BETTER FINANCE
The European Federation of Investors and Financial Services Users
Fédération Européenne des Épargnants et Usagers des Services Financiers

COMMUNIQUE DE PRESSE

AU MOINS 619 OPCVM ACTIONS SUSPECTÉS DE CONTREVENIR AUX RÈGLES D'INFORMATION CLÉ - MANQUEMENTS RÉPÉTÉS DANS PLUSIEURS PAYS EUROPÉENS

4 Juin 2018 – Une nouvelle étude de BETTER FINANCE révèle qu'au moins 30% des principaux OPCVM actions (gérés activement et utilisant un indice de référence[1]) continuent de contrevenir aux principales exigences d'information des épargnants prévues par la réglementation européenne relative au Document Clé d'Information pour l'Investisseur (DICI). Face à ce défaut persistant de respect des règles européennes, BETTER FINANCE ne voit pas d'autre choix que de nommer les contrevenants et les juridictions européennes coupables de ces manquements selon nous à la législation européenne.

Ce qui avait commencé par une enquête sur le problème trop répandu des fonds faussement actifs (appelés "Closet index funds") a aujourd'hui pris une autre dimension. En 2017, en répliquant l'étude de l'ESMA (l'Autorité Européenne des Marché Financiers), BETTER FINANCE avait, à l'inverse de l'ESMA, révélé le nom des 165 fonds OPCVM qui, selon l'ESMA, étaient des fonds « potentiellement faussement actifs ». Dans le cadre de cette recherche, BETTER FINANCE avait aussi découvert des violations étendues des règles d'information des investisseurs. Bien que BETTER FINANCE ait immédiatement attiré l'attention des autorités européennes, plus d'un an après, ces violations des règles de publication d'information des épargnants perdurent.

À exception de l'Autorité Financière britannique (Financial Conduct Authority) qui a récemment forcé 64 fonds faussement actifs domiciliés au Royaume-Uni à indemniser leurs clients, aucune autres autorités nationales n'a réagi à ce jour. Pire, alors que 93% des fonds suspectés par ESMA d'être potentiellement faussement actifs sont domiciliés dans d'autres juridictions que le Royaume-Uni, au moins trois autorités nationales (Luxembourg, Allemagne et France) ont déclaré qu'ils n'avaient trouvé aucun cas de « *closet indexing* », dont celle du Luxembourg, où sont pourtant domiciliés 47% de l'ensemble des fonds potentiellement faussement actifs.

> ***« Il pourrait aussi s'avérer utile d'évaluer si un fonds a été capable de réaliser les objectifs indiqués dans la documentation du fonds »***
>
> (Recommandation de l'ESMA, Février 2016, Communication sur les fonds faussement actifs)

Plus préoccupant encore est le fait que ni l'autorité de supervision européenne (ESMA), ni les autorités nationales n'aient réagi aux manquements aux règles édictant le contenu du Document d'Information Clé pour l'Investisseur (DICI).

BETTER FINANCE avait découvert l'année dernière que sur les 165 fonds suspectés d'être faussement actifs, 67 ne divulguaient pas la performance passée de l'indice de référence au côté de celle du du fonds, empêchant ainsi les épargnants d'essayer de sivre la recommandation ci-

[1] Selon le site internet Morningstar (voir méthodologie de l'Annexe 4)

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

dessus de l'ESMA : c'est- à- dire d'évaluer les performances du fonds par rapport à son indicateur de référence.

De nouvelles recherches menées entre janvier et avril 2018 n'ont pas apaisé nos craintes, car, sur les 165 fonds potentiellement faussement actifs identifiés fin 2016, 44 continuent en plus de violer les règles européennes relatives à la divulgation des indices de référence dans le DICI. Et ces conclusions ne représentent que la partie émergée de l'iceberg puisqu'environ 30% de l'ensemble des OPCVM actions utilisant un indice de référence (plus de 2000) ne respectent pas non plus les règles européennes d'informations clés prévues pour le DICI.

Une grande partie des fonds ne respectant pas la législation européenne à notre sens sont domiciliés au Luxembourg où 66% des fonds potentiellement faussement actifs et 43% (soit 272) des tous les les OPCVMactions étudiés utilisant un indice de référence ne publient toujours pas la performance de leur indice de référence dans leur DICI. Au total, 82% des contrevenants sont domiciliés au Luxembourg, au Royaume-Uni ou en Irlande (voir ci-dessous le tableau et l'annexe 1 pour plus de détails). En revanche, seulement 1% des OPCVM domiciliés en France utilisant un indice de référence ne respectent pas à notre sens la réglementation européenne, et aucun d'entre eux ne sont suspectés d'être faussement actifs. Ces conclusions démontrent le manque sérieux de convergence de la supervison financière au sein de l'Union européenne.

BETTER FINANCE a aussi détecté une autre pratique inquiétante. Alors que la plupart des DICI des fonds violant la législation européenne à notre sens ne font aucune référence à un benchmark, 145 autres fonds mentionnent de manière explicite dans leur DICI qu'ils ne suivent pas d'indice de référence ce qui, à tout le moins, semble contradictoire avec les informations d'une base de données publique qui mentionne clairement que ces fonds ont un indice de référence.

Guillaume Prache, Directeur Général de BETTER FINANCE souligne que *« comme le montrent les résultats de l'étude, ces violations à notre sens manifestes et très fréquentes des règles européennes de protection des épargnants sont un nouvel*[2] *appel à l'intervention urgente des autorités publiques afin de mettre fin au préjudice subi par les citoyens européens en tant qu'épargnants, et cela particulièrement à la lumière du débat actuel sur la réforme necéssaire des autorités européennes de Surveillance (ESAs) ».*

[2] En mars 2017 BETTER FINANCE a alerté les autorités européennes sur ces problèmes, et a appelé la Commission européenne et l'ESMA à faire respecter ces réglementations relatives à l'information des épargnants. La Commission européenne n'a jamais donné suite, et l'ESMA a répondu qu'elle demanderait aux autorités nationales d'étudier ce problème …

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Principaux OPCVM actions utilisant un indice de référence

Domicile du fonds	Nombre de fonds ne respectant pas le règlement européen sur le DICI	Pourcentage des fonds domiciliés
Luxembourg	272	43%
Royaume-Uni	157	43%
Irlande	80	54%
Allemagne	45	38%
Autriche	28	67%
Belgique	25	93%
Autres (11)	12	2%
Total	**619**	**30%**

Source: *BETTER FINANCE*

Avertissement et clause de non-responsabilité : Toutes ces conclusions sont basées sur et se réfèrent à la méthodologie utilisée et au périmètre de l'étude de l'ESMA (détaillés à l'Annexe 4). Les informations relatives aux indices de référence utilisés par les OPCVM proviennent de site internet publics. BETTER FINANCE ne dispose pas des ressources suffisantes pour analyser elle-même les plus de 2000 prospectus et, à l'instar de l'ESMA, elle s'est référé aux indices de référence des fonds mentionnés par Morningstar.

