



Brussels, 13.7.2018
C(2018) 4435 final

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 specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology

(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 13 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

In accordance with Article 10 of Regulation (EU) No 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A discussion paper was published on 15 February 2016 on the ESMA website and the consultation closed on 31 March 2016. An open hearing on the discussion paper was held on 29 February 2016 in Paris. On 29 September 2016, a consultation paper which included a first version of the draft technical standards was published. The consultation ended 2 December 2016.

In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of Regulation (EU) No 1095/2010. The SMSG submitted its response on 11 November 2016.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has submitted an analysis of costs and benefits related to the draft technical standards. This analysis is available at http://www.europe-economics.com/publications/ee_bmr_final_report_9-02-2017.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt regulatory technical standards is provided for under Article 13(3) of Regulation (EU) 2016/1011. Under these provisions, the Commission is empowered to specify further the information to be provided by an administrator to ensure appropriate transparency of methodology for the calculation of a benchmark.

Article 1 defines the scope of this Regulation.

Article 2 lists the key elements of the methodology which have to be published or made available for critical and significant benchmarks.

Article 3 specifies the elements an administrator of a critical or significant benchmark has to publish or make available with regard to its procedures for reviewing the methodology of such benchmark.

Article 4 specifies that an administrator of a critical or significant benchmark should publish or make available the rationale for a proposed material change in the methodology of the benchmark and the procedures it will follow when consulting on such a proposal.

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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 13(3) thereof,

Whereas:

- (1) Article 13(1) of Regulation (EU) 2016/1011 requires the administrator of a benchmark or, where applicable, family of benchmarks to publish or make available the key elements of the methodology used by it to determine the benchmark or, where applicable, benchmarks in a family of benchmarks, details of the internal review and approval of the methodology, and the procedures for consulting on and notifying users of material changes to the methodology. This Regulation specifies further the information to be provided by administrators in respect of their significant and critical benchmarks. It does not apply to administrators which only provide non-significant benchmarks. Where administrators provide non-significant as well as significant or critical benchmarks they should comply with this Regulation for their significant and critical benchmarks. ESMA may issue guidelines on the same subject for administrators of non-significant benchmarks.
- (2) Benchmark methodologies differ hugely. The key elements specified by this Regulation should therefore have to be published or made available only insofar as they are relevant to the particular benchmark in question.
- (3) Two key elements of the methodology that should be disclosed in order to ensure the reliability and accuracy of a critical or significant benchmark are the minimum quantity and the minimum quality of the input data required to apply the methodology and perform the calculation. In addition, the use of discretion in determining benchmarks increases their vulnerability to manipulation. Therefore, in order to minimise this risk of manipulation, the administrator should disclose, as part of the key elements of its methodology, the clear rules that it has identified about how and when discretion may be exercised.

¹ OJ L 171, 29.06.2016 p. 1.

- (4) To help potential users to choose the most appropriate benchmark from amongst a range of potentially suitable benchmarks, they should be given information to allow them to understand what a benchmark aims to measure, what input data is used and how it is selected, what the constituents of the benchmark are, who is involved in the data collection and benchmark calculation, when and to what extent discretion may be used, and what the limitations of the methodology are and when and how the benchmark might be changed.
- (5) In order for users and potential users to have sufficient information about the administrator's process for reviewing the methodology internally, the administrator should publish its policies and procedures relating to this process, together with details of the bodies involved and the relevant governance arrangements in place in accordance with Article 4 of Regulation (EU) 2016/1011.
- (6) In order for users and potential users to understand how an administrator will consult on a proposed material change to a critical or significant benchmark and the rationale of such a change, the administrator should disclose certain information, including how it will assess the impact of the proposed change.
- (7) In accordance with the principle of proportionality, this Regulation avoids putting an excessive burden on administrators of significant (as opposed to critical) benchmarks by allowing them to choose to reduce disclosure to a more limited set of elements, or to disclose fewer details of certain elements, with respect to their significant benchmarks.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (9) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) 1095/2010 of the European Parliament and of the Council².
- (10) In order to be consistent with the Delegated Regulation specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors it is appropriate to delay the application of this Delegated Regulation by two months,

HAS ADOPTED THIS REGULATION:

Article 1
Scope

This Regulation does not cover or apply to administrators of non-significant benchmarks.

