved by competent authorities. The approval require the submission of such plans by supervised entities to the regulators thereby enhancing the reporting burden for all involved parties without any additional value for the competent authority.

With respect to Article 28 (2) BMR our members apply contingency plans for regulated investment funds (UCITS/AIFs) that use indices in accordance with Article 3 (1) No. 7 (e) BMR. The German fund industry has already developed contingency plans for investment funds, as the selection and determination of (alternative) benchmarks is a well-established process in the portfolio-, risk and product management of fund management companies. Due to the introduction of the ESMA guidelines for ETFs and other UCITS issues for financial indices in 2012[2], regulated investment funds (UCITS/AIF) are subject to stringent and extensive due diligence obligations on the use of financial indices.

In the context of the updated publication of alternative benchmarks within fund documents (e.g. UCITS prospectus) our member fear that the concrete naming of alternative indices could trigger the forced conclusion of new license agreements with the corresponding index provider. Fund management companies have already concluded extensive, complex and overpriced license agreements with the index providers in order to use the indices for internal (e.g. portfolio and risk management) and external purposes (e.g. institutional reporting). The alternative benchmarks should therefore only be disclosed in the case of regulatory request (Article 28 (2) BMR).

Supervised entities should have leeway 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.

- **Benchmark administrators (Article 28 (1))**

Benchmark administrators should be required to obtain an approval for cessation plans by competent authorities. Such an approval could be beneficial for market stability and investor protection in general and for supervised entities in particular since there would be legal certainty 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 regulators would constitute important information for supervised entities. Therefore, index providers would not have any leeway to deviate from the alternative benchmarks which are provided by the competent authorities.

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, we strongly disagree with the proposal. As already mentioned in our answer to questions 4, our members have already established contingency plans for regulated investment funds. Such plans include also critical benchmarks. However, supervised entities such as fund management companies do not have the necessary skills 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. Therefore, such critical assessment should be the clear responsibility of the benchmark administrator and not be delegated to the supervised entities.

[2] https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf

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?

We do not have any comment.

3. 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)

It is clear that Article 35 BMR operates only on the basis of the administrator. For our members, it is legally unclear what will occur if one more individual benchmarks of an index provider are not BMR compliant anymore. Therefore, we support the idea to clarify within the BMR that the regulators should have the options to suspend or withdraw authorization or registration in respect of one or more individual benchmarks without having to suspend the authorization for the administrator itself. This would enable the supervised entities (e.g. Asset Managers) to use all other BMR compliant benchmarks of that particular index provider. It could be practical to empower regulators with the mandate to withdraw authorization or registration of a benchmark on a case by case basis. Such processes/updates should be also reflected within the ESMA register. Supervised entity should be able to continue using a benchmark provided by an administrator located in the EU if the administrator is included in the ESMA Register with the exception of those benchmarks for which the authorisation has been expressly withdrawn and the withdraw is transparent on the ESMA website.

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.

We are of the view that NCAs should allow the continued use of benchmarks provided by index providers for which authorization has been suspended or withdrawn (totally sufficient). This will enhance legal certainty for supervised entities which use such benchmarks in existing instruments/contracts and investment funds.

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.

Please see our answer to question 9. NCAs should have the power to allow the continued use of such a benchmark. Such benchmarks should to be available to those supervised entities that already reference the benchmark (very appropriate). 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.

4. 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.

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.

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.

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 strongly support the aim of the BMR to regulate benchmarks and index providers. However, any recalibration of the scope of the regulation should efficiently tackle risks of conflicts of interest and misconduct by the index provider that can jeopardize the robustness of a benchmark or create risks for the overall market stability.

5. 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.

Overall, our members are “not satisfied” with the ESMA register for benchmarks and administrators. We have identified the following issues:

- It is impossible to search benchmarks with an identifier which are produced by EU index providers and non-EU index providers. There is a big problem in the case of global benchmark groups. Some index providers appear in the ESMA register: it is then not possible to identify whether a specific benchmark is produced by the index provider in the register or by another entity within the group.

- It is not practicable to maintain two different registers. The usage of two different registers enhances the complexity for supervised entities to identify the relevant indices as fast as possible.