Les conclusions présentées ci-dessus sont basées sur certaines hypothèses et comportent d'importantes limites et réserves. Veuillez-vous référer à la méthodologie en annexe 4.

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76, rue du Lombard, 1000 Brussels - Belgium
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Annex 1:

EXAMPLES OF A COMPLIANT AND OF A NON-COMPLIANT KIID (PAST PERFORMANCE DISCLOSURE)

COMPLIANT FUND

Objectives and Investment Policy

- The Fund aims to maximise the return on your investment through a combination of capital growth and income on the Fund's assets.
- The Fund invests at least 70% of its total assets in the equity securities (e.g. shares) of companies domiciled in, or the main business of which is in, emerging European countries or the Mediterranean region (countries bordering the Mediterranean Sea).
- The Fund may indirectly invest in emerging markets by investing in American Depository Receipts (ADRs) and Global Depositary Receipts (GDRs), which are listed or traded on stock exchanges and regulated markets outside emerging markets. ADRs and GDRs are investments issued by financial institutions which give exposure to underlying equity securities.
- The investment adviser (IA) may use financial derivative instruments (FDIs) (i.e. investments the prices of which are based on one or more underlying assets) for investment purposes in order to achieve the investment objective of the Fund, and/or to reduce risk within the Fund's portfolio, reduce investment costs and generate additional income. The Fund may, via FDIs, generate varying amounts of market leverage (i.e. where the Fund gains market exposure in excess of the value of its assets).
- The investment adviser has discretion to select the Fund's investments and in doing so may take into consideration the MSCI Emerging Markets Europe 10/40 Index.
- Recommendation: This Fund may not be appropriate for short-term investment.
- Your shares will be non-distributing (i.e. dividend income will be included in their value).
- Your shares will be denominated in Euro, the Fund's base currency.
- You can buy and sell your shares daily. The minimum initial investment for this share class is US$5,000 or currency equivalent.

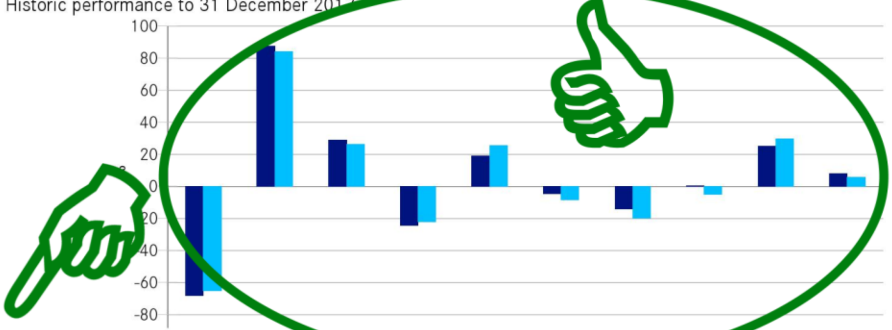
For more information on the Fund, share/unit classes, risks and charges, please see the Fund's prospectus, available on the product pages at www.blackrock.com

Past Performance

Past performance is not a guide to future performance.
The chart shows the Fund's annual performance in EUR for each full calendar year over the period displayed in the chart. It is expressed as a percentage change of the Fund's net asset value at each year-end. The Fund was launched in 1995. The share class was launched in 1995.
Performance is shown after deduction of ongoing charges. Any entry/exit charges are excluded from the calculation.

† Benchmark:MSCI EM Europe 10/40 Index (EUR)

Historic performance to 31 December 2017



	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Fund	-68.1	87.5	29.0	-24.5	18.9	-4.5	-14.3	0.3	25.1	7.9
Benchmark †	-65.1	84.2	26.2	-21.9	25.4	-8.5	-19.7	-5.0	29.5	5.7

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E-mail: info@betterfinance.eu - http://www.betterfinance.eu

NON-COMPLIANT FUND

Gegenstand dieses Dokuments sind wesentliche Informationen für den Anleger über diesen Fonds. Es handelt sich nicht um Werbematerial. Diese Informationen sind gesetzlich vorgeschrieben, um Ihnen die Wesensart dieses Fonds und die Risiken einer Anlage in ihn zu erläutern. Wir raten Ihnen zur Lektüre dieses Dokuments, so dass Sie eine fundierte Anlageentscheidung treffen können.

1. Ziele und Anlagepolitik

- Das Anlageziel dieses Investmentfonds ist mittel- bis langfristiger Kapitalzuwachs durch eine positive Entwicklung der Kurse der im Sondervermögen enthaltenen Vermögenswerte.
- Das Fondsmanagement verfolgt die Strategie, überwiegend in Aktien von Unternehmen mit Sitz in der Bundesrepublik Deutschland zu investieren. Der Fonds investiert dabei überwiegend in Standardwerte (Blue Chips).
- Der Fonds legt mindestens 51% seines Wertes in Kapitalbeteiligungen i.S.d. § 2 Abs. 8 InvStG an.
- Weiterhin können Geschäfte in von einem Basiswert abgeleiteten Finanzinstrumenten (Derivate) getätigt werden.
- Die Erträge eines Geschäftsjahres werden bei dieser Anteilklasse grundsätzlich ausgeschüttet.
- Die Anleger können börsentäglich die Rücknahme der Anteile verlangen. Die Verwaltungsgesellschaft kann die Rücknahme aussetzen, wenn außergewöhnliche Umstände dies zur Wahrung der Anlegerinteressen erforderlich erscheinen lassen.

