



7 April 2020

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An Economy that Works for People,
European Commission,
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Belgium

Steven Maijoor,
Chair,
ESMA,
201-203 rue de Bercy
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France

Dear Sirs,

Uncertainty regarding implementation of amendments to the Benchmarks Regulation under the Low Carbon Benchmarks Regulation

The International Swaps and Derivatives Association (**ISDA**), The Association for Financial Markets in Europe (**AFME**), The European Federation of Energy Traders (**EFET**), The Association of European Energy Exchanges (**Europex**), The Futures Industry Association (**FIA**), hereafter referred to as ‘The Associations’, would like to express their concerns in relation to the requirement for benchmark administrators to comply with additional obligations set out in Regulation (EU) 2019/2089 (‘Low Carbon Benchmarks Regulation’) by 30 April 2020.¹ **In order to address these concerns, the Associations would respectfully like to ask ESMA to consider publishing guidance to national competent authorities, setting out its expectation that they will not prioritise their supervisory actions in relation to implementation of the obligations under the Low Carbon Benchmarks Regulation until the Level 2 measures have been finalised and administrators have had the opportunity to implement the Level 2 measures.**

The Associations understand that the European Commission is in the process of drafting delegated acts specifying the detailed obligations that administrators will be required to meet, but that these delegated acts will not be finalised until some months after 30 April 2020. If administrators are required to comply with the Level 1 obligations without knowing the detail of the Level 2 requirements, this is likely to lead to significant divergence in implementation, contrary to the objective of these obligations, which was to increase harmonisation and comparability in relevant disclosures.

¹<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R2089&from=EN>

The Associations are also concerned that requiring implementation of obligations based only on the Level 1 framework text and the recommendations² of the Technical Expert Group on Sustainable Finance (TEG) set out in its Final Report on Climate Benchmarks and Benchmarks' ESG Disclosures when further detail is expected to be provided in Level 2 measures sets an unfortunate precedent for future implementation processes. This approach would also seem not to be aligned with the Commission's Better Regulations principles and commitment.

Under the Low Carbon Benchmarks Regulation benchmark administrators are required, by 30 April 2020, to do the following:

- include in their published information on the key elements of their benchmark methodologies an explanation of how the key elements reflect ESG factors for each benchmark or family of benchmarks³;
- comply with the requirements of the Low Carbon Benchmarks Regulation if they provide an EU Climate Transition Benchmark or an EU Paris-aligned Benchmark⁴;
- include in their benchmark statement an explanation of how ESG factors are reflected in each benchmark or family of benchmarks provided and published⁵.

The Commission is empowered to adopt delegated acts laying down the minimum content and format of the explanation to be included in the key elements; laying down the minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks; and further specifying the information to be included in the benchmark statement.

The Associations understand that drafts of these delegated acts will be published in due course. However, even once the drafts have been published, they will still be subject to a further public consultation period and a 3-month scrutiny period by the co-legislators. As a result, there will still be the potential for significant change between the draft delegated acts and the final version that sets out the requirements that will be binding on benchmark administrators.

The Associations consider that the Level 2 measures set out the detail of the obligations under the Level 1 text, rather than introducing a parallel but separate requirement, and that as a result it is not possible to comply with the obligations under the Level 1 text in the absence of the Level 2 text. The obligations in the Level 1 text should only start to apply once the Level 2 text has entered into effect. In the absence of the Level 2 text, the implementation of the Low Carbon Benchmarks Regulation risks fragmentation and lack of standardisation, which goes contrary to the spirit of the regulation and is likely to create unnecessary increases in compliance costs by duplicating implementation work. This seems to go against the Better Regulation objective of avoiding unnecessary costs.

