



Brussels, 13.7.2018  
C(2018) 4439 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 contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark**

(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 27 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](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 27(3) of Regulation (EU) 2016/1011. Under these provisions, the Commission is empowered to specify further the contents of a benchmark statement and the cases in which an update of such statement is required.

Article 1 sets out general disclosure items which the benchmark statement has to include.

Articles 2 to 6 specify additional disclosure requirements for certain types of benchmarks.

Article 2 specifies that the benchmark statement of a regulated-data benchmark has to indicate this qualification and the source of the input data used as well as why the source qualifies as a source of regulated data.

Article 3 specifies that the benchmark statement of an interest rate benchmark has to indicate this qualification and refer to the specific regime applicable to interest rate benchmarks.

Article 4 specifies additional requirements for commodity benchmarks which include the benchmark's qualification as commodity benchmark and the regulatory regime applicable (Title II or Annex II of the Benchmark Regulation) and an explanation why. It should also include criteria defining the physical commodity and an indication where explanations regarding the calculation of the benchmark are being published.

Article 5 specifies that the benchmark statement of a critical benchmark has to indicate this qualification and refer to the specific regime applicable to critical benchmarks. Furthermore, it has to be indicated how users will be informed about delayed publications of the benchmark. The benchmark statement should, to the extent possible, also contain information on the most common types of use of the critical benchmark.

Article 6 specifies that the benchmark statement has to be updated when it is no longer correct or sufficiently precise, in particular when the type of benchmark has changed or the methodology has changed materially.

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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<sup>1</sup>, and in particular the fourth subparagraph of Article 27(3) thereof,

Whereas:

- (1) Article 27(1) of Regulation (EU) 2016/1011 requires administrators to publish a benchmark statement for the benchmark or, where applicable, for a family of benchmarks if it may be used in the Union.
- (2) Benchmark statements should include comprehensive information regarding the market or economic reality that the benchmark or family of benchmarks is intended to measure, together with an explanation of when the measurement of that market or economic reality may become unreliable. This is because users and potential users rely on such information in order to understand fully the benchmark or family of benchmarks.
- (3) Benchmark statements should indicate the discretionary elements in the benchmark's methodology, as well as the process for any *ex post* evaluation of the use of such discretion. That information is key to ensuring that users and potential users have an understanding of the susceptibility of the benchmark or family of benchmarks to manipulation.
- (4) Different types of benchmark (namely, regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks, significant benchmarks and non-significant benchmarks) are subject to different requirements under Regulation (EU) 2016/1011. The benchmark statement should therefore identify clearly and unambiguously the type or types of benchmark to which the benchmark or family of benchmarks belongs.
- (5) In relation to critical benchmarks, the benchmark statement should include additional information explaining why the benchmark is recognised under Regulation (EU) 2016/1011 as critical, so that users and potential users have at their disposal the

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<sup>1</sup> OJ L 171, 29.6.2016, p. 1

information needed to understand the basis upon which the benchmark has been recognised as critical.

- (6) The use of regulated data releases administrators and their contributors from certain obligations under Regulation (EU) 2016/1011. For regulated-data benchmarks, administrators should therefore be required to indicate their data sources and what qualifies the benchmark as a regulated data benchmark.
- (7) Due to their particular nature, interest rate benchmarks and commodity benchmarks have to comply with the provisions of specific annexes to Regulation (EU) 2016/1011 instead of or in addition to complying with Title II of that Regulation. Administrators of such benchmarks should indicate that fact in the benchmark statement so that users and potential users are aware of it.
- (8) Administrators of critical benchmarks have to comply with an enhanced regulatory regime under Regulation (EU) 2016/1011. It is therefore important that users and potential users are appropriately informed of this fact.
- (9) Where a benchmark exhibits the characteristics of different types of benchmark, the specific provisions in this Regulation in relation to those different types of benchmark should apply in parallel and in addition to the general disclosure requirements, so as to provide users and potential users with comprehensive information on all of the benchmark's characteristics.
- (10) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators of significant and non-significant benchmarks by requiring a more limited set of information to be included in the benchmark statement for significant and non-significant benchmarks.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (12) 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) No 1095/2010 of the European Parliament and of the Council<sup>2</sup>.
- (13) 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*  
*General disclosure requirements*

1. The benchmark statement shall state:
  - (a) the date of publication of the statement and, where applicable, the date of its last update;

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<sup>2</sup> 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).

