



Brussels, 13.7.2018
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COMMISSION DELEGATED REGULATION (EU) .../...

of 13.7.2018

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards determining the minimum content of cooperation arrangements with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent.

(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 aims to contribute to the functioning of the internal market, while achieving a high level of consumer and investor protection.

This Delegated Regulation is based on a mandatory empowerment in Article 30 of 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

ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor has it analysed their potential costs and benefits. ESMA concluded that conducting open public consultations would have been disproportionate in relation to the scope and impact of the draft regulatory technical standards. This is because the regulatory technical standards are only of direct concern to the competent authorities of third countries, the competent authorities of Member States and ESMA, and not to market participants.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt regulatory technical standards is provided for under Article 30(4) of Regulation (EU) 2016/1011. Under these provisions, the Commission is empowered to determine the minimum content of the cooperation arrangements between ESMA and competent authorities of non-EU countries.

Article 1 sets out that these cooperation arrangements should clearly define the scope of their application and defines the minimum scope of application.

Articles 2 to 4 detail minimum requirements on the exchange of information and notifications, supervisory cooperation and confidentiality and data protection issues.

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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 the third subparagraph of Article 30(5) thereof,

Whereas:

- (1) Article 30 of Regulation (EU) 2016/1011 sets out conditions for allowing benchmarks provided by an administrator located in a third country to be used in the Union. One of those conditions is that an equivalence decision has been adopted recognising the legal framework and supervisory practices of the third country as equivalent. Paragraph (4) of Article 30 requires ESMA to establish cooperation arrangements with the competent authority of any third country in respect of which an equivalence decision has been adopted.
- (2) The cooperation arrangements should allow ESMA and the competent authority of the third country to exchange all information relevant to the fulfilment of their respective supervisory tasks. The Commission may adopt a number of equivalence decisions, and benchmarks provided by administrators located in each of the relevant countries may then be eligible for use by supervised entities in the Union. It is therefore important that each set of cooperation arrangements contains the same minimum requirements regarding the forms and procedures to be used for the exchange of information, including the same confidentiality provisions and the same terms governing the use of information obtained under the cooperation arrangements.
- (3) Competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent will have adequate knowledge of all relevant events and changes of circumstance likely to affect benchmark administrators in their jurisdiction. If supervised entities use benchmarks provided by administrators from those jurisdictions in the Union, it is appropriate that the competent authorities in those jurisdictions keep ESMA informed of such events and changes. Cooperation arrangements should therefore include provision for ESMA to be notified of all such events and changes.

¹ OJ L 171, 29.06.2016, p. 1.

- (4) Similarly, competent authorities of third countries need to be kept informed of the activities of the administrators that they are supervising. Cooperation arrangements should therefore provide for ESMA to inform the competent authority of a third country if administrators supervised by that authority notify ESMA of their consent to their benchmarks being used by supervised entities in the Union.
- (5) With the exception of its obligation under Article 31 of Regulation (EU) 2016/1011 to withdraw the registration of administrators located in third countries, ESMA has no direct supervisory powers over administrators located in third countries. It relies instead on supervision by, and cooperation with, the competent authority of the third country. Cooperation arrangements should therefore include provisions setting out the respective roles of the parties involved in supervisory cooperation, including on-site inspections.
- (6) Point (a) of the third subparagraph of Article 32(5) of Regulation (EU) 2016/1011 requires cooperation arrangements between competent authorities of third countries and competent authorities of Member States of reference to have the same minimum content as cooperation arrangements between ESMA and competent authorities of third countries. It is therefore necessary to ensure that, in setting the minimum content for cooperation arrangements with ESMA, the content is also appropriate for cooperation arrangements required by Article 32(5).
- (7) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (8) ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor has it analysed the potential related costs and benefits, as ESMA concluded that this would have been disproportionate in relation to the scope and impact of the draft regulatory technical standards, taking into account the fact that the regulatory technical standards would only be of direct concern to the competent authorities of third countries, the competent authorities of Member States and ESMA, and not to market participants.
- (9) ESMA has requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council².
- (10) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force,