²https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190930-sustainable-finance-teg-final-report-climate-benchmarks-and-disclosures_en.pdf

³ New Article 13(1)(d) of the Benchmarks Regulation, with new Article 13(2a) empowering the Commission to adopt delegated acts

⁴ New Article 19a of the Benchmarks Regulation

⁵ New Article 27(2a), with new Article 27(2b) empowering the Commission to adopt delegated acts

In particular:

- The absence of the Level 2 measures creates great uncertainty for benchmark administrators with respect to implementing the requirements of the Level 1 text. The Level 2 measures are urgently needed as otherwise implementation could be divergent across the market, leading to a significant lack of standardization with respect to Climate Benchmarks and ESG disclosures directly affecting the comparability of ESG-related information across benchmarks. Such an outcome would be contrary to the policy objective of the regulation, which aims to enhance comparability and transparency in the ESG benchmark market and ensure an adequate level of harmonization.
- Furthermore, benchmark administrators will face unnecessary and disproportionately high compliance costs if their initial interpretation of the compliance requirements does not align fully with the detail of the Delegated Acts. Benchmark administrators will in all cases have to revisit their preparations to assess and determine the appropriateness and correctness of their implementing measures once the Level 2 measures have been finalised and will have to review and adjust their disclosures and other implementing measures as necessary.
- The Associations also have the following specific concerns regarding implementation on the basis of the Level 1 text and the TEG Final Report:
 - The TEG Final Report represents the views of an independent group, and so may not reflect the views of the European Commission and may not be representative of the Level 2 measures once published;
 - The TEG Final Report envisages quantitative factors and scores to be assigned to different ESG criteria which may not take appropriate account of different methodologies across benchmark administrators;
 - There may be unintended consequences for benchmark users and end clients if the TEG recommendations are implemented without carefully considered thought, once the Level 2 measures have been published and can be considered alongside the TEG recommendations;
 - The TEG Final Report was finalised in September 2019, when the assumption was that the EU Taxonomy Regulation would be adopted in Q3 2019. Many of the proposed disclosures refer to the EU Taxonomy Regulation directly or to data that would be available in the market in light of corporate disclosures under the EU Non-Financial Reporting Directive (NFRD). In light of the delayed timetable for the EU Taxonomy Regulation, technical screening criteria and NFRD consultation, benchmark administrators will need further detailed guidance on the sources of information that they should use.
- Even in the event that the Level 2 text would be finalised in good time (which seems unlikely with less than 4 weeks to effective date), appropriate implementation time would still be lacking, as the development of the ESG benchmark methodology document and the benchmark statement in compliance with the Level 2 measures will require time and resources. Many benchmark administrators may also need to consult external counsel or consultants for the purpose of complying with the new requirements.

- While this concern does not stem from the COVID 19 crisis, resource constraints on benchmark administrators further complicate the challenge created by confronting uncertainty as to the practical compliance requirements, and potentially, having to reverse course if benchmark administrators' initial interpretations are not aligned with the detail of the final Delegated Acts.

The Associations would welcome the opportunity to discuss our concerns with you in more detail if this may be helpful.

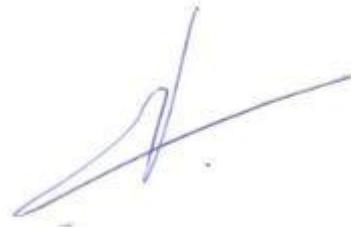
Yours sincerely,



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CEO, ISDA



Adam Farkas
CEO, AFME



Jan van Aken
Secretary General, EFET



Christian Baer
Secretary General, Europex



Bruce Savage
Head of Europe, FIA

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 70 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

About AFME

AFME (Association for Financial Markets in Europe) advocates for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society. AFME is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues. AFME aims to act as a bridge between market participants and policy makers across Europe, drawing on its strong and long-standing relationships, its technical knowledge and fact-based work. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) through the GFMA (Global Financial Markets Association). For more information please visit the AFME website: www.afme.eu. Follow us on Twitter @AFME_EU

About EFET

The European Federation of Energy Traders (EFET) promotes competition, transparency and open access in the European energy sector.

We build trust in power and gas markets across Europe, so that they may underpin a sustainable and secure energy supply and a competitive economy.

We do this by:

- Working to improve the functionality and design of European gas, electricity and associated markets for the benefit of the overall economy, society and especially end consumers.
- Developing and maintaining standard wholesale supply contracts and standardising related transaction and business processes.
- Facilitating debate amongst TSOs, regulators, policy makers, traders and others in the value chain about the future of the European energy market.

We represent more than 100 member companies, active in over 27 European countries.

About Europex

Europex is a not-for-profit association of European energy exchanges with 29 members. It represents the interests of exchange-based wholesale electricity, gas and environmental markets, focuses on developments of the European regulatory framework for wholesale energy trading and provides a discussion platform at European level.

About FIA

[FIA](http://www.fia.com) is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership

includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.