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| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
| date of receipt: | 7 May 2021 |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |

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| Subject: | COMMISSION DELEGATED REGULATION (EU) .../... supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark |

Delegations will find attached document C(2021) 3117 final .

Encl.: C(2021) 3117 final



EUROPEAN
COMMISSION

Brussels, 6.5.2021
C(2021) 3117 final

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

of 6.5.2021

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical 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 21 of Regulation (EU) 2016/1011 (BMR) as amended by Regulation (EU) 2019/2175. 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) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 9 March 2020 on the ESMA website and the consultation closed on 8 June 2020. An open hearing on the consultation paper was held on 29 May 2020 via conference call. On 29 September 2020, ESMA published a final report including the draft technical standards. In addition, ESMA requested the opinion of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of Regulation (EU) No 1095/2010. 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.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt regulatory technical standards is provided for under Article 21(5) of Regulation (EU) No 2016/1011 (BMR) as amended by Regulation (EU) 2019/2175. Under this provision, the Commission is empowered to further specify the criteria for assessing the mandatory administration or suspension of a critical benchmark.

Article 1 defines the criteria on which a competent authority shall base its assessment of how a critical benchmark is to be transitioned to a new administrator.

Article 2 specifies the criteria on which a competent authority shall base its assessment of how a critical benchmark is to be ceased to be provided.

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

of 6.5.2021

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark

(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 21(5) thereof,

Whereas:

- (1) The competent authorities' assessment referred to in Article 21(2), point (b), of Regulation (EU) 2016/1011 concerns either how a critical benchmark is to be transitioned to a new administrator or how that benchmark is to be ceased to be provided. It is therefore appropriate to specify two sets of criteria to be considered by competent authorities, depending on which scenario they are assessing.
- (2) Where a critical benchmark is to be transitioned to a new administrator, the new administrator should be able to ensure the continuity of the provision of the critical benchmark in such a way that supervised entities can continue to use it without interruption and in compliance with Regulation (EU) 2016/1011. It is therefore necessary to specify the criteria that a competent authority should consider when assessing whether the new administrator can ensure such continuity.
- (3) The supervision of a critical benchmark should be ensured throughout the transition of that benchmark to a new administrator. There is a higher risk of a discontinuity in the supervision of such benchmark where the new administrator is located in a different Member State from the one of the competent authority making the assessment on how the critical benchmark is to be transitioned to that new administrator.. The competent authorities concerned should cooperate to ensure that the competent authority making the assessment receives all the necessary information to determine whether the continuation of the supervision of the benchmark will be ensured throughout such transition, including an analysis focusing on the new administrator's location and its authorisation status.

¹ OJ L 171, 29.6.2016, p. 1.

- (4) When assessing how a critical benchmark is to be transitioned to a new administrator, a competent authority should analyse from an operational perspective how the provision of the critical benchmark will be transferred from the current administrator to the new administrator. The competent authority concerned should in particular consider the uninterrupted publication of the benchmark, the availability of input data, the methodology for the calculation of the benchmark and any necessary engagement with any contributors, users and other stakeholders.
- (5) A competent authority that assesses how a critical benchmark is to be ceased to be provided, should be satisfied that the benchmark can be ceased to be provided in an orderly fashion, having regard to, *inter alia*, the procedure for the cessation of the benchmark established by its administrator in accordance with Article 28(1) of Regulation (EU) 2016/1011. It is therefore necessary to specify the criteria which a competent authority should consider to determine whether that is the case.
- (6) A competent authority that assesses how a critical benchmark is to be ceased to be provided should also consider the written plans for the cessation of the benchmark referred to in Article 28(2) of Regulation (EU) 2016/1011. Those written plans of different users of a critical benchmark may not always be aligned and may not be consistent if applied at the same time. It is therefore important that competent authorities consider to what extent those written plans are compatible between different users of the benchmark, including in respect of the trigger events for the cessation of the benchmark which those written plans envisage, and how those written plans can be used to ensure the cessation of the critical benchmark in an orderly fashion.
- (7) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (8) 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 advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council².
- (9) In order to ensure consistency with the date of application of Article 5 of Regulation (EU) 2019/2175 of the European Parliament and of the Council³, which introduced in Regulation (EU) 2016/1011 Article 21(5) of that Regulation, this Regulation should apply from 1 January 2022,

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).

³ Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

Criteria for assessing the transition to a new administrator

Competent authorities shall, when assessing how a critical benchmark is to be transitioned to a new administrator, consider all of the following criteria:

- (a) whether the new administrator proposed in the assessment submitted by the current administrator pursuant to Article 21(1), point (b)(i), of Regulation (EU) 2016/1011:
 - (i) is located in the same Member State as the current administrator, or in a different Member State in which case the competent authority, where necessary, shall cooperate with the competent authority of the Member State of the new administrator to assess whether the supervision of the critical benchmark will be ensured throughout the transition to the new administrator;
 - (ii) is a supervised entity and, if so, for which activities it is supervised, and whether there are any actual or potential conflicts of interest with that entity's existing activities;
 - (iii) is a user of the benchmark and, if so, whether the conflicts of interest that may arise are adequately mitigated;
 - (iv) is already authorised as a benchmark administrator under Article 34 of Regulation (EU) 2016/1011;
 - (v) already provides benchmarks, and if so, whether those benchmarks are critical, significant, non-significant, commodity or interest rate benchmarks.
- (b) whether the current administrator of the critical benchmark has informed any contributors, users and other stakeholders or has conducted public consultations about the possible transition of the critical benchmark to the new administrator.;
- (c) the way in which the new administrator intends to calculate the critical benchmark and whether that administrator intends to amend any of the following elements related to the critical benchmark and, if so, how the administrator will ensure the compliance of those elements with Regulation (EU) 2016/1011:
 - (i) the methodology, including the quality of the input data, and its review;
 - (ii) the contingency policy for the calculation of the benchmark;
 - (iii) the procedures for handling errors in input data or in the redetermination of the benchmark;
 - (iv) the code of conduct;
- (d) whether the new administrator will have access to the same input data as the current administrator, including historical input data held by the current administrator