- (b) where available, the international securities identification number (ISIN) of the benchmark or benchmarks; alternatively, for a family of benchmarks, the statement may provide details of where the ISINs are publicly accessible free of charge;
  - (c) whether the benchmark, or any benchmark in the family of benchmarks, is determined using contributions of input data;
  - (d) whether the benchmark or any benchmark in the family of benchmarks qualifies as one of the types of benchmarks listed under Title III of Regulation (EU) 2016/1011, including the specific provision by virtue of which the benchmark qualifies as that type.
2. In defining the market or economic reality, the benchmark statement shall include at least the following information:
- (a) a general description of the market or economic reality.
  - (b) the geographical boundaries, if any, of the market or economic reality;
  - (c) any other information that the administrator reasonably considers to be relevant or useful to help users or potential users of the benchmark to understand the relevant features of the market or economic reality, including at least the following elements insofar as reliable data on these elements is available:
    - (i) information on actual or potential participants in the market;
    - (ii) an indication of the size of the market or economic reality.
3. In defining the potential limitations of the benchmark and the circumstances in which the measurement of the market or economic reality may become unreliable, the benchmark statement shall include at least:
- (a) a description of the circumstances in which the administrator would lack sufficient input data to determine the benchmark in accordance with the methodology;
  - (b) where relevant, a description of instances when the accuracy and reliability of the methodology used for determining the benchmark can no longer be ensured, such as when the administrator deems the liquidity in the underlying market as insufficient;
  - (c) any other information that the administrator reasonably considers to be relevant or useful to help users and potential users to understand the circumstances in which the measurement of the market or economic reality may become unreliable, including a description of what might constitute an exceptional market event.
4. In specifying the controls and rules that govern any exercise of judgement or discretion by the administrator or any contributors in calculating the benchmark or benchmarks, the benchmark statement shall include an outline of each step of the process for any *ex post* evaluation of the use of discretion, together with a clear indication of the position of any person(s) responsible for carrying out the evaluations.
5. In specifying the procedures for review of the methodology, the benchmark statement shall at least outline the procedures for public consultation on any material changes to the methodology.

6. Point (c) of paragraph 3, and paragraph 5, shall not apply to the benchmark statement:
  - (a) for a significant benchmark; or
  - (b) for a family of benchmarks that does not include any critical benchmarks and does not consist solely of non-significant benchmarks.
7. In the case of a benchmark statement for a non-significant benchmark or for a family of benchmarks that consists solely of non-significant benchmarks:
  - (a) the following provisions of this Article shall not apply:
    - (i) point (c) of paragraph 2;
    - (ii) points (b) and (c) of paragraph 3,
    - (iii) paragraphs 4 and 5; and
  - (b) the requirements of points (a) and (b) of paragraph 2 may be satisfied alternatively by including a clear reference in the benchmark statement to a published document that includes the same information and is accessible free of charge.
8. Administrators may include additional information at the end of their benchmark statements provided that, if this is done by referring to a published document containing the information, the document shall be one that is accessible free of charge.

#### *Article 2*

##### *Specific disclosure requirements for regulated-data benchmarks*

In addition to the information to be included pursuant to Article 1, for a regulated-data benchmark or, where applicable, family of regulated-data benchmarks, the benchmark statement shall state at least the following in its description of the input data:

- (a) the sources of the input data used;
- (b) for each source, the relevant type, as listed in Article 3(1)(24) of Regulation (EU) 2016/1011.

#### *Article 3*

##### *Specific disclosure requirements for interest rate benchmarks*

In addition to the information to be included pursuant to Article 1, for an interest rate benchmark or, where applicable, family of interest rate benchmarks, the benchmark statement shall include at least the following information:

- (a) a reference alerting users to the additional regulatory regime applicable to interest rate benchmarks under Annex I to Regulation (EU) 2016/1011;
- (b) a description of the arrangements that have been put in place to comply with that Annex.

#### *Article 4*

##### *Specific disclosure requirements for commodity benchmarks*

In addition to the information to be included pursuant to Article 1, for a commodity benchmark or, where applicable, family of commodity benchmarks, the benchmark statement shall at least:

- (a) indicate whether the requirements of Title II of, or Annex II to, Regulation (EU) 2016/1011 apply to the benchmark, or family of benchmarks as prescribed by Article 19 of that Regulation;
- (b) include an explanation as to why Title II of or, as the case may be, Annex II to that Regulation applies;
- (c) include in the definitions of key terms a concise description of the criteria that define the relevant underlying physical commodity;
- (d) where applicable, indicate where the explanations are published that the administrator is required to publish under paragraph 7 of Annex II to that Regulation.

#### *Article 5*

##### *Specific disclosure requirements for critical benchmarks*

In addition to the information to be included pursuant to Article 1, for a critical benchmark, or, where applicable, a family of benchmarks that contains at least one critical benchmark, the benchmark statement shall include at least the following information:

- (a) a reference alerting users to the enhanced regulatory regime applicable to critical benchmarks under Regulation (EU) 2016/1011;
- (b) a statement indicating how users will be informed of any delay in the publication of the benchmark or of any re-determination of the benchmark, and indicating the (expected) duration of measures.

#### *Article 6*

##### *Updates*

In addition to the cases referred to in the third subparagraph of Article 27(1) of Regulation (EU) 2016/1011, an update of the benchmark statement shall be required whenever the information contained in the statement ceases to be correct or sufficiently precise, and including in any event in the following cases:

- (a) whenever there is a change in the type of the benchmark;
- (b) whenever there is a material change in the methodology used for determining the benchmark or, if the benchmark statement is for a family of benchmarks, in the methodology used for determining any benchmark within the family of benchmarks.

#### *Article 7*

##### *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: 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*