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COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 29 September 2017

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. Cion doc.: C(2017) 6474 final

Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 29.9.2017
supplementing Regulation (EU) 2016/1011 of the European Parliament and
of the Council specifying technical elements of the definitions laid down in
paragraph 1 of Article 3 of the Regulation

Delegations will find attached document C(2017) 6474 final.

Encl.: C(2017) 6474 final



Brussels, 29.9.2017
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COMMISSION DELEGATED REGULATION (EU) .../...

of 29.9.2017

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation

(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 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.

Many respondents to the consultation on the draft technical advice raised concerns about the specific reference as to when a figure is ‘made available to the public’. The main area of comment focused on the intended recipients of the figure. There was concern that the proposed wording, ‘a large or potentially indeterminate number of recipients’, would be too vague to be interpreted in a consistent manner. Some viewed this as a very broad definition and others believed it could create large loopholes. In view of these uncertainties, a number of respondents called for safe harbours, while others pleaded for a wide definition to ensure that all investors were protected. In response to the feedback, ESMA removed the reference to a ‘large number’ of recipients. Furthermore, ESMA noted that making available could also result from use of an index because this would result in other parties or investors having direct access to the actual index figures and not only to the name of the index used in the respective financial instrument, financial contract or investment fund.

The vast majority of respondents agreed with the definition of ‘administering the arrangements for determining a benchmark’, but there seemed to be considerable confusion between the definition and significance of ‘provision of a benchmark’, of which the administering is part, and the definition and significance of being an administrator, which does not focus on the provision of a benchmark as such but on the control over the provision.

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>

ESMA had also asked for views on a third definition, the term ‘issuance of a financial instrument’, which is part of the definition of ‘use of a benchmark’. Respondents broadly agreed with the proposed definition. However, as the proposed definition and the technical advice from ESMA simply brought definitions from other EU laws together, and as respondents did not ask for further clarification in the consultations, it was decided that that it would not be appropriate proportional or useful to include this definition in this Regulation.

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. Three of the eight contributions received welcomed the text without further comment. One respondent suggested exempting all parties with a contract with the index provider from the definition of 'Making available to the public'. As this would partly overlap with the current draft it was considered as more confusing than helpful. The suggested exclusion of the making available of figures to retail clients for the use on proprietary platforms only from the definition would go against the original meaning of 'public'. Furthermore, it would be impossible to control any subsequent use of the figure by the retail or other clients. The suggested exclusion of publication due to regulatory obligations from the definition of 'making available to the public' was not considered relevant as the publication would already fulfil the relevant condition of the Benchmark Regulation. Other comments regarding CCPs and reference or settlement prices were not taken up as these issues are more appropriate for clarifications in the form of questions and answers or guidelines by ESMA. A suggestion for a minor clarification in recital 4 was taken up.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Articles 1 and 2 further specify the meaning of two technical elements of the definitions set out in the Benchmark Regulation: public availability and administering the arrangements for determining a benchmark.

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

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supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation

(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 3(2) thereof,

Whereas:

- (1) According to the Regulation (EU) 2016/1011 a figure, in order to be considered as an 'index', must be published or made available to the public. The definition of an index is, in turn, the basis for the definition of a benchmark, as referred to in Regulation (EU) 2016/1011.
- (2) It is therefore necessary to specify in which situations a figure is considered to be made available to the public in order to avoid regulatory arbitrage across the jurisdictions in the Union.
- (3) The entity of the provider of the figure should not be considered to form the public for the purpose of Regulation (EU) 2016/1011 as otherwise there would not be any difference between 'making available' and 'making available to the public'. For the same reasons, a narrowly defined number of recipients should not qualify as the public either.
- (4) A figure should be considered to be made available to the public where it can be accessed by a wider group of persons directly or indirectly. The use of a benchmark providing the user access to the referenced figure should constitute indirect access.
- (5) The making available of a figure can take place in various forms at the same time or subsequently, through the provider of the figure or through the passing on of the figure by any of the primary recipients.

¹ OJ L 171, 29.6.2016, p. 1.

- (6) In order to ensure that the definition of 'provision of a benchmark' is applied in a uniform manner it is appropriate to specify that administering the arrangements for determining a benchmark, as referred to in Article 3(1)(5)(a), involves the ongoing management of the benchmark provision and the setting, adaptation and ongoing maintenance of the methodology,

HAS ADOPTED THIS REGULATION:

Article 1
Making available to the public

1. A figure shall be considered to be made available to the public for the purposes of Regulation (EU) 2016/1011 where the figure is made accessible to a potentially indeterminate number of legal and natural persons other than the index provider or other than a determined number of recipients connected or related to the index provider
2. A figure is made available to the public where it may be accessed by such persons either directly or indirectly as a result, inter alia, of its use by one or more supervised entities as a reference for a financial instrument it issues or to determine the amount payable under a financial instrument or a financial contract, or to measure the performance of an investment fund, or to provide a borrowing rate calculated as a spread or mark-up over such figure.
3. Access may take place through a variety of media and modalities, set out by the provider or agreed between the provider and the recipients, free of charge or upon payment of a fee, including, but not limited to, telephone, file transfer protocol, internet, open access, news, media, through financial instruments, financial contracts or investment funds referencing the figure or by way of request to the users.

Article 2
Administering the arrangements for determining a benchmark

For the purposes of Regulation (EU) 2016/1011, administering the arrangements for the determination of a benchmark shall include both of the following:

- (a) the ongoing management of the provider's structures and of its personnel that are involved in the determination process of a benchmark;
- (b) the setting, adaptation and ongoing maintenance of a specific methodology for determining a benchmark.

Article 3
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