3. Kosten

Aus den Gebühren und sonstigen Kosten wird die laufende Verwaltung und Verwahrung des Fondsvermögens sowie der Vertrieb der Fondsanteile finanziert. Anfallende Kosten verringern die Ertragschancen des Anlegers.

Einmalige Kosten vor und nach der Anlage:	
Ausgabeauf- und	0,00 %
Rücknahmeabschläge	0,00 %
Dabei handelt es sich um den Höchstsatz, der von Ihrem Anlagebetrag bei Kauf bzw. Verkauf abgezogen wird und somit Ihre Rendite mindert. Im Einzelfall können diese Kosten niedriger ausfallen. Den tatsächlich für Sie geltenden Betrag können Sie jederzeit in Ihrer Sparkasse erfragen.	
Kosten, die vom Fonds im Laufe des Jahres abgezogen werden:	
Laufende Kosten	2,24 %
Die hier angegebenen laufenden Kosten fielen im Geschäftsjahr des Fonds an, das im September 2017 endete. Sie können von Jahr zu Jahr schwanken und enthalten weder Kosten für den An- und Verkauf von Wertpapieren (Transaktionskosten) noch ggf. anfallende, an die Wertentwicklung des Fonds gebundene Gebühren. Sie beinhalten jedoch alle Kosten, die bei der Anlage in andere Fonds anfallen, sofern diese einen wesentlichen Anteil am Fondsvermögen ausmachen.	
Kosten, die der Fonds unter bestimmten Umständen zu tragen hat:	
An die Wertentwicklung des Fonds gebundene Gebühren	25 % der über 100% HDAX Total Return Index in EUR® liegenden Wertentwicklung, sofern die Wertentwicklung des Fonds die des Index auch unter Berücksichtigung der bis zu fünf vorausgegangenen Geschäftsjahre (frühestens ab dem 01.10.2013) übertrifft.* Im abgelaufenen Geschäftsjahr waren dies für den Zeitraum vom 01.10.2016 bis 30.09.2017: 0,00 %.

4. Frühere Wertentwicklung

Annex 2

BENCHMARK DISCLOSURE COMPLIANCE 2018 – KEY RESULTS

This 2018 research studies the compliance of the Key Investor Information Documents (**KIID**) of the UCITS funds in scope with the mandatory key benchmark disclosure requirements provided in the UCITS V Directive[3] and in the KIID Regulation.[4]

The Research analyses a total of 2033 **EU-domiciled actively managed equity funds:** all those that have an inception date prior to 1 January 2005, at least €50 million AuM and management fees of at least 0.65% of the NAV: the same selection criteria as ESMA's 2016 'Supervisory Work on Closet Indexing'.[5] Out of the initial 2332 UCITS (2017), 299 have been eliminated since they no longer fulfil the aforementioned criteria.

The study focuses on two important mandatory disclosure requirements concerning the benchmark prescribed by the KIID Regulation (in accordance with Article 78.3(c) and (d) UCITS V Directive), i.e.:

A. the KIID must clearly indicate in Section 1 (*Objectives and Investment Policy*) of the KIID whether it uses, either explicitly **or implicitly**,[6] a benchmark; *Legal basis*: Article 7.1. (d) KIID Regulation;
B. the KIID must publish the past performance of the index alongside the past performance of the fund in Section 4 (*Past Performance*); *Legal basis*: Article 18(1) KIID Regulation;

In addition, the UCITS V Directive specifies that '*an up-to-date version of the key investor information shall be made available on the website of the investment company or management company*'.[7]

Thus, in light of the foregoing, following ESMA's methodology and fund selection criteria[8] and based – as ESMA - on data provided by Morningstar, out of the main 2033 benchmarked UCITS equity funds:

a) **1239** (61%) funds were found to be in compliance with the KIID disclosure requirements;
b) **619** (30%) funds are in breach of one or more of their legal obligations, out of which 98 (16%) are major offenders, meaning that their KIIDs clearly indicate an index (either in Section 1 or in Section 3 as a performance benchmark), but do not publish its past performance in Section 4;

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[3] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (Text with EEA relevance).
[4] Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website (Text with EEA relevance), OJ L 176, 10.7.2010, p. 1–15.
[5] European Securities and Markets Authority, 'Public Statement - Supervisory work on potential closet index tracking' (ESMA Website, 02 February 2016, ESMA/2016/165) https://www.esma.europa.eu/document/public-statement-supervisory-work-potential-closet-index-tracking
[6] According to Article 7.1(d) KIID Regulation, the objectives and investment policy section of the KIID shall disclose whether the UCITS uses an approach that "*includes or implies a reference to a benchmark and if so, which one*". Therefore, even if the UCITS fund is actively managed and the investment policy does not directly use a benchmark (for instance, the fund will be compared to the index), the benchmark must still be named in accordance with the "*fair, clear and not misleading*" principle enshrined in Article 3.2 KIID Regulation, as per Article 79.1 and Article 78.5 UCITS V Directive.
[7] Article 81 UCITS V Directive.
[8] See Annex 2 of this Research.

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76, rue du Lombard, 1000 Brussels - Belgium
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c) **145** (7%) funds have a "fund benchmark" but claim the contrary in their KIID: BETTER FINANCE believes these funds are probably non-compliant with the spirit of the EU Regulations**;**
d) **30** (1%) of the UCITS are still active, though BETTER FINANCE could not find the corresponding KIIDs;

Based on domicile, overall 81% (508) of the offending UCITS are from Luxembourg, UK and Ireland.

Main EU domiciled benchmarked UCITS equity funds1

Domicile	Number of funds that are not in compliance with the KIID Reg.	As % of total domiciled
Luxembourg	272	43%
United Kingdom	157	43%
Ireland	80	54%
Germany	45	38%
Austria	28	67%
Belgium	25	93%
Sweden	9	8%
France	3	1%
Total	619	30%

Source: BETTER FINANCE own composition.

