



Brussels, 29.9.2017
C(2017) 6464 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 29.9.2017

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the Benchmark Regulation) introduces a common framework to ensure the accuracy and integrity of benchmarks referenced in financial instruments, financial contracts or investment funds in the European Union. In doing so it contributes to the proper functioning of the internal market, while achieving a high level of consumer and investor protection.

This Delegated Regulation is based on an optional empowerment in the Benchmark Regulation. The issue of subsidiarity was covered in the impact assessment for the Benchmark Regulation.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission mandated the European Securities and Markets Authority (ESMA) to provide it with technical advice on possible delegated acts for the Benchmark Regulation. ESMA delivered this advice to the Commission on 10 November 2016. In preparing its technical advice ESMA organised two public consultations – one in February-March 2016 (51 replies published¹) and the other in June 2016 (33 replies published²). It also organised an open hearing on 29 February 2016. The Commission attended the meetings of the ESMA task force preparing the advice and the open hearing, and took the replies to the consultation into account in drafting the Delegated Regulation.

Respondents to the ESMA consultation on the draft technical advice were broadly satisfied with the rules to be applied in the absence of available data from the data sources proposed by ESMA. Some asked for clarification that the use of available data did not mean that benchmark administrators would have to buy any data available against payment. Others suggested that the competent national authorities and ESMA should make their relevant data sources available as well.

Finally, ESMA asked whether using licensing agreements to identify financial instruments referencing benchmarks would be helpful, in particular for investment funds. The majority of respondents did not believe that it would. They stated that any mandatory use of the licensing agreements would be highly burdensome, especially since there was no legal obligation for users to reply to the questionnaires. Respondents also doubted that this approach would result in a complete picture of the degree of use of a benchmark. Therefore, ESMA decided not to refer to the use of licensing agreements in its advice and it is not mentioned in this Delegated Act.

For its part, the Commission held bilateral meetings with various stakeholders to discuss the delegated acts in 2016 and the first quarter of 2017. It also held two meetings of the relevant expert group, during which the delegated measures were discussed among experts from finance ministries and supervisory authorities in the Member States and observers from the European Parliament and ESMA.

The public was invited to provide feedback on the draft Commission Delegated Regulation after the Commission-internal inter-service consultation from 22 June 2017 to 20 July 2017.

¹ <https://www.esma.europa.eu/press-news/consultations/discussion-paper-benchmarks-regulation#TODO>

² <https://www.esma.europa.eu/press-news/consultations/consultation-paper-esma-technical-advice-benchmarks-regulation#TODO>

One respondent noted that the possible use of alternative amounts and values defined in Article 4 might benefit from further guidance from ESMA. Another respondent suggested that the reference to a 'best effort basis and to the best of its ability' in Article 4 should also be introduced in Articles 1, 2 and 3. However, Articles 1, 2 and 3 propose clearly defined references. Benchmark administrators should be able to comply with them. It is left to them to decide from which source they get the data, but it is also their responsibility that the data is correct.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 sets out the approach for making calculations in the initial phase if the data required, described in Articles 2 to 4, are not available when this Delegated Regulation enters into force.

Articles 2 to 4 specify how nominal amounts, notional amounts and net asset values should be calculated to determine whether a benchmark would have to be recognised as critical.

Article 5 determines how the calculation should proceed if indirect reference is made to a benchmark.

COMMISSION DELEGATED REGULATION (EU) .../...

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014¹, and in particular Article 20(6)(a) thereof,

Whereas:

- (1) The total value of financial instruments, financial contracts or investment funds referencing a benchmark is a key criterion for the categorisation of that benchmark, in accordance with Regulation (EU) 2016/1011, as critical, significant or non-significant. It is therefore necessary that the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are calculated in the same manner across the Union, so that a consistent categorisation of benchmarks in the Member States and a uniform application of Regulation (EU) 2016/1011 is ensured.
- (2) To ensure reliability of benchmarks, the nominal amount of financial instruments, the notional amount of derivatives and the net asset value of investment funds should therefore be calculated using regulatory data where available.
- (3) The total value of financial instruments, financial contracts or investment funds should be calculated by taking into account both direct references to those financial instruments, financial contracts or investment funds and indirect references to a benchmark within a combination of benchmarks. Where a financial instrument, a financial contract or an investment fund references a number of benchmarks, it is appropriate to take this multiple referencing into account in the calculation of the total value of the financial instruments, financial contracts and investment funds referencing a benchmark as these financial products are not solely depending on that benchmark. The calculation of the total value in the case of indirect references therefore needs to be specified in order to be directly applicable and measured consistently across the Union,

¹ OJ L 171, 29.6.2016, p. 1.

