Benchmark Regulation Review
AFG's Key messages

Data are a key element of the Regulatory construction. As any other actor of the chain, data providers should be brought into the scope of the Regulatory framework. Benchmark regulation is one piece of this framework that should continue to capture index providers in the Union. Implementing/compliance costs have already been impacted on players, including users as asset managers. The latter have already streamlined their use of indices and use with zero difficulty ESMA registers. Lowering the protection of users of indices could weaken the initial regulatory purposes.

On the 17th of October 2023, the European Commission (EC) published a proposal amending the Benchmark Regulation regarding the use in the Union of benchmarks provided by an administrator located in a third country.

Here below are AFG's key messages on the EC proposal.

I- Creation of large discrepancies between requirements imposed on users and the absence of requirements for providers

AFG supports adopting a more proportionate approach to regulating benchmarks, ensuring the integrity and accuracy of indices without disproportionately increasing costs for investors and hampering fund investment strategies. More proportionate regulation would address the issue that required a revision of the Benchmark regulation, i.e. the fact that the European market relies heavily on third country benchmarks and that rules requiring non-EU benchmark providers to obtain recognition or endorsement or to comply with organizational rules could deprive EU market participants of their current use of benchmarks and hinder product innovation and diversification.

However, this issue seems mainly pertinent to small and mid-sized non-EU index providers, whereas the benchmark proposal goes much further by removing all non-significant benchmarks from the scope of the text.

From data we've gathered from our members, **non-significant benchmarks represent around 80 to 100% of their indexes** and are **provided mainly by the major non-EU index providers**. In view of these figures, we believe the proposal could have extremely detrimental impact as notably:

- It **affects the** already very limited **possibility for users to negotiate** contractual & commercial terms of the licencing agreement and **reinforces dependency towards providers ;**
- The proposal goes against the tide, notably on organisational measures as we see today that most index providers are also data/ratings providers (ESG data or rating providers notably) **which would call for tighter conflict of interest rules.**
- **It affects users' due diligence processes** for which they need to require data from their providers. For instance, for the *Financial Index Eligibility Table* that some NCAs require annually (*see. Guidelines on ETFs and other UCITS issues – ESMA/2012/832*). Without strict organisational rules, this information will be even harder to retrieve from providers;
- **Users will be ultimately responsible even in case of an error from their provider.** Please note that agreements usually never mention liabilities for negligence and that the process for when an error occurs lacks transparency. With the difficulty to negotiate clauses, users/asset managers are always on the forefront;
- **It does not take into account the systemic risk** of providers whose indexes are below the thresholds but who produce significantly more indexes than smaller players and yet are subject to the same lack of requirements;

Last, asset managers rely on providers' data to respond to their increasing regulatory obligations

regarding transparency, reporting and disclosure requirements. If they are not able to receive those

data through providers' methodologies, benchmark statement for instance, it's going to be even harder for asset managers to get the right level of data to comply with their own requirements, and forinvestors to get high-quality data. This is mainly true for ESG data which are increasingly important forinvestors notably to address climate change challenges.

This is why we believe that instead of scoping out all non-significant indexes, they should be subject to a lighter regime encompassing mainly transparency on the methodology, on the disclosures of conflict of interest and on input data. The benchmark statement should also still be published.

As developed below, AFG supports provisions avoiding the scoping out of systemic indexes and ensuring an alignment between BMR and SFDR.

II- Avoid the scoping out of systemic providers

The proposal to scope out all non-significant indexes **does not take into account the systemic risk of providers** whose indexes are below the thresholds but who produce significantly more indexes than smaller players and yet are subject to the same lack of requirements. Keeping in mind that these players are usually the same who provide data or ratings (ESG data/ratings providers) which would, on the contrary, call for tighter conflict of interest rules for instance.

Therefore, we propose adding a provision under which, indexes provided by one administrator and that reach the 50 billion € exposure threshold on a consolidated basis would be subject to the requirements that apply to significant benchmarks. This would allow to capture these actors who have the ability to put in place BMR provisions and on whom asset managers rely heavily on to respond to their own requirements.

Consequently, we support the amendments tabled by MEPs Gilles Boyer, Stéphanie Yon-Courtin and Olivier Chastel proposing that administrators which provides a combination of benchmarks that surpass the EUR 50 billion threshold on a cumulative basis should be subject to the same obligations as significant benchmarks (amendments 74 & 104). (See in the Annex). They were part of the compromise amendments from rapporteur Jonas Fernandez.