- Technical interfaces are improperly calibrated to download the data content an in efficient way in the IT systems of supervised entities.

In order to improve the effectiveness of the registers we would like to make the following proposals:

- **The two registers should be merged into one. This will enhance the operational efficiency for all supervised entities as they have only to use one register and access/build up only one interface.**

- The merged register should maintain a research functionality which enables supervised entities to user friendly identify individual indices provided by EU/Non-EU authorized/endorsed administrators. An identification code of each benchmark (e.g. ISIN, Ticker) should be provided in the register. Supervised entities should also be able to search for indices based on historical data.

- It should be possible to download the indices in a user friendly way which automatically fits in the IT systems of the supervised entities.

- It would also be useful if for those benchmark administrators endorsed under Article 33, the details of the endorsing entity were stated on the register. Similarly, it would be welcome if the register shows 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 very 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.

- Beyond the obligation for climate-related benchmarks, it should be possible to indicate/flag if a benchmark is based on ESG factors or not.

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)

Please see our answer to question 15. The two registers should be merged into one. These will enhance the operational efficiency for all supervised entities as they have only to use one register and access/build up only one interface.

6. Benchmark Statement

Question 16: In your experience, how useful do you find the benchmark statement?
Very useful – not useful at all (5 categories)

So far, the benchmark statements are generally not user friendly created allowing supervised entities to identify the relevant information as fast as possible. Regulators 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?

Benchmark statements should be designated in way which enables supervised entities to find the relevant information as quickly as possible.

Question 18: Do you consider that the option to publish the benchmark statement at benchmark level and at family level should be maintained?
Should definitely be maintained – should definitely be removed (5 categories). Please explain.

The benchmark statement at family level should be clearly defined/standardised in order to enable the supervised entities to better compare the individual indices across all index providers. 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.

7. Supervision of 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.

Yes, we agree that competent authorities should have explicit powers to verify that climate related benchmarks comply with the requirements of the regulation, especially in cases where the benchmark administrator applies for authorisation or registration for a particular benchmark as an EU Climate transition Benchmark or an EU Paris-aligned Benchmark.

However, supervised entities (e.g. Asset Manager) should not be forced to obtain regulatory approval if the investment strategy referencing an index complies with the chosen climate-related benchmark. Supervised entities should be able to use any benchmark which is on the ESMA register. The compliance of the benchmark with the standards to be set out in the in updated BMR should be determined when the benchmark administrator applies for authorisation or registration, not when investment fund management companies decide to use it.

It should be left to the discretion of (institutional) investors to assess if they would like to use a particular investment strategy which is in line with a climate related benchmark 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.

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.

Please see our answer to question 4 and 19. We “do not agree at all” that NCAs 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.

Supervised entities such as investment fund management companies rely on the climate-relaled benchmarks/index providers which are recorded in the ESMA register. Otherwise Asset Managers could be restricted within their investment strategy if regulators have the possibility to intervene due to BMR obligations. Such regulatory proposals are not within the aim of the BMR which was designed to improve the functioning and governance of benchmarks and ensures that benchmarks which are defined and used in the EU are robust, reliable, representative and fit for purpose and that they are not subject to manipulation.

8. Commodity Benchmarks

Question 21: Do you consider the current conditions under which a commodity benchmark is subject to the requirements in Title II of the BMR are appropriate?
Completely appropriate – completely inappropriate (5 categories). Please explain.

Question 22: Do you consider that the compound de minimis threshold for commodity benchmarks is appropriately set?

Completely appropriate – completely inappropriate (5 categories). Please explain.

We do not have any comments.

9. 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?
Question 24: What improvements in the above procedures do you recommend?

Asset Managers need to maintain access to a wide range of Non-EEA benchmarks. The extension of the transitional provision to the end of 2021 give the Non-EEA index providers more time to apply for recognition. However, we presume that by the end 2021 especially not all small and medium sized non-EU index providers have applied for recognition. Therefore, we encourage the EU Commission to further process with the assessment and recognition for equivalence under the Benchmark Regulation.