



Brussels, 13.7.2018
C(2018) 4434 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 criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements

(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 25 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 25(9) of Regulation (EU) 2016/1011. Under these provisions, the Commission is empowered to specify further criteria a competent authority should consider when assessing whether an administrator of a significant benchmark should comply with certain provisions listed in Article 25(3) of the Benchmark Regulation which the administrator intended not to comply with.

Articles 1 to 9 specify further the criteria listed in letters (a) to (i) of Article 25(3) of the Benchmark Regulation.

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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 596/2014 of the European Parliament and of the Council¹, and in particular the third subparagraph of Article 25(9) thereof,

Whereas:

- (1) Article 25(1) of Regulation (EU) 2016/1011 allows the administrator of a significant benchmark to choose not to apply certain provisions of that Regulation. If an administrator chooses not to apply one or more of those provisions, the competent authority has power to decide that the administrator should nonetheless apply one or more of them. Article 25(3) of that Regulation specifies criteria that a competent authority must take into account in assessing whether it would be appropriate for the administrator to apply those provisions.
- (2) The criteria that a competent authority is required to take into account should take into consideration the nature of the provisions under Regulation (EU) 2016/1011 that administrators of significant benchmarks may choose not to apply. Administrators of significant benchmarks may choose not to apply certain provisions that require them to put in place organisational measures to reduce the risk of conflicts of interest resulting from their employees' involvement in the provision of the benchmark. When taking into account the criteria specified in points (a), (c) and (i) of Article 25(3) of that Regulation, competent authorities should therefore also consider whether other adequate means are in place to protect the benchmark's integrity, instead of the organisational measures that are required by those provisions.
- (3) When taking into account the criteria specified in Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider the benchmark's impact on one or more specific markets, the economy more generally and the benchmark's importance in ensuring financial stability. For this purpose, competent authorities should use information which is in the public domain or has been made available to them through disclosure by the administrator or otherwise.

¹ OJ L 171, 29.06.2016, p. 1.

- (4) When taking into account the criterion specified in point (f) of Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider whether the administrator has adequate alternative technical means and control mechanisms in place to maintain the continuity of the provision of the benchmark and its robustness, taking into account the nature of the provisions that the administrator has chosen not to apply.
- (5) Administrators should be given sufficient time to prepare applications and to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) The ESMA 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) No 1095/2010 of the European Parliament and of the Council²,

HAS ADOPTED THIS REGULATION:

Article 1

Vulnerability of the benchmark to manipulation

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the vulnerability of the benchmark to manipulation shall include at least the following:

- (a) whether the benchmark is based on transaction data;
- (b) whether the contributors are supervised entities;
- (c) whether measures apply that increase the robustness of the input data;
- (d) whether the administrator's organisational structure reduces incentives to manipulation;
- (e) whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark;
- (f) whether there are proven cases of manipulation of the same benchmark or a benchmark with a similar methodology provided by an administrator of similar size and organisational structure.

Article 2

Nature of the input data

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature of the input data shall include at least the following:

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) in cases where the input data is transaction data, whether the administrator is a participant in the market or economic reality that the benchmark is intended to measure;
- (b) in cases where the input data is provided by contributors, whether the contributors have a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;
- (c) in cases where the input data is sourced from exchanges or trading systems located in a third country, whether a regulatory and supervisory framework applies to those exchanges or trading systems that maintains the integrity of the input data;
- (d) in cases where the input data consists of quotes, whether the quotes are committed or indicative and whether adequate control mechanisms apply to them.

Article 3

Level of conflicts of interest

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the level of conflicts of interest shall include at least the following:

- (a) whether the administrator has a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;
- (b) in cases where the benchmark is based on input data contributions, whether the administrator's relationship with the contributors is governed by adequate control mechanisms;
- (c) whether the administrator has controls or other measures in place that mitigate potential conflicts of interest effectively.

Article 4

Degree of discretion of the administrator

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the degree of discretion of the administrator shall include at least the following:

- (a) in cases where the benchmark methodology allows for expert judgement by the administrator, whether the use of judgement or exercise of discretion is sufficiently transparent;
- (b) in cases where the benchmark is based on estimates, the effectiveness of the internal control measures that the administrator has in place.

Article 5

Impact of the benchmark on markets

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the impact of the benchmark on markets shall include at least the following:

- (a) in cases where the benchmark has particular relevance for a specific market or markets, whether the unreliability of the benchmark would have a disruptive effect on the functioning of that market or those markets and whether there are adequate substitutes for that benchmark;
- (b) in cases where the benchmark qualifies as a significant benchmark by virtue of point (b) of Article 24(1) of Regulation (EU) 2016/1011, and where the information is known to the competent authority, any relevant quantitative relation of financial instruments, financial contracts, or investment funds referencing the benchmark to the total value of the respective instruments in a Member State.

Article 6

Nature, scale and complexity of the provision of the benchmark

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature, scale and complexity of the provision of the benchmark shall include at least the following:

- (a) the degree to which the input data is based on contributions, whether the input data is transaction data and how this degree is reflected in the control mechanisms that the administrator has in place;
- (b) the amount of input data to be processed and the number of data sources;
- (c) whether the administrator has sufficient technical means to process the input data continuously and robustly;
- (d) whether the methodology gives rise to operational risks in processing the input data;
- (e) the extent to which the administrator relies on contributors for the determination of the benchmark.

Article 7

Importance of the benchmark to financial stability

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the importance of the benchmark to financial stability shall include at least an assessment of the relationship between the total value of the financial instruments, financial contracts and investment funds referencing the benchmark and the value of the total assets of the financial sector and of the banking sector in a Member State, where that information is known to the competent authority.

Article 8

Value of financial instruments, financial contracts and investment funds that reference the benchmark

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the value of financial instruments, financial contracts or investment funds that reference the benchmark shall include at least the following:

- (a) the total value of all financial instruments, financial contracts and investment funds referencing the benchmark on the basis of all the ranges of maturities or tenors of the benchmark, where known to the competent authority;

- (b) whether the use of the benchmark is concentrated in individual categories of financial instrument, financial contract or investment fund;
- (c) in cases where the benchmark is a significant benchmark by virtue of point (a) of Article 24(1) of Regulation (EU) 2016/1011, and where known to the competent authority, how close the total value of financial instruments, financial contracts and investment funds that reference the benchmark is to the thresholds referred to in Article 20(1)(a) and (c)(i) of that Regulation.

Article 9

The administrator's size, organisational form or structure

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the administrator's size, organisational form or structure shall include at least the following:

- (a) in cases where the provision of benchmarks is not the administrator's principal business activity, whether the provision of the benchmark is organisationally separate or whether other appropriate means are in place to avoid conflicts of interest;
- (b) in cases where the administrator is part of a group and one or more entities within the group are actual or potential users of the benchmark, whether the administrator is acting independently and whether the administrator has in place other appropriate means to avoid conflicts of interest.

Article 10

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