III- Alignment of BMR provisions with SFDR data requirements

ESG data are increasingly important for investors notably to address climate change challenges. However, **methodologies are today insufficiently transparent on ESG factors**. Large discrepancies and gaps remain between the various legislations applicable to the various categories of actors. Providers for instance are not required to provide SFDR metrics where users are. With more than 80% of our members' indexes being non-significant and therefore out of scope of BMR, it's going to be even harder for asset managers to get the right level of data to comply with their requirements, and for investors to get high-quality data.

Therefore, we suggest aligning benchmark regulation obligations with information that are required in respect of SFDR (Sustainable Finance Disclosure Regulation) and in respect of the future guidelines on funds' names using ESG or sustainability-related terms. furthermore, mandate should begiven to ESMA to assess how benchmark regulation could integrate ESG considerations to align with what is required through other existing pieces of legislation.

Consequently, we support the amendment from Gilles Boyer, Stéphanie Yon-Courtin and Olivier Chastel (Amendment 88, see in the Annex).

IV- The situation has evolved since the publication of the EU Commission in 2023

- **ESMA has published its guidelines on funds' name,** with new transparency requirements for financial market players

- **The FCA** has published in February 2024 its study, « **Wholesale Data Market Study** »,

  where it warned on the consequences of "*market power being held by most established benchmark administrators*", implying that it "*may provide limited incentives for benchmark administrators to lower prices, improve quality or innovate*" and that "***this can be exacerbated by firm behaviours or practices which use their market power to hamper competition***."[1]

- **ESMA** has published in July 2024 **its report on greenwashing,** where it states that "*according to the EC proposal, all benchmarks considered as non-significant would be out of the scope of the regulation except for the EU CTB/PAB. As all ESG benchmarks are used in the EU in financial products for a reference value below 50 billion EUR, they are all considered as non-significant benchmarks. Consequently, the ESG disclosure requirements will no longer be applicable to ESG benchmarks and thus no longer under the supervisory scrutiny. The only exception would be the labelled benchmarks i.e., EU CTB / PAB. Therefore,* ***this proposal leaves ESG benchmarks outside of the BMR scope without any supervisory powers regarding these benchmarks. From a supervisory perspective, NCAs and ESMA consider this as a problematic aspect stemming from the legislative proposal.***"

  Consequently: ***«The EC is invited to*:**
  - ***Incorporate a provision prohibiting misleading information under BMR.***
  - ***Address the loophole resulting from the recent review of BMR which leaves non-significant benchmarks out of scope of the BMR and without any supervisory oversight***"

Annex – Amendments tabled by MEPs

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[1] **2024 FCA's Wholesale Data Market Study - Extracts:** "*Operating margins earned by established benchmark administrators were around 56% on average during the analysed period, exceeding 60% in certain instances. In contrast, those of challengers and new entrants were significantly lower and inconsistent when compared with established benchmark administrators (around 11% on average).*

The return on capital achieved by the majority of the established firms was consistently above the cost of capital, largely outperforming challengers and new entrants. These results are consistent with a degree of market power being held by most established benchmark administrators.

In summary, there is very limited scope for competition 'in the market' where benchmarks are used for pricing financial contracts, and we found that competition 'for the market' once an industry standard is established is weak. We have also found that some benchmark administrators' products are considered to be a must have for specific market segments due to customer preferences for well-known brands.

As a result, benchmark administrators of industry standard or must have benchmarks are subject to limited competitive constraints from users switching or the threat of new entrants, and have been highly profitable for a number of years, suggesting they enjoy persistent market power. This means competition may provide limited incentives for benchmark administrators to lower prices, improve quality or innovate. This can be exacerbated by firm behaviours or practices which use their market power to hamper competition."

- **Application of significant benchmarks requirements to non-significant benchmarks which, for a sole provider and on when calculated on an aggregate basis, fall within the threshold of significant indices (i.e. 50 billion)**

Amendment 74
Gilles Boyer, Stéphanie Yon-Courtin, Olivier Chastel
Proposal for a regulation
Recital 5 a (new)

Text proposed by the Commission	*Amendment*
	(5a) In cases where one administrator provides a combination of benchmarks, none of which individually surpass the EUR 50 billion threshold but cumulatively the threshold of EUR 50 billion is surpassed, then the administrator of these non-significant benchmarks will be subject to the same obligations as significant benchmarks.