HAS ADOPTED THIS REGULATION:

Article 1

Scope of the cooperation arrangements

The cooperation arrangements referred to in Article 30(4) of Regulation (EU) 2016/1011 ("cooperation arrangements") shall clearly set out their scope of application. That scope shall include cooperation by the parties on at least the following matters:

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (a) the exchange of information and provision of notifications relevant to the fulfilment of their respective supervisory tasks;
- (b) any issues that may be relevant to the operations, activities or services of administrators covered by the cooperation arrangements in question, including the provision to ESMA of information on the laws and regulations to which those administrators are subject in the third country and any material changes to those laws or regulations;
- (c) any regulatory or supervisory actions taken, or approvals given, by the competent authority of the third country in relation to any administrator which has given its consent to the use of benchmarks in the Union, including changes to the obligations or requirements to which the administrator is subject that may have an impact on the administrator's continued compliance with applicable laws and regulations.

Article 2

Exchange of information and notifications

Cooperation arrangements shall contain at least the following provisions with respect to any information or notifications to be exchanged or provided under the arrangements:

- (a) a provision requiring requests for information to contain at least the information sought by the authority requesting it and brief details describing the subject matter of the request, the purpose for which the information is sought and the relevant laws and regulations applicable to benchmarks activity;
- (b) details of the mechanism or mechanisms by which information and notifications are to be exchanged or provided;
- (c) a provision requiring information and notifications to be exchanged or provided in writing;
- (d) a provision requiring measures to be taken to ensure that any exchange or provision of information takes place in a secure manner;
- (e) a provision requiring information and notifications to be provided promptly and, where applicable, in accordance with the relevant time scale specified in the arrangements;

Article 3

Supervisory cooperation

1. Cooperation arrangements shall specify a framework for the coordination of supervisory activities of the parties in the area of benchmarks supervision, including at least the following requirements:
 - (a) a requirement that a signatory wishing to undertake a supervisory activity make an initial written request with respect to the activity;
 - (b) a requirement that the request set out the factual and legal background to, and an estimated timeframe for, the activity in question;
 - (c) a requirement that the other signatory acknowledges receipt of the request in writing within ten working days of receipt.
2. For the purposes of coordinating on-site inspections in the competent authority's jurisdiction in the third country, cooperation arrangements shall set out a procedure

for the parties to reach an understanding on the terms governing such on-site inspections, including at least terms stating their respective roles and responsibilities, the right of the competent authority of the third country to accompany any on-site inspection and any duty on that authority to assist in reviewing, interpreting and analysing the contents of public and non-public books and records and in obtaining information from directors and senior management of any administrator covered by the arrangements.

Article 4

Confidentiality, use of information and data protection

1. Cooperation arrangements shall require the parties to refrain from disclosing information exchanged or provided to them under the cooperation arrangements, except where the party which had provided the information has given its prior written consent or where the disclosure of data is a necessary and proportionate obligation required under Union or national law, in particular in the context of investigations or subsequent judicial proceedings.
2. Cooperation arrangements shall require information obtained by an authority under the arrangements to be securely stored, and shall permit the information to be used solely for the purpose set out by that authority in its request for the information or, if the information was provided other than by means of a request, solely for the purpose of enabling that authority to exercise its regulatory and supervisory functions. That authority may, however, use the information for another purpose if it has obtained prior written consent to do so from the authority that provided the information under the arrangements.
3. Where cooperation arrangements allow for personal data to be exchanged, they shall contain provisions to ensure adequate means for the protection of such data that complies with all applicable data protection legislation in the jurisdictions of the competent authorities which are party to the respective cooperation arrangement.

Article 5

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*.

It shall apply from [OJ: please insert date 2 months after the date of entry into force].

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

Done at Brussels, 13.7.2018

For the Commission
The President
Jean-Claude JUNCKER