Worst cases by domicile: Luxembourg, UK, Ireland, Germany and Austria, where almost 94% (582) of the non-compliant UCITS are domiciled…

"Best-in-Class": Two countries stand out as best practices in this study, i.e.:

i. *France*: first of all we were able to find the relevant, updated KIIDs for all French-registered UCITS; second, 99% of domiciled-UCITS (281 out of 284) are compliant with the relevant EU law provisions; third, none of the 3 non-compliant funds were identified as potential closet index funds;
ii. *Spain*: with 97% of UCITS in compliance with the benchmark disclosure requirements (61 out of 63) – for the rest we did not find the relevant documentation.[9] The supervisor (CNMV) provides a neutral, standardised and updated[10] KIID for most Spanish-domiciled UCITS on its website[11], with two highlights:
  - the first sentence of Section 1 in the KIID discloses the benchmark of the fund, always using the same wording;
  - the past performance charts are complete, updated, and publicly available on the CNMV website.

[9] BETTER FINANCE could not find the KIIDs for these 2 funds neither on the CNMV website, neither on Morningstar public website.
[10] Under the *Performance* section, the KIID contains a link to the CNMV website where an updated version of the past performance graph (fund and benchmark) is available, calculated on the basis of the annual report.
[11] In accordance with Recital (60) UCITS V Directive

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76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
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The present Research is accurate as of 12 April 2018. It is important to know that data and information on UCITS funds and their corresponding documentation or reporting may have changed since then.

The Research also uses assumptions and BETTER FINANCE does not control the correctness nor the accuracy or reporting of the aforementioned, nor can it be held liable for any disputes that may result directly or indirectly from the publication of this research.

BETTER FINANCE *has not legally identified any closet index fund, as there is still no legal definition for those. It has only recreated and published the list of funds that ESMA sampled earlier, including those ESMA identified itself as "potential equity closet indexing funds", based on its sampling criteria and on its quantitative analysis; we refer to ESMA's press release and statement from 02/02/2016. BETTER FINANCE's quantitative study therefore bears the same limitations as the ESMA one. The data used for the study carried out by BETTER FINANCE and based entirely on the methodology and criteria of the ESMA study, references the period from 2010 to 2014 only. It is a one shot study limited in time. Variables that formed part of the selection and filtering criteria therefore may very well have changed since then.*

"Fund benchmark" information is mostly sourced from public databases, not from the fund prospectuses themselves (see Annex 4: Methodology).

The findings are based on assumptions and are subject to significant limitations and caveats. Please refer to the methodology annexed to this Press Release (Annex 4).

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

Annex 3

LIST: THE 44 "POTENTIAL CLOSET INDEX FUNDS" THAT CONTINUE TO BREACH[12] THE KEY INFORMATION DISCLOSURE RULES ON BENCHMARK PERFORMANCE

NAME	ISIN	Fund Benchmark
Barings Latin America A USD Inc	IE0000828933	MSCI EM Latin America 10/40 GR USD
Belfius Eqs B Global Finance C Acc	BE0174812181	MSCI Europe/Financials NR USD
Belfius Eqs B Global Health Care C Acc	BE0163900674	MSCI World/Health Care PR USD
Belfius Eqs B Robotics &Innt Tech C Acc	BE0176735018	MSCI World/Information Tech PR USD
Candriam Eqs L Emerging Markets C EURInc	LU0056053001	MSCI EM NR EUR
Candriam Eqs L Europe C EUR Acc	LU0027144939	MSCI Europe NR EUR
Candriam Eqs L Germany C EUR Inc	LU0093601580	MSCI Germany PR USD
Candriam Eqs L Switzerland C CHF Acc	LU0082273227	MSCI Switzerland NR CHF
Candriam Eqs L United Kingdom C GBP Acc	LU0093582269	MSCI United Kingdom NR EUR
Candriam Quant Eqs Europe C Acc	LU0149700378	MSCI Europe NR EUR
DekaLux-Europa TF (A)	LU0062625115	MSCI Europe Large NR EUR
Deka-Europa Value CF	LU0100187060	MSCI Europe NR EUR
DekaLux-USA TF	LU0064405334	S&P 500 TR EUR
Fidelity American Diversified A-USD	LU0187121727	S&P 500 NR USD
Fidelity ASEAN A-USD	LU0048573645	MSCI South East Asia NR USD
Fidelity Australia A-AUD	LU0048574536	S&P/ASX 200 TR AUD
Fidelity Global Health Care A-EUR	LU0114720955	MSCI ACWI/Health Care NR USD
Fidelity Global TeleComs A EUR Inc	LU0099575291	MSCI ACWI/Telecom Services NR USD
Fidelity Greater China A-USD	LU0048580855	MSCI Golden Dragon NR USD
Fidelity International A-USD	LU0048584097	MSCI World NR USD
Fidelity Malaysia A-USD	LU0048587868	MSCI Malaysia IMI NR USD
FT Frankfurt-Effekten-Fonds	DE0008478058	MSCI Germany NR EUR
Henderson Gartmore Cont Eurp I Acc	LU0113993397	MSCI Europe Ex UK NR EUR
Henderson Gartmore Latin Am R EUR Acc	LU0200080918	MSCI EM Latin America NR USD
Henderson Horizon Glb Tech A2 USD Acc	LU0070992663	MSCI ACWI/Information Technology NR USD
INTECH US Core I USD Acc/ new name Janus Henderson INTECH Core USD Acc	IE0032747168	S&P 500 TR EUR
KBC Real Estate Equity Glbl P EUR acc	LU0198389784	S&P/Citig. World Property EUR
Legg Mason CB US Appreciation B Inc (A)$	IE00B19ZB763	S&P 500 TR USD
Metzler Aktien Deutschland AR	DE0009752238	MSCI Germany NR EUR
Mirabaud Eq Swiss Small & Mid A CHF	LU0636969866	SIX SPI Extra TR CHF

[12] See Annex 4: Methodology.

