

CONSULTATION PAPER OF ESMA Draft guidelines on non-significant benchmarks

AMAFI comments

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 140 members operating for their own account or for clients in equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI welcomes the opportunity to comment on ESMA's consultation paper regarding the draft guidelines on non-significant benchmarks. Before responding to the specific questions of ESMA's consultation document, we would like to point out the following general comments.

1. GENERAL COMMENTS

AMAFI is confused by the extent of the requirements of these draft Guidelines which are very similar to the ones for significant and critical benchmarks. Therefore, as a whole, the Consultation Paper do not seem to reflect the need for proportionality for non-significant benchmark administrators. It may lead to the wrong impression that the same conditions apply to all categories of benchmarks whereas level 1 is clearly designed around the distinction that has to be made for the 3 different categories: critical, significant and non significant benchmarks.

Moreover, AMAFI questions the opportunity to draft such precise Guidelines on provisions that administrators of non-significant benchmarks have the option of not applying according to article 26.1 of BMR. In our understanding of BMR, there is two different sets of rules regarding the non-significant benchmarks: (1) article 26 allows to exempt non-significant benchmarks from certain requirements based on the principle "comply or explain", and, (2) e articles 5, 11, 13 and 16 that introduce proportionality for the different requirements covered by those articles. This second set of provisions exclude non-significant benchmarks from their respective scope but, in the meantime, allowing curiously, ESMA to reintroduce some of those requirements addressed to administrators of non-significant benchmarks. It is also important to mention that those two regimes have their own logical but are not contradictory. The second exemption regime cannot be nullified by the first one. In general, it would be important to specify that the Guidelines complete the exemption regime under article 26 and do not make it null nor avoid. We would therefore be very cautious about legally unclear language or disproportionately burdensome requirements that could potentially bring any doubts in this respect.

We welcome the specifications as to which sections of the Guidelines are not applicable to administrators of non-significant benchmarks who chose not to apply the relevant article and paragraph of BMR. We would strongly encourage ESMA to include such clarifications consistently throughout the whole text of the Guidelines (*i.e.* in the chapters on oversight, input data, methodology and contributors) in all concerned sections in order to avoid any legal uncertainties and not in some of them only.

2. RESPONSES TO ESMA QUESTIONS

Q1 Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

AMAFI believes any kind of benchmarks including non-significant benchmarks should have appropriate governance in place and the oversight function is its cornerstone. However, AMAFI is afraid that the requirements proposed by ESMA in this consultation paper do not seem proportionate to the nature and scale of activities of non-significant benchmark administrators. For example, it seems hardly feasible to have a detailed procedure for evaluation criteria or election of potential members.

Q2 Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

AMAFI does not answer Q2.

Q3 Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

AMAFI does not answer Q3.

Q4 Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

AMAFI is not comfortable with the requirement for administrators to publish or to make available detailed information related to internal procedures and policies that managed transversally (meaning not specifically to an index) regulatory requirements. This comment applies to internal policies related to the quality of the input data as well as the internal review of the methodology, and more generally to all internal policies and procedures. AMAFI supports the approach generally used in other regulations such as MiFID 2, where only a summary or some elements only of internal policies is required to be made available (the MiFID best execution Policy for instance).

Q5 Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public “a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable” is appropriate for administrator of non-significant benchmarks?

AMAFI believes this proposal is not appropriate. Non-significant benchmarks are generally tailored-made benchmark with low level of outstanding contracts underlying the benchmark. Thus the specific events giving rise to an internal review are likely to be upon client request. If the review results in a material change of the benchmark, a new benchmark will be created.

Q6 Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

AMAFI does not answer Q6.

Q7 Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

AMAFI does not answer Q7.

