

ADVICE TO ESMA

Response to ESMA's Consultation Paper on draft guidelines on non-significant benchmarks

I. Executive summary

We welcome the proposed guidelines with the aim to ensure common, uniform and consistent application, in relation of non-significant benchmarks, of the oversight function requirements, the input data provision, the transparency of the methodology provision and the governance and control requirements for supervised contributors.

However, given that the BMR definition of benchmarks is very broad and that accordingly non-significant benchmarks can cover a very wide range of indices a proportional approach is important. While the draft Guidelines on non-significant benchmarks helpfully clarify that some sections are elective (in keeping with Level 1), other sections cannot be waived and here the requirements are very close to those of significant benchmarks. This lack of proportionality for benchmarks with a narrow or low volume usage could act as a barrier to entry for providers of non-significant benchmarks that could limit competition and customer choice..

II. Background

1. The role of the SMSG

The Securities and Markets Stakeholder Group (SMSG) advises ESMA on all regulatory and supervision matters. In compliance with EU Law, it is composed of expert representatives of financial market participants operating in the Union, of their employees, of consumers, of users of financial services and of independent top-ranking academics.

2. Purpose of this Advice

The SMSG wishes to use the opportunity of the publication of ESMA's Consultation Paper on Draft Guidelines on non-significant benchmarks.

The SMSG considers that indices are fundamental as they may underpin an investment strategy, serve as underlyings or even reflect the state of an economy. Therefore, indices should be underpinned by universally agreed principles of good governance, sound methodology and transparency, in order to provide investors with the adequate level of protection and to limit risks of conflicts of interests and manipulation.

The Benchmark Regulation (BMR) will introduce important rules and requirements and following its implementation, correct supervision and enforcement will be essential in order to avoid future cases of benchmark manipulation. Rules alone will not prevent abuses, but supervision and enforcement will be key to strengthen consumer protection.

Following the serious cases of manipulation of critical benchmarks such as LIBOR and EURIBOR, BMR aims to prevent future manipulation from occurring by strengthening governance structure and controls to ensure the accuracy, robustness and integrity of financial benchmarks.

III. Summary of ESMA SMSG Views on ESMA Draft Guidelines on Non-Significant Benchmarks Under the Benchmarks Regulation

1. Oversight function

1. The SMSG considers that there is merit to the content of the oversight function to take the form of a separate committee within the organisational structure of the administrator.
2. For regulated data benchmarks, we support the option to include external representatives as members of the oversight function. We support this being optional and not mandatory, as inclusion of external representatives could introduce conflicts of interest to benchmark administration. In particular, we would have had concerns about mandatory inclusion of representatives from other, competing trading venues on the oversight committee. For instance, parties could have gained access to price sensitive information (such as planned index changes) before other market participants. The BMR Level 1 text does not require external parties to be included in the oversight and therefore requiring this in Level 3 would have been against the Level 1 text.

2. Input Data

3. In terms of the scope of input data the SMSG considers that further clarification is necessary to determine that regulated data will be considered regulated data and that trading venues should not be considered contributors.
4. Benchmarks based on regulated data are subject to a proportionate framework that acknowledges that the input data is transaction based, already subject to stringent regulatory requirements and that these benchmarks are therefore less prone to manipulation. Today, benchmark administrators often obtain data from trading venues via market data providers that provide the technical link between the venue and administrator without making any alterations to the raw and unprocessed data. Such practices should be deemed to fall within the scope of a regulated data benchmark, specifically meeting the requirement for the data to be taken 'entirely and directly from the trading venue' so long as the data is provided in a raw and unprocessed state.
5. A regulated data benchmark is based on (post-trade) transparent transaction data published by trading venues and made available to the public. Therefore, regulated data can be considered to be 'readily available'. Using regulated data as input data for a benchmark can, for that reason, not be considered as data that is being contributed as defined in Article 3(1)(8). Trading venues whose data is being used for purposes of a benchmark cannot be considered a (supervised) contributor for that purpose.

3. Transparency of methodology

6. The SMSG supports the guidelines as developed by ESMA and deems that these correspond to current market practices. The SMSG supports the ESMA proposal to promote clarity regarding the composition and ensuring that the methodology is traceable and verifiable.
7. However, the SMSG also wished to underline the need to strike the right balance between transparency and the protection of intellectual property rights and that the transparency requirements should be calibrated to a level that is suitable and proportionate for non-significant benchmarks.

4. Governance and control requirements

8. The SMSG welcomes the ESMA draft guidelines regarding governance and control requirements for supervised contributors to non-significant benchmarks.
9. In principle, the SMSG supports the proposal to establish, where appropriate, a physical separation of submitters from other employees of the supervised contributors.
10. However, a balanced approach should be undertaken when making these decisions to avoid instating cumbersome and costly processes where this is not appropriate and proportionate.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 8 November 2017

[Signed]

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