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PineBridge Greater China Equity A	IE0032431581	MSCI Golden Dragon NR USD
Russell US Equity A	IE0002190993	Russell 1000 TR EUR
Russell US Quant C	IE0031179298	Russell 1000 TR EUR
Sanlam World Equity A	IE00B01J9H59	MSCI World NR USD
SEI GMF Pac Bsn Ex-Jpn Eq Inv Acc	IE0000617179	MSCI Pacific ex Japan PR USD
SLI Japanese Equities D Acc	LU0137295654	MSCI Japan NR EUR
UniEM Osteuropa A	LU0054734388	25% MSCI GCC Countries GR USD , 75% MSCI EM Europe&Middle East 10/40 NR USD
UniEuropa A	LU0047060487	MSCI Europe NR EUR
UniEuropa -net-	DE0009750232	MSCI Europe NR EUR
UniNordamerika	DE0009750075	S&P 500 TR USD
UniSector: BioPharma A	LU0101441086	MSCI World/Health Care PR USD
UniSector: HighTech A	LU0101441672	MSCI ACWI/Information Technology PR USD
UniValueFonds: Europa A	LU0126314995	MSCI Europe Value NR

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"Fund benchmark" information is mostly sourced from public databases, not from the fund prospectuses themselves (see Annex 4: Methodology).

The findings are based on assumptions and are subject to significant limitations and caveats. Please refer to the methodology annexed to this Press Release (Annex 4).

Annex 4

METHODOLOGY: 2018 RESEARCH ON THE COMPLIANCE OF KEY EQUITY FUNDS WITH BENCHMARK DISCLOSURE REQUIREMENTS

Following a BETTER FINANCE request from October 2014, ESMA investigated potentially falsely active equity "UCITS"[13] funds (also called "closet indexers"). On February 2nd 2016, ESMA released some of the long-awaited results of its investigation. Closet indexers are funds that claim to be "actively" managed whereas in reality they merely follow market indices, charging far higher fees than low-cost index-tracking funds such as ETFs do. The promotion and distribution of such funds as "active" is very misleading to the investor and causes detriment because the investor is paying for a service that he or she is not receiving.

BETTER FINANCE has been using both ESMA's methodology and sampling criteria.

1. ESMA METHODOLOGY

On 2 February 2016, ESMA issued a statement highlighting the issue of closet index tracking funds and describing the analysis it undertook to "*determine whether any indication of closet indexing can be found at an EU-wide level*".

The ESMA analysis was twofold:

- It used quantitative metrics, which indicated that up to 15 % of the UCITS funds ESMA sampled were potentially falsely active,
- and reviewed the investor disclosure documents of the funds concerned, and "*found they tended to confirm the quantitative analysis results*".

ESMA, however, did not disclose the funds that were uncovered by its investigation as being potentially falsely active, nor did it disclose in which countries they are domiciled, leaving EU investors in the dark. When a request by BETTER FINANCE for ESMA to release the results of its investigation and actually disclose the names of the dozens of funds suspected by ESMA of engaging in "closet indexing" was declined, BETTER FINANCE took the decision to replicate the ESMA study and release the results.

Also, ESMA did not communicate any disclosure breaches following its review of the "investor disclosure documents".

In this respect the key objective of the BETTER FINANCE Research in 2017 was to replicate to the extent possible the quantitative methodology and the fund selection criteria of the ESMA study.

[13] UCITS funds ('undertakings for collective investment in transferable securities'): investment funds that have a European distribution passport, by complying with the EU UCITS funds Directives; according to Article 1 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), http://data.europa.eu/eli/dir/2009/65/2014-09-17, hereinafter '**UCITS V Directive**'.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

2. ESMA FUND SELECTION CRITERIA

ESMA explicitly specified that the Morningstar commercial database was used as the data source for their study. Using specific criteria, ESMA then filtered the universe of available funds limiting the study to "*UCITS with a significant size, a proven track record and a management fee in the typical range of funds with an active management style*".

Having applied these filtering criteria to the Morningstar database, ESMA was left with a sample size of over 2600 funds. It then removed those funds for which it could not retrieve the necessary data (Active Share ("AS"), Tracking Error ("TE") and R-Squared) during the period 2010-2014[14] inclusive, which led to a final sub-sample of 1251 funds to be analysed.

In order to replicate the ESMA study as closely as possible, BETTER FINANCE also used the Morningstar database and filtered the full universe of funds using the same criteria as ESMA, both explicit and implicit. The following criteria were therefore used to filter the Morningstar database to produce this study:

Explicit Criteria from the ESMA statement:

- UCITS only
- Equity funds only
- Only funds domiciled in EU Member States
- Not categorised as index-tracking
- With inception date prior to 1 January 2005
- Fund size > 50 million
- Management fee starting > 0.65%

Implicit ESMA study criteria:

- Surviving funds only
- Oldest share class only
- Available on the Morningstar commercial database
- Must have published a KIID[15]

In order to remain consistent with the earlier research carried out, for the 2018 update of the study the same criteria and time period were used as those by ESMA. Applying the filters again, the 2018 update of the Research was left with only 2259 UCITS, since the rest either: did not survive (59); explicitly stated an index-tracking objective (1); one fund did not have a KIID (1); not available on Morningstar public websites (11); or started after 1 January 2005 (1).

[14] The ESMA Statement mentioned the period 2012 – 2014, but following exchanges with ESMA it was confirmed that the data was out of 5 years.
[15] This criterion was added by BETTER FINANCE as it is now looking at the compliance with KIID disclosure rules.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

3. LEGAL AND COMPLIANCE BASIS

The 2018 update of the Research focuses on the benchmark disclosure requirements[16] using the same source, i.e. the Morningstar Database. The mandatory benchmark disclosure requirements are drawn up from the:

- UCITS V Directive;
- Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website, http://data.europa.eu/eli/reg/2010/583/oj, hereinafter '**KIID Regulation**'.

The methodology of the Research is based on the following legal requirement: if an actively managed fund[17] uses a benchmark (explicitly or implicitly)[18] for its portfolio management[19], it must also be stated[20] in the '*Objectives and investment policy*' section of the KIID[21] and its past performance must be disclosed alongside the fund's past performance under the '*Past Performance*' section of the KIID.[22] Like ESMA, BETTER FINANCE uses – whenever possible - the '*fund benchmark*' reported by Morningstar. BETTER FINANCE referred to the Morningstar websites to determine which of the funds in the list are benchmarked and, therefore, should comply with these requirements.