HAS ADOPTED THIS REGULATION:

Article 1

Nominal amount of financial instruments other than derivatives and units in collective investment undertakings

The nominal amount of financial instruments other than derivatives and units in collective investment undertakings shall be the total issued nominal amount in monetary value referred to in Table 3, Field 14, of the Annex to Commission Delegated Regulation (EU) 2017/585².

Article 2

Notional amount of derivatives

The notional amount of derivatives, referred to in Article 20(6)(a) of Regulation (EU) 2016/1011, shall be the notional value referred to in Table 2, Field 20, of the Annex to Commission Delegated Regulation (EU) 2017/104³. However, where that notional value is negative, the notional value shall be equal to the absolute value.

For credit derivative index transactions, an indexation factor derived from Table 2, Field 89 of the Annex to Delegated Regulation (EU) 2017/104 shall be applied to the notional value.

Article 3

Net asset value of collective investment undertakings

The net asset value of collective investment undertakings referred to in Article 20(6)(a) of Regulation (EU) 2016/1011, shall be either of the following:

- (a) for collective investment undertakings subject to Directive 2009/65/EU of the European Parliament and of the Council⁴: the net asset value per unit reported in the most recent annual or half-yearly report referred to in Article 68(2) of that Directive, multiplied by the number of units;
- (b) for collective investment undertakings subject to Directive 2011/61/EU of the European Parliament and of the Council⁵: the latest available net asset value referred to in Article 104(1)(c) of Commission Delegated Regulation (EU) 231/2013⁶.

² Commission Delegated Regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities (OJ L 87, 31.3.2017, p. 368).

³ Commission Delegated Regulation (EU) 2017/104 of 19 October 2016 amending Delegated Regulation (EU) No 148/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories (OJ L 17, 21.1.2017, p. 1).

⁴ 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) (OJ L 302, 17.11.2009, p. 32).

⁵ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

⁶ Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

Article 4
Use of alternative amounts and values

Where the amounts or values for the calculation of the total value of financial instruments, financial contracts, or investment funds referencing the benchmark referred to in Articles 1, 2 and 3, are not available or are incomplete, the total value referred to in Article 20(1)(a) of Regulation (EU) 2016/1011 and the total average value referred to in Article 24(1)(a) of that Regulation shall be calculated by using alternative amounts or values, including proxies and amounts or values reported by private providers of information or open interest data calculated and published by market operators, provided that those proxies and amounts or values are of sufficient repute and are sufficiently reliable.

An administrator using alternative amounts or data shall calculate the total amount on a best effort basis and to the best of its ability, based on the available data.

An administrator using alternative amounts or data shall provide the competent authority with a written specification of the data sources used when notifying that competent authority in accordance with Article 24(3) of Regulation (EU) 2016/1011.

Article 5
Currency

The amounts and values referred to in Articles 1, 2 and 3 shall be expressed in EUR. Where necessary, the amounts or values shall be converted using the daily euro foreign exchange reference rate published by the European Central Bank.

Article 6
Indirect reference to a benchmark within a combination of benchmarks

Where a benchmark is used indirectly within a combination of benchmarks, the amounts or values for the purpose of the thresholds referred to in Article 20(1) and Article 24(1)(a) of Regulation (EU) 2016/1011 shall be either of the following:

- (a) the benchmark's weight, in percentage terms, within the combination of benchmarks, multiplied by the total amount or value or average value, as applicable, of the financial instrument or investment fund in question, where that weight is clearly specified or can be approximated on the basis of other available information;
- (b) the total amount or value or average value, as applicable, of the financial instrument or investment fund in question divided by the number of benchmarks within the combination of benchmarks, where the actual weight of the benchmark is not specified or cannot be approximated.

Article 7
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 29.9.2017

For the Commission
The President
Jean-Claude JUNCKER