



Council of the
European Union

Brussels, 10 May 2021
(OR. en)

8614/21

EF 164
ECOFIN 422
DELECT 96

COVER NOTE

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

No. Cion doc.:	C(2021) 3123 final
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 requirements to ensure that an administrator's governance arrangements are sufficiently robust

Delegations will find attached document C(2021) 3123 final.

Encl.: C(2021) 3123 final



EUROPEAN
COMMISSION

Brussels, 6.5.2021
C(2021) 3123 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 requirements to ensure that an administrator's governance arrangements are sufficiently robust

(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 4 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 4(9) of Regulation (EU) No 2016/1011 (BMR) as amended by Regulation (EU) 2019/2175. Under this provision, the Commission is empowered to further specify how benchmark administrators are to ensure that governance arrangements are sufficiently robust.

Article 1 defines the content of an administrator's governance arrangements, whose organisational structure is to contain the decision-making procedures, the allocation of functions and responsibilities, and the reporting lines.

Article 2 specifies the persons involved with the provision of a benchmark whose responsibilities are to be defined in the governance arrangements of the administrator.

Article 3 specifies that an administrator's governance arrangements are to ensure a clear definition of the responsibilities allocated to the persons involved with the provision of a benchmark and the procedures which must be followed for the proper discharge of those responsibilities.

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 requirements to ensure that an administrator's governance arrangements are sufficiently robust

(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 4(9) thereof,

Whereas:

- (1) In order to be robust, the governance arrangements of benchmark administrators should provide for an organisational structure that in a clear and documented manner specifies procedures for management decision-making, internal reporting lines and the allocation of functions and responsibilities of the persons involved in the provision of a benchmark.
- (2) Robust governance arrangements should allow to identify and to manage possible conflicts of interest that may arise within the organisational structure of benchmark administrators. Therefore, the governance arrangements of benchmark administrators should in particular specify the structure of the management body and its roles and responsibilities.
- (3) A circumstance that may give rise to a conflict of interest does not automatically exclude a person involved in that conflict of interest from being involved in the provision of a benchmark. Benchmark administrators should nevertheless identify all circumstances that may give rise to a potential or an actual conflict of interest, assess them and decide, where appropriate, on mitigating measures.
- (4) Benchmark administrators that are part of a group should duly assess any implications of the group's structure for their own governance arrangements. Such assessment should consider whether resulting conflicts of interest may compromise their ability to meet their regulatory obligations. It should also assess whether the administrators' independence could be compromised by the group structure or by the fact that a member of the administrators' management body is also a member of the board of

¹ OJ L 171, 29.6.2016, p. 1.

other entities of the same group. Those benchmark administrators should adopt specific procedures for preventing and managing conflicts of interest that may arise from that group structure.

- (5) Administrators that operate as a part of a group should be able to seek synergies at group level. However, functions that are outsourced within a group should comply with Article 10 of Regulation (EU) 2016/1011 and with all other relevant provisions of that Regulation.
- (6) In accordance with the principle of proportionality, administrators of non-significant benchmarks should not be subject to an excessive administrative burden. With respect to their non-significant benchmarks, those administrators should therefore be able to opt out from certain requirements regarding their organisational structure. In addition, where it is justified in view of the nature, scale and complexity of their activities, the likelihood of a conflict of interest arising between the provision of the benchmark and any other activities of the administrator, and the level of discretion involved in the process of provision of the benchmark, certain benchmark administrators should be able to opt out from the requirement of specifying in their governance arrangements the procedure for the appointment of the management body.
- (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 4(9) 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

Decision-making procedures, allocation of functions and responsibilities and internal reporting lines

1. The governance arrangements of benchmark administrators shall be approved by the management body, if any, and shall specify, in a clear and well documented manner, all of the following:
 - (a) the procedures for the management's decision-making;
 - (b) an organisational chart of the benchmark administrator, setting out how functions and responsibilities are allocated to the persons directly involved in the provision of a benchmark;
 - (c) internal reporting lines.
2. The procedures referred to in paragraph 1, point (a), shall cover all of the following, where applicable:
 - (a) the composition, roles and responsibilities of the management body and of any related committees;
 - (b) the structure of the management body;
 - (c) the appointment of the management body.
3. The organisational chart referred to in paragraph 1, point (b), shall specify any outsourced functions within and outside the administrator's group and any shared staff within the administrator's group. In allocating functions and responsibilities, the governance arrangements of administrators shall ensure that, where persons perform multiple functions or are involved in various committees, they are able to commit sufficient time to the functions and responsibilities allocated to them and are not prevented from discharging their functions soundly, honestly and professionally.

For the purposes of the first subparagraph, administrators shall take into account the number of meetings that the relevant person has to attend, the nature of the specific position and the related responsibilities and whether the person concerned carries out any other function or activity.
4. The governance arrangements of benchmark administrators shall provide for a clear remuneration framework for all persons directly involved in the provision of the benchmark, taking into account the functions and responsibilities allocated to them.
5. Benchmark administrators may choose not to apply paragraph 2, point (c), and paragraph 4 with respect to their non-significant benchmarks.
6. Benchmark administrators may choose not to apply paragraph 2, point (c), and paragraph 4 where such opt-out is appropriate and proportionate, having regard to the following:

- (a) the nature, scale and complexity of the activities of the administrator;
- (b) the likelihood of a conflict of interest arising between the provision of the benchmark and any other activities of the administrator;
- (c) the level of discretion involved in the process of provision of the benchmark.

Article 2

Accountability

1. The governance arrangements of benchmark administrators shall, as part of their organisational structure, specify in a clear and well documented manner the accountability of the following persons:
 - (a) the persons responsible for decisions that could have a significant impact on the provision of the benchmark, in particular where taking those decisions is delegated
 - (b) the persons responsible for the publication or disclosure of existing or potential conflicts of interest pursuant to Article 4(5) of Regulation (EU) 2016/1011;
 - (c) the persons responsible for the establishment of specific internal control procedures to ensure the integrity and reliability of the employee or person determining the benchmark, referred to in Article 4(8) of Regulation (EU) 2016/1011;
 - (d) the persons responsible for the internal reporting of any circumstance that may give rise to conflicts of interest.
2. Benchmark administrators may choose not to apply paragraph 1, point (d), with respect to their non-significant benchmarks.

Article 3

Transparency requirements

1. The governance arrangements of benchmark administrators shall ensure that all of their managers or employees, and any other natural person whose services are placed at their disposal or under their control and who are directly involved in the provision of a benchmark, are aware of their responsibilities and of the procedures that must be followed for the proper discharge of those responsibilities.
2. Where a benchmark administrator is part of a group, the governance arrangements of that administrator shall detail any functions related to any concerned services and activities in the provision of the benchmark that have been outsourced, including to group entities, in accordance with Article 10 of Regulation (EU) No 1011/2016.

Article 4

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