Article 2
Key elements of the methodology used to determine a critical or significant benchmark

1. The information to be provided by an administrator of a benchmark or, where applicable, family of benchmarks in compliance with the requirement laid down in

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).

Article 13(1)(a) of Regulation (EU) 2016/1011 shall include at least the following elements, insofar as they are relevant to that benchmark or family of benchmarks or to the input data used to determine it:

- (a) a definition and description of the benchmark or family of benchmarks and of the market or economic reality that it is intended to measure;
- (b) the currency or other unit of measurement of the benchmark or family of benchmarks;
- (c) the criteria used by the administrator for selecting the sources of input data used to determine the benchmark or family of benchmarks;
- (d) the types of input data used to determine the benchmark or family of benchmarks and the priority given to each type;
- (e) the composition of any panel of contributors and the criteria used to determine eligibility for panel membership;
- (f) a description of the constituents of the benchmark or family of benchmarks and the criteria used for selecting and weighting them;
- (g) any minimum liquidity requirements for the constituents of the benchmark or family of benchmarks;
- (h) any minimum requirements for the quantity of input data, and any minimum standards for the quality of input data, used to determine the benchmark or family of benchmarks;
- (i) the clear rules identifying how and when discretion may be exercised in the determination of the benchmark or family of benchmarks;
- (j) whether the benchmark or family of benchmarks takes into account any reinvestment of dividends or coupons paid by its constituents;
- (k) if the methodology may be changed periodically to ensure the benchmark or family of benchmarks remains representative of the relevant market or economic reality:
 - (i) any criteria to be used to determine when such a change is necessary;
 - (ii) any criteria to be used to determine the frequency of such a change; and
 - (iii) any criteria to be used to rebalance the constituents of the benchmark or family of benchmarks as part of making such a change;
- (l) the potential limitations of the methodology and details of any methodology to be used in exceptional circumstances, including in the case of an illiquid market or in periods of stress or where transaction data sources may be insufficient, inaccurate or unreliable;
- (m) a description of the roles of any third parties involved in data collection for, or in calculation or dissemination of, the benchmark or family of benchmarks;
- (n) the model or method used for the extrapolation and any interpolation of benchmark data.

2. Administrators may opt to publish or make available the information referred to in points (m) and (n) of paragraph 1 for their critical benchmarks only.

Article 3

Details of the internal review and approval of the methodology

1. The information to be provided by an administrator of a benchmark or, where applicable, a family of benchmarks in compliance with the requirement laid down in Article 13(1)(b) of Regulation (EU) 2016/1011 shall include at least the following:
 - (a) the policies and procedures relating to the internal review and approval of the methodology;
 - (b) details of any specific events that may give rise to an internal review, including details of any mechanism used by the administrator to determine whether the methodology is traceable and verifiable;
 - (c) the bodies or functions within the administrator's organisational structure that are involved in reviewing and approving the methodology;
 - (d) the roles performed by any persons involved in reviewing or approving the methodology;
 - (e) a description of the procedure for nominating and removing persons involved in reviewing or approving the methodology.
2. Administrators may opt to publish or make available the information referred to in points (d) and (e) of paragraph 1 for their critical benchmarks only.

Article 4

Material changes to the methodology

1. The information to be provided by an administrator of a benchmark or, where applicable, family of benchmarks in compliance with the requirement laid down in Article 13(1)(c) and (2) of Regulation (EU) 2016/1011 shall include at least the following:
 - (a) a description of the information to be disclosed by the administrator at the start of each consultation exercise, including a requirement to disclose the key elements of the methodology that would, in its view, be affected by the proposed material change;
 - (b) the administrator's standard time frame for consultations;
 - (c) the circumstances in which a consultation may take place within a shorter time frame and a description of the procedures to be followed when undertaking a consultation within a shorter time frame.
2. The rationale to be provided by an administrator in compliance with the requirement laid down in Article 13(1)(c) of Regulation (EU) 2016/1011 shall include, among other things, whether the representativeness of the benchmark or family of benchmarks, and its appropriateness as a reference for financial instruments and contracts, would be put at risk if a proposed material change were not made.

Article 5

Entry into force and application

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