***Note**: BETTER FINANCE assumes that the 'fund benchmark' is accurate and, like ESMA, uses it as a criterion for the Research. However, BETTER FINANCE did not (and could not due to obvious resource limitations) revalidate all published fund benchmarks by reviewing the entire contents of the more than 2000 prospectuses. BETTER FINANCE assumes that the main source of this information is the funds' Prospectus. However, a definition of the 'fund benchmark' is not available on the websites and BETTER FINANCE cannot certify the source of information.*

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[16] The UCITS V Directive defines 'key investor information, the prospectus and annual and half-yearly reports' as 'obligatory investor disclosures' (Recital 58) and lays down the requirements of these documents under '*Obligations concerning information to be provided to investors*' (Chapter IX), Articles 68 *et seq.* In addition, pursuant to Article 78(7) UCITS V Directive, the Commission has defined the legal obligations of investment or management companies with regard to the KIID and its content under the KIID Regulation.

[17] An actively managed fund is one that either (i) explicitly states in the Prospectus that its investment strategy is of such nature or, implicitly, (ii) does not indicate that the fund aims to 'replicate a stock or debt securities index' considering the requirement to 'include a prominent statement drawing attention' to the former, as per Article 70(3) UCITS V Directive.

[18] As per Article 69(2) in conjunction with point 1.15 of Schedule A, Annex I, UCITS V Directive.

[19] Such as index-tracking, as described in Recital (47) UCITS V Directive.

[20] According to Article 7(1) KIID Regulation, the essential features of the UCITS – thus, including whether the UCITS uses explicitly or implicitly a benchmark, as per point (d) of Article 7(1) – must be published in the '*Objectives and investment policy*' section of the KIID even if they are not disclosed under the same section in the Prospectus. Therefore, where a UCITS' prospectus does indicate the use of a benchmark, it is a clear indication that the same information **must be**, beyond doubt, **stated in the KIID.**

[21] In accordance with Article 7.1.(d) KIID Regulation,

[22] Article 18(1) KIID Regulation.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

The purpose of the Research is to expand the previous qualitative analysis of the funds in scope and draw findings that reflect the level of information disclosure for retail investors.

3.1 Fund sample

After eliminating the 73 funds that did not comply with ESMA's criteria, BETTER FINANCE first checked which of the remaining 2259 UCITS have a 'fund benchmark' according to Morningstar (in other words, which funds are benchmarked).

On this basis, a further 145 UCITS funds have been excluded from the Research since no corresponding 'fund benchmark' was published on the Morningstar website. In addition, 81 UCITS were pension funds, and therefore also eliminated, reducing the final list of funds in scope to 2033.

3.2 KIID reporting time-frame

In order to put forward accurate findings, the KIIDs used for this Research must be actual and updated. Therefore, considering the update requirement of the KIID Regulation,[23] the dates [24] of the analysed KIIDs all fall within the period ran from 1 January to 12 April 2018, due to limited resources and difficulties involved in finding a significant number of KIIDs.

However, the KIID research has a significant limitation: due to limited resources and time constraints, all the KIIDs that have been analysed for this research have *an accurate date*[25] earlier than 12 April 2018. For this reason, some UCITS' KIIDs may have been downloaded a month or two earlier than others, which means that certain KIIDs were potentially updated during that time-period and were not considered for the study.

The reason for which the study only considered KIIDs uploaded earlier than 12 April is based on the fact that there is an update ***requirement***[26] of 35 business days after 31 December each year. The aim was to gather the first version of the updated KIIDs (thus, also including the 2017 figures in the past performance section), since not all KIIDs have been updated and published in the aforementioned timeframe. Even so, 2332 documents cannot be downloaded in one day.

Also, for several funds in scope of the Research, the 2018 version of the KIID could not be found although the research team believes that those funds are still surviving.[27]

In light of the above, BETTER FINANCE is aware that there may be updates which could influence the results concerning some (but not many) of the UCITS. Therefore, it is important to note that:

ALL FINDINGS REFLECT ONLY THE SITUATION UP UNTIL THE ACCURATE DATE MENTIONED IN THE KIID. THE RESEARCH IS ACCURATE TO 12 APRIL 2018. NONE OF THE FINDINGS (EITHER DIRECTLY OR INFERRED) ARE EXTENDED TO LATER THAN: (1) GENERALLY, THE DATE MENTIONED ABOVE AND, (2) SPECIFICALLY, THE ACCURATE DATE MENTIONED IN THE KIID.

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[23] Article 22(1) read in conjunction with Article 23(3) KIID Regulation.

[24] The accurate date is the date published in the KIID according to Article 4(13) KIID Regulation.

[25] According to Article 4.13 KIID Regulation, the accurate date is

[26] Article 23.3 KIID Regulation.

[27] Based on reporting from trusted companies such as Morningstar, Finanzen, Fundsquare, Sicavonline, Boursorama, Vafinans, Markets FT, Börse Stuttgart (Stuttgart Stock Exchange), London Stock Exchange, Bourse Luxembourg (Luxembourg Stock Exchange), Fondmarknaden.se, Yahoo! Finance etc.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

3.3 Compliance criteria

Having defined the final list of funds, BETTER FINANCE analysed compliance with two main disclosure requirements governed by the KIID Regulation:

a) **the explicit <u>or implicit</u> use of a benchmark must be disclosed** under the '*Objectives and investment policy*' section of the KIID – Article 7.1.(d) KIID Regulation;

Particular cases:

Not all the KIIDs analysed are clear-cut cases and thus required a deeper analysis of the disclosed information in comparison with the legal requirements. Therefore, some UCITS' KIIDs were marked as 'compliant' and assigned to this category where the funds have a corresponding index as per the '*fund benchmark*' of Morningstar, even if:

- the KIID indicates in the *Objectives and Investment Policy Section* that the fund is managed with reference to a benchmark, and in the *Past Performance* section (or in a notice attached to the KIID) mentions that, as of 2018, the fund will be managed in relation to a benchmark;
- the *Past Performance* section discloses the returns of a benchmark alongside the returns of the fund, but did not name the benchmark;
- the *Past Performance* section discloses the returns of the fund's benchmark (also naming it) but the fund's management with reference to a benchmark is not indicated in the *Objectives and Investment Policy* section of the KIID;
- the *Past Performance* section discloses the benchmark's returns only for a part (recent years up-to-date) of the fund's past returns, without indicating when the fund started to be managed with reference to a financial index;

***Note**: The list is non-exhaustive and there are other variations of such cases.*

b) **the past-performance of the benchmark must be displayed in the relevant chart, alongside the performance of the UCITS**, under the '*Past performance*' section of the KIID – Article 18(1) KIID Regulation;