- (e) whether the IT infrastructures of the new administrator have been adequately tested for the provision of the critical benchmark;
- (f) where the critical benchmark is based on input data contributed by a panel of contributors, how the new administrator intends to fulfil the requirement set out in Article 11(1), point (d), of Regulation (EU) 2016/1011 and whether the current contributors will continue to be part of the panel after the benchmark's transition to the new administrator;
- (g) the way in which the new administrator intends to publish the critical benchmark, including the standard daily publication arrangements, the frequency of publication, the address of the website and whether critical benchmark will be accessible upon payment of a fee or free of charge;
- (h) whether there is detailed plan for the transition date, and if so, whether that plan deals with all possible issues, including contractual issues, stemming from the transition of the critical benchmark to a new administrator;
- (i) legal risks involved in the transition, including the risk of contract frustration;
- (j) the accounting and tax implications of the critical benchmark being provided by a new administrator;
- (k) the impact of the transition on financial market infrastructures, including clearing houses.

Article 2

Criteria for assessing the cessation of the provision of a critical benchmark

1. Competent authorities shall, when assessing how a critical benchmark is to be ceased to be provided, consider all of the following criteria:
 - (a) the effectiveness of the procedure established in accordance with Article 28(1) of Regulation (EU) 2016/1011, and in particular:
 - (i) whether that procedure precisely defines the actions to be taken by the administrator to cease in an orderly fashion the provision of the critical benchmark;
 - (ii) whether, considering the circumstances of the specific case, those actions will be adequate to ensure the cessation in an orderly fashion of the provision of the critical benchmark, having also regard to the criterion referred to in point (b) of this paragraph;
 - (iii) when that procedure was produced and when it was last updated.
 - (b) the written plans referred to in Article 28(2) of Regulation (EU) 2016/1011 and in particular:
 - (i) whether those written plans nominate suitable alternative benchmarks that can be referenced to substitute the critical benchmark and, if so,

whether those written plans nominate the same or different alternative benchmarks;

- (ii) where those written plans nominate the same alternative benchmark, whether that benchmark has been adopted in different asset classes;
 - (iii) whether the trigger events for the cessation of the provision of critical benchmark included in the written plans are the same among the plans produced by the supervised entities using that critical benchmark, where it is feasible to assess this.
- (c) whether the administrators of the alternative benchmarks referred to in point (b)(i) of this paragraph are authorised;
 - (d) where feasible, whether the cessation of the provision of the critical benchmark would have an adverse impact on the market integrity, financial stability, consumers, the real economy, or the financing of households and businesses⁴;
 - (e) whether the cessation of the provision of the critical benchmark would result in a force majeure event;
 - (f) the dynamics of the market or economic reality that the critical benchmark intends to measure and whether there exists input data of sufficient quality and quantity to represent that underlying market or economic reality with precision;
 - (g) whether the administrator has informed any contributors to the critical benchmark, users of that benchmark and other stakeholders or has conducted public consultations about the possible cessation of the provision of the critical benchmark.;
 - (h) any legal risks involved in the cessation of the provision of the critical benchmark;
 - (i) the accounting and tax implications of the cessation of the provision of the critical benchmark;
 - (j) the impact of the cessation of the provision of the critical benchmark on market infrastructures, including clearing houses.

For the purposes of point (c), where the administrators of the alternative benchmarks referred to in point (b)(i) of this paragraph are not authorised, the competent authority shall assess the conditions of their authorisation under Article 34 of Regulation (EU) 2016/1011 and shall assess whether a period of mandatory administration of the critical benchmark is necessary to allow for authorisation of the administrators of those alternative benchmarks.

2. In addition to the criteria referred to in paragraph 1, point (a), a competent authority may assess whether the procedure established by the administrator in accordance

⁴ Commission Delegated Regulation (EU) 2018/64 of 29 September 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to specifying how the criteria of Article 20(1)(c)(iii) are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States (OJ L 12, 17.1.2018, p. 5).

with Article 28(1) of Regulation (EU) 2016/1011 is appropriate having regard to the following elements concerning the financial instruments, financial contracts or investment funds which reference the critical benchmark:

- (a) their volume and value;
- (b) the term, duration, maturity or expiry date of the financial instruments, financial contracts and any other document entered into for measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees.
- (c) whether the critical benchmark will continue to be provided for use during a transitional or run-off period ;
- (d) whether the procedure referred to in Article 28(1) of Regulation (EU) 2016/1011 provides for such changes to the critical benchmark as may be necessary to ensure that the critical benchmark remains reliable and representative of the underlying market or economic reality which it intends to measure throughout the period referred to in subparagraph 2(c) of this Article;
- (e) the likelihood that any such financial instrument, financial contract or other document entered into for measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees would be frustrated or that its terms would be breached in the event of the cessation of the provision of the critical benchmark.

Article 3

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 1 January 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 6.5.2021

For the Commission
The President
Ursula VON DER LEYEN