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COVER NOTE

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

date of receipt: 3 October 2017

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

No. Cion doc.: C(2017) 6537 final

Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 3.10.2017
supplementing Regulation (EU) 2016/1011 of the European Parliament and
of the Council with regard to the establishment of the conditions to assess
the impact resulting from the cessation of or change to existing
benchmarks

Delegations will find attached document C(2017) 6537 final.

Encl.: C(2017) 6537 final



Brussels, 3.10.2017
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COMMISSION DELEGATED REGULATION (EU) .../...

of 3.10.2017

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks

(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 Article 51 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

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.

Overall, respondents to the ESMA consultation on the draft technical advice supported the draft. They also backed an ESMA proposal to publish the benchmarks that could be used in accordance with this Delegated Act. However, the empowerment in Article 51 of the Benchmark Regulation does not authorise the competent authorities to publish. This proposal has therefore not been retained in the Delegated Act.

The vast majority of respondents also welcomed the non-exhaustive nature of the list of conditions suggested by ESMA, as it would not be possible to anticipate any conditions that might trigger a *force majeure* event or similar. Respondents welcomed the fact that conditions would not be limited in time.

Several respondents considered that the first condition regarding changes in the methodology or input data that result in a significantly different benchmark value was too vague. As a result, the types of change envisioned have been clarified in a recital.

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 Regulations supplementing Regulation (EU) 2016/1011 after the Commission-internal inter-service consultation from 22 June 2017 to 20 July 2017. There were no specific comments on this Delegated Act.

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>

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This Delegated Regulation sets out a non-exhaustive list of conditions to be taken into account by a national competent authority when considering the permission to use an existing benchmark which does not meet the requirements of the Benchmark Regulation in the Union.

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

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supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks

(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 51(6) thereof,

Whereas:

- (1) To ensure that competent authorities apply Article 51(4) of Regulation (EU) 2016/1011 in the same manner, it is appropriate to set out in detail under which conditions the competent authorities may conclude that the cessation or changing of an existing benchmark could result in a force majeure event, or could frustrate or otherwise breach the terms of a financial contract or financial instrument, or the rules of an investment fund, referencing an existing benchmark.
- (2) This is in particular the case in the event of a ‘force majeure’, a term which is interpreted in a different manner across the Member States.
- (3) A significantly different value in the index is a major cause of frustration or breach of the terms of any financial contract or financial instrument or the rules of any investment fund, referencing a benchmark. Those significantly different values can be caused by a sudden discontinuity in time series of the index or a different degree of volatility of the index, which in turn can be caused by changes to the methodology for the provision of the benchmark or to the input data on which the benchmark calculation is based. Competent authorities should assess the potential impacts of such changes on a case-by-case basis since the magnitude of the discontinuity or the extent of the change in the volatility of the index depends very much on the nature of the benchmark and of the referencing financial instruments, financial contracts or investment funds.
- (4) Changes to the type of input data used or the reliability of data sources can have an impact on the suitability of a benchmark for certain types of use. Competent authorities should therefore assess whether those changes could cause a force majeure event, or frustrate or otherwise breach contractual terms.

¹ OJ L 171, 29.6.2016, p. 1.

- (5) Force majeure events, the frustration or other breaches of contractual terms are less likely where there is an acceptable substitute benchmark or at least a procedure referenced in the relevant documents to select such a substitute benchmark.
- (6) Indices measuring very particular markets might rely significantly on the reputation, judgement or expertise of the index provider. Competent authorities should therefore assess whether, in those circumstances, a change of the provider of an index could result in a force majeure event, or frustrate or otherwise breach contractual terms,

HAS ADOPTED THIS REGULATION:

Article 1
Conditions for assessment

1. A competent authority shall, for the purpose of Article 51(4) of Regulation (EU) 2016/1011, take into account the following conditions when assessing whether the cessation of or the changing of a benchmark that does not meet the requirements of that Regulation would result in a force majeure event, or would frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark:
 - (a) changing the benchmark would require a material change to the nature of the input data, to the methodology to determine those data, to the data gathering process itself or to other elements of the benchmark provision, which would lead to a significantly different value of the benchmark;
 - (b) changing the nature of the input data or the methodology to determine those data in order to make the benchmark compliant with Regulation (EU) 2016/1011 would undermine the representativeness of the benchmark of the market or the economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark;
 - (c) there is no substitute benchmark for the benchmark that does not meet the requirements of Regulation (EU) 2016/1011 which:
 - (i) meets the requirements of Regulation (EU) 2016/1011;
 - (ii) measures the same market or the same economic reality;
 - (iii) is either included in the public register referred to in Article 36 of Regulation (EU) 2016/1011 or is provided by an administrator included in that register;
 - (d) existing financial contracts, financial instruments and investment funds referencing the benchmark, and their accompanying documents, do not provide for a substitute benchmark or do not contain rules on how such a substitute benchmark shall be determined or any other appropriate contingency measures;
 - (e) the transitioning of the benchmark from one administrator to another administrator would lead to a substantial change in the benchmark.
2. The conditions of paragraph 1 shall be applied on a case-by-case basis.

Article 2
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, 3.10.2017

For the Commission
The President
Jean-Claude JUNCKER