Following the same line of reasoning as for the 'compliant' category, BETTER FINANCE assigned funds to the 'non-compliant' category, those that have a corresponding '*fund benchmark*' as per Morningstar and where:

- the *Objectives and Investment Policy* section of the KIID (and, where applicable, the *Charges* section, in relation to the performance fee) indicates the fund's benchmark, but does not publish its past performance under the *Past Performance* section;
- the *Objectives and Investment Policy* and/or the *Past Performance* sections of the KIID refer to a particular index, but the returns of the index are not shown alongside the fund's past returns;
- the fund (share class) does not have a standalone KIID, but is represented by the KIID of another share class, and that KIID does not comply with the abovementioned legal requirements;

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

- where the *Objectives and Investment Policy* section does not mention a benchmark, and the *Past Performance* section discloses the returns of the benchmark only for a part (earlier years) alongside the past performance of the fund;

***Note**: The list is non-exhaustive and there are other variations of such cases.*

Where any of the abovementioned cases (or variations) are incident and where the two benchmark disclosure requirements are not fulfilled cumulatively (excluding all particular cases mentioned under Section 3.3(a) of this Annex), and excluding all funds assigned to the *Inconsistent* category (see Section 3.4 of this Annex below), the fund has been assigned to the 'non-compliant category'.

In addition, for the purpose of determining which funds should comply with the aforementioned requirements (in addition to the 'fund benchmark'), BETTER FINANCE also considered the *performance fee benchmark*, based on the following considerations: if the fund charges a performance fee calculated when it has over performed a benchmark, it must disclose the benchmark under the '*Charges*' section of the KIID – Article 12(3) in conjunction with Article 10.2(c) KIID Regulation; therefore, it is BETTER FINANCE's understanding that, in such a case, the fund is managed with explicit reference to that said benchmark also in the sense of Article 7.1(d) KIID Regulation, entailing the obligation to comply with the abovementioned (a and b) legal requirements.

***Note:** Contrary to ESMA's 'Questions and Answers: Key Investor Information Document (KIID) for UCITS'*[28] *document, BETTER FINANCE considers it to be a breach of the benchmark disclosure requirements when a UCITS:*

- *refers to an index as the universe from which stocks may be selected,*
- *does have a benchmark according to Morningstar,*
- *does not have any other real investment objectives,*
- *does not disclose its performance alongside the fund's one, thus preventing the fund investors to assess the achievements of the fund's objectives as recommended by ESMA.*

For a detailed discussion of these interpretations of EU Law, see annex 5 related to BETTER FINANCE policy recommendations.

Therefore, BETTER FINANCE searched and analysed the KIIDs of the UCITS in scope of the Research (either using the Morningstar database, other fund-information websites or the investment or management company's website[29]), to check:

- first, whether the KIID for each UCITS in scope discloses the use of a benchmark in the first section, under the caveat mentioned above;
- second, whether the KIID for each UCITS in scope uses a benchmark for performance fee calculation;

[28] European Securities and Markets Authority, 'Questions and Answers: Key Investor Information Document (KIID) for UCITS' (ESMA, 26 March 2015) 2015/ESMA/631, question and answer 4c, page 7.

[29] According to Article 81(1) UCITS V Directive, the investment or management company must make '*an up-to-date version of the key investor information* available on their website'.

- last, whether the KIID for each UCITS publishes the updated past-performance figures of the fund and benchmark.

***Note**: The present Research does not conclude whether any of the funds in scope are closet indexers, but, in this instance merely attempts to assess the compliance of the funds selected based on ESMA's criteria with the benchmark disclosure requirements.*

Drawing up the findings, four categories are used:

- the 'Compliant' category: listing the UCITS that have been found to be in line with the abovementioned legal requirements;
- the 'Non-compliant' category: listing the UCITS for which BETTER FINANCE found inconsistencies between what is reported (or not reported) in the KIID and what is assumedly reported in the Prospectus – according to the '*fund benchmark*' of Morningstar – thus entailing an inconsistency with the KIID Regulation;
- the 'Inconsistent' category: listing all the UCITS which have a '*fund benchmark*' according to the Morningstar public websites, but explicitly mention the contrary in the KIID;
- the 'Not Found' category: listing the UCITS which BETTER FINANCE, based on data from Morningstar, believes to still be surviving, but for which the relevant documentation (the KIID) could not be found, despite all the due diligence research efforts of the research team.

3.4 **"INCONSISTENT" FUNDS**

As mentioned above, among the funds in scope of the research, BETTER FINANCE identified a practice which raises many questions, to say the least. The main methodological criteria of the study was the correlation between what Morningstar reported on its websites as the *fund benchmark* for each UCITS and what was reported in the KIID. However, based on a qualitative analysis of the KIIDs of the non-compliant funds, BETTER FINANCE found that many KIIDs explicitly stated in Section 1 (*Objectives and Investment Policy*) that the fund is not managed with reference to an index or benchmark.

While it may be argued that, in the latter cases, the UCITS' KIID does not have to publish a benchmark's past performance in Section 4 (*Past Performance*),[30] it raises many suspicions as to why there would be an inconsistency between Morningstar's findings and the regulatory KIID reporting.

Since it was not clear for the research team whether these funds did indeed use a referential index for their investment policy (either explicitly or implicitly), they were assigned to the *Inconsistent* category, which means that:

- Morningstar reported a *fund benchmark* in these cases;
- the KIID does not refer or disclose a benchmark in relation to *performance fees* or in Section 4 (*Past Performance*); and
- the KIID (Section 1) explicitly states that the fund is not managed with reference to an index / benchmark.

[30] According to the legal provisions laid down in the KIID Regulation in this sense.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

However, the research team maintains its reserves with regard to this practice and views it as a means to circumvent the application of EU Law since:

- the KIID must state (*Objectives and Investment Policy*) all essential elements in Section 1, including the use of a benchmark, **even if they are not disclosed under the same section** in the Prospectus (Article 7 KIID Regulation);
- there remains no legal way to assess whether an investment policy of a UCITS includes or implies an index; the only applicable EU law provisions (which must in any case be read in conjunction) are referring to the Prospectus and the KIID;
- if the Prospectus omits this type of information and the KIID excludes the use of a benchmark, even very motivated retail financial services users will no longer be able to tell whether the fund is compared to an index or not.