Amendment 104
Gilles Boyer, Stéphanie Yon-Courtin, Olivier Chastel

Proposal for a regulation
Article 1 - paragraph 1 - point 11
Regulation (EU) 2016/1011
Article 24 – paragraph 1a (new)

Text proposed by the Commission	Amendment
	1a. The aggregated volume of nonsignificant benchmarks provided by one administrator, used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investments funds having a total average value of at least EUR 50 billion on the basis of all the range of maturities or tenors of the benchmark, where applicable, over a period of six months, are subject to the same obligations as significant benchmarks.

- **Alignment of BMR provisions with SFDR data requirements**

Amendment 88

Gilles Boyer, Stéphanie Yon-Courtin, Olivier Chastel

Proposal for a regulation
Article 1 - paragraph 1 - point 5 - point b
Regulation (EU) 2016/1011
Article 13 – paragraph 4

Text proposed by the Commission	*Amendment*
(b) paragraph 4 is **deleted**;	(b) paragraph 4 ***is replaced by the following;***
	4. ESMA shall develop :
	(a) regulatory technical standards to align benchmark-level ESG disclosures, to be published by the benchmark administrator, with the regulatory disclosures requirements under Regulation (EU) 2019/2088 and its delegated regulations.
	ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2025.
	Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010;
	(b) guidelines regarding benchmarks names aligned with the ones for funds names, prioritising benchmarks underlying ETFs and index funds, by [12 months after the date of entry into force of this amending Regulation];

Justification

Alignment concerning compulsory ESG disclosures of ESG Benchmarks with EU regulatory disclosures for financial products (SFDR) and between Benchmark name requirements with fund names requirements, especially for ETFs (whose names replicate those of their underlying indices) is essential (UCITSD and AIFMD) is essential

Amendment 100
Gilles Boyer, Stéphanie Yon-Courtin, Olivier Chastel

Proposal for a regulation
Article 1 - paragraph 1 - point 10 b (new)
Regulation (EU) No 2016/1011
Article 19d a (new)

Text proposed by the Commission	*Amendment*
	(10b) The following Article is inserted:

"Article 19da

Title for the Article here

1. Administrators that are not authorised or registered pursuant to Article 34, or recognised pursuant to Article 32 shall not:

(a) provide or endorse ESG Benchmarks; or

(b) indicate or suggest, in the name of the benchmarks they make available for the use in the Union or in the legal or marketing documentation for those benchmarks, that the benchmarks they make available pursue ESG objectives or take into account ESG factors.

2. ESMA shall develop draft regulatory technical standards to specify common standards on the names of ESG Benchmarks consistent with Regulation (EU) 2019/2088, and directives 2011/61/EU and 2009/65/EC.

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months after the entry into force of this Regulation].

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first sub-paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."

Justification

Alignment concerning compulsory ESG disclosures of ESG Benchmarks with EU regulatory disclosures for financial products (SFDR) and between Benchmark name requirements with fund names requirements, especially for ETFs (whose names replicate those of their underlying indices) is essential (UCITSD and AIFMD) is essential.

Amendment 128
Gilles Boyer, Stéphanie Yon-Courtin, Olivier Chastel

Proposal for a regulation
Article 1 - paragraph 1 - point 14 - point c a (new)
Regulation (EU) 2016/1011
Article 29 – paragraph 1 b a (new)

Text proposed by the Commission	*Amendment*

(ca) the following paragraph is inserted:

1ba. A supervised entity may use a benchmark claiming, in its legal or marketing documentation, or denomination, to take ESG factors into account in its methodology, only where its administrator discloses the information referred to in Article 13(1), point (d), and in Article 27(2a). All methodology disclosure requirements must be coherent with Regulation (EU) 2019/2088, directive 2011/61/EU and directive 2009/65/EC.

This paragraph shall apply to both EU and non-EU benchmarks.

Justification

Alignment concerning compulsory ESG disclosures of ESG Benchmarks with EU regulatory disclosures for financial products (SFDR) and between Benchmark name requirements with fund names requirements, especially for ETFs (whose names replicate those of their underlying indices) is essential (UCITSD and AIFMD) is essential.