Nevertheless, the Research grants these 145 cases the benefit of doubt, although it may be that most of them are, in fact, violators of the regulatory framework.

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The present Research is accurate as of 12 April 2018. It is important to know that data and information on UCITS funds and their corresponding documentation or reporting may have changed since then.

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BETTER FINANCE's quantitative study therefore bears the same limitations as the ESMA one. The data used for the study carried out by BETTER FINANCE and based entirely on the methodology and criteria of the ESMA study, references the period from 2010 to 2014 only. It is a one shot study limited in time. Variables that formed part of the selection and filtering criteria therefore may very well have changed since then.

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The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

ANNEX 5

Inadequate Key Investor Information on Investment Objectives: Supervisors must stick to the spirit of EU Law and to their investor protection mandate and advice

> Article 7.1(d) of the KIID Regulation: the objectives and investment policy section of the KIID shall disclose whether the UCITS uses an approach that “*includes or implies a reference to a benchmark and if so, which one*”.
>
> Article 18(1) of the KIID Regulation: the past-performance of the benchmark must be displayed in the relevant chart, alongside the performance of the UCITS, under the ‘*Past performance*’ section of the KIID.

However, ESMA in its Q&A and the UK FCA in its recent interpretation, and generally many major national supervisors (except for in France and Spain) leave fund investors in the dark by not enforcing the clear spirit of this Regulation. In its review of most of the major UCITS equity funds KIIDs, BETTER FINANCE far too often found very poorly disclosed fund investment objectives that prevent fund investors from even trying to assess “***whether a fund has been able to achieve the objectives referred to in the fund documentation***”, which is ESMA’s recommendation to fund investors, following its inquiry on closet indexing.

Case 1:

To start with, too many funds disclose a pseudo-investment objective such as “*to provide capital growth*”.

> **Objectives and investment policy**
>
> **Objective**
>
> The Fund aims to provide capital growth.

To disclose this “investment objective” or nothing is the same thing: every fund investor already knows the fund does want to grow its value over time!

What is the “growth” or “return” or “performance” objective? Positive or negative? In nominal terms or in real terms? Comparable, below or above that of the universe of securities in which the fund is investing? What objective achievement in such a fund can an investor actually assess? For example, if the fund returned + 2% after ten years, its manager can then claim it has achieved such an “objective”. Even if inflation reached 20 % over the same period (so a real loss of - 18% for the investor)? Even if indices replicating the universe of securities of the fund have returned +30 %?

→ Supervisors should prohibit such pseudo, meaningless and uncheckable investment objectives and sanction those fund managers who persist to disclose such meaningless investment objectives.

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu

Case 2:

> **Ziele und Anlagepolitik**
>
> Ziel des Fondsmanagements ist es, eine Wertentwicklung zu erreichen, die zu einem Vermögenszuwachs führt und Ausschüttungen ermöglicht.

Translation: Objectives and Investment Policy (title): The investment objective is to increase the value, which will enable both capital growth and income (distribution).

Then we found examples of more devious key disclosure of investment objectives: one fund also aims for "capital growth", and then mentions that it will invest mostly in German equities. However, it then mentions in its prospectus (not in its KIID) that it does not follow any benchmark! Again how can the fund investor assess the achievement of this investment objective over the long term? Obviously by looking at the performance of German equity indices over the same period! This is why obviously the fund makes an implicit reference to German equity indices (it even quotes them in that case: "[t]o achieve this [*objective*], the fund invests mainly in equities and in shares listed on the German stock indices DAX, M-DAX and TEC-DAX"[31]).

However, the inconsistent addition in its Prospectus that it does not follow any benchmark legally enables it to avoid disclosing the performance of a German equity index alongside the performance of its fund. It is then impossible for the fund investor to assess the achievement of its objective. This did not fool Morningstar which assigned the HDAX index as its '*fund* benchmark'.[32]

Another example that did not fool Morningstar: an 'Australia Fund' that invests according to its KIID '*at least 70% in Australian company shares*' does not disclose the performance of any Australian equity index alongside the performance of the fund, again preventing the investor from following ESMA's advice to assess the achievements of the fund manager over time, as the fund has no other objective than the "pseudo" one of "capital growth".

> **Objectives and Investment Policy**
>
> - Aims to provide long-term capital growth with the level of income expected to be low.
> - At least 70% invested in company shares in markets throughout the world including major markets and smaller emerging markets.
> - Has the freedom to invest outside the fund's principal geographies, market sectors, industries or asset classes.

[31] Author's translation ("Um dies zu erreichen, investiert der Fonds überwiegend in Aktien und dabei in Aktien aus den deutschen Aktienindizes DAX, M-DAX und TEC-DAX")

[32] However BETTER FINANCE did not count this fund as non-compliant in its Research on Benchmark Disclosure Compliance, but it strongly believes this practice should be banned whatsoever.

One of the worst cases found is in the KIID of a world equity fund ("International fund") that first specifies it is "*at least 70% invested in company shares in markets throughout the world including major markets and smaller emerging mark*ets".

And then claims it has freedom to invest "*outside the fund's principal geographies*"!

First, according to the first sentence it is not free to invest, but only up to 30%. Second, one wonders which other "geographies" those can be outside of the whole world! Obviously neither the fund manager nor the supervisor who reviewed the KIID did any serious proofreading of this two pager legal key disclosure document.

➔ A fund with a Key investment disclosure mentioning that:

- a large majority of its investments are in a specified universe,
- and does not really define its investment objectives in any other way (fake objectives like "long-term capital growth" or "long term performance") has to disclose the performance of an index tracking the performance of such universe alongside the fund's ten year past performance to comply with the EU rule.

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The findings hereupon are based on assumptions and are subject to significant limitations and caveats. Please refer to the methodology annexed to this Press Release (Annex 4).

The European Federation of Investors and Financial Services Users
76, rue du Lombard, 1000 Brussels - Belgium
Tel. (+32) 02 514 37 77 - Fax. (+32) 02 514 36 66
E-mail: info@betterfinance.eu - http://www.betterfinance.eu