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REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON INDICES USED AS BENCHMARKS IN FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS

With this mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts concerning the Regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts (the "**Regulation**")¹. These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**")², the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")³, and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**")⁴.

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

The mandate focuses on technical issues which follow from the **Regulation**. The following delegated acts provided for by this Regulation should be adopted so that they enter into application by 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3 months):

a) The measures to "*specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index*" (Article 3, paragraph 2, of the Regulation);

b) The measures to "*specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in article 14b(1)(a)*"; (Article 13, paragraph 3, point i, of the Regulation);

¹ The text referred to here is the text of the political agreement reached between the European Parliament and the Council as adopted by COREPER (doc. 14985/15 EF 224 ECOFIN 956 CODEC 1664). It might still be subject to change until finalised by the co-legislators. Should the final text differ in parts relevant to this request the Commission might update its request. <http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf>

² Communication of 9.12.2009. COM(2009) 673 final.

³ 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 L331/84, 15.12.2010, p.84.

⁴ The Framework Agreement on relations between the European Parliament and the European Commission, OJ L304/47, 20.11.2010, p.47.

c) The measures to "*specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on markets integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States*" (Article 13, paragraph 3, point iii, of the Regulation);

d) The measures to "*to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union.*" (Article 21b, paragraph 8, of the Regulation);

e) The measures "*to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.*" (Article 39, paragraph 6, of the Regulation).

This request does not cover delegated acts on issues, such as reviews, which do not have to be in place at the date of application of the Regulation. The Commission might request technical advice on these delegated acts at a later stage.

The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. CONTEXT

1.1 Scope

On 20 October 2011, Commission published its proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts. On 25 November 2015 the European Parliament and the Council reached political agreement on a compromise text of the regulation in the trilogue. This compromise text was endorsed by COREPER on 09 December 2015.

The Regulation has as main objectives to:

- improve the governance and controls over the benchmark process;
- improve the quality of the input data and methodologies used by benchmark administrators;
- ensure that contributors to benchmarks provide adequate data and are subject to adequate controls;
- ensure adequate protection for consumers and investors using benchmarks;
- ensure the supervision and viability of critical benchmarks.

Certain elements of the Regulation need to be further specified in delegated acts to be adopted by the Commission: These delegated acts should enter into application by 18 months after the entry into force of the Regulation.

1.2 Principles that ESMA should take into account

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- **Proportionality:** the technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation. In particular, ESMA should distinguish between the different types and categories of benchmarks and sectors as set out in this Regulation and take into account the vulnerability of the benchmarks to manipulation and any impact of such manipulation, as well as developments in benchmarks and financial markets, including international convergence of supervisory practices in relation to benchmarks.
- **Comprehensive:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.
- **Coherent:** While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.
- **Proactive:** In accordance with the ESMA Regulation, ESMA should not feel confined in its advice to elements that are addressed by the delegated acts but, if appropriate, it may include advice, guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. In addition it may indicate how the delegated act should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.
- **Autonomy in working methods:** ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal

questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.

- **Consultation:** In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- **Evidenced and justified:**
 - ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its impact assessment. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.
 - ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.
 - ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the Directive and Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- **Clarity:** The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- **Advice, not legislation:** The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.
- **Responsive:** ESMA should address to the Commission any question they might have concerning the clarification on the text of the Regulation, which they should consider of relevance to the preparation of its technical advice.

2. PROCEDURE

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act and in particular answers to the questions in section 3 of this mandate.

This mandate is made in accordance with the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Regulation.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission has informed the European Parliament and the Council about this mandate. As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

3. ISSUES ON WHICH ESMA IS INVITED TO PROVIDE TECHNICAL ADVICE

3.1. Definitions: measures to "specify further technical elements of the definitions laid down in paragraph 1, in particular specifying what constitutes making available to the public for the purposes of the definition of an index" (Article 3, paragraph 2, of the Regulation)

Making available to the public

Article 3(1), point 1, defines an index as "any figure (a) that is published or made available to the public; (b) that is regularly determined, entirely or partially, by the application of a formula or any other method of calculation, or by an assessment; and (c) where this determination is made on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys".

This definition is critical since it determines the scope of the Regulation. As stated in recital 8, the scope of the Regulation should be broad to provide a comprehensive preventative framework.

The concept of 'making available to the public' is a concept stemming from the EU acquis on copyright. Although of a different nature and not providing a legal definition of the concept, the discussion in that context may provide useful guidance for the preparation of the technical advice.

Administrating the arrangements for determining a benchmark

Article 3(1), point 3, defines one of the elements of provision of a benchmark as "administering the arrangements for determining a benchmark". Given the variety of business models employed for the provision of benchmarks, it would be useful to further clarify what 'administering the arrangements' means in the context of benchmark determination.

Use of a benchmark

Article 3(1), point 5, lists five activities or situations which are considered to represent use of a benchmark under the Regulation. Some of the uses, such as point (a) "issuance of a financial instrument which references an index or a combination of indices", could benefit from further clarification in order to ensure a uniform application of the definition of 'use of a benchmark' across the Union.

ESMA is invited to provide technical advice on how to specify *what constitutes making available to the public for the purposes of the definition of an index*", taking into account recital 8 of the Regulation and any other existing Union legislation on this matter.

ESMA is invited to provide technical advice on specifying *what constitutes administering the arrangements for determining a benchmark taking into account different existing business practices*.

ESMA is invited to provide technical advice on specifying *what constitutes the issuance of a financial instrument for the purposes of defining use of a benchmark*.

3.2. Critical and significant benchmarks: measures to "specify how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are assessed, also in case of the indirect reference to a benchmark within a combination of benchmarks, in order to be compared with the thresholds referred to in paragraph 1 and in Article 14b(1)(a); (Article 13, paragraph 3, point i, of the Regulation)

The concepts of critical and significant benchmarks are defined in Article 3 and further expanded upon in Chapters 3 and 5 respectively.

For critical benchmarks, recital 30 makes clear that the failure of a critical benchmark would have important implications for the Union or individual Member States. Therefore Article 13 and recital 31 indicate that several methods are available to designate such critical benchmarks. In particular, point (a) and point (c) of paragraph 1 of Article 13 refer to two thresholds of EUR 500 billion and EUR 400 billion, respectively, in order to ascertain whether a benchmark is critical.

Similarly, recital 31b explains the rationale for significant benchmarks, and paragraph 1 of Article 14b provides two methods for their designation, one of which relies on a threshold of EUR 50 billion.

In all of these cases, the thresholds refer to the total value of direct use of a benchmark and its indirect use within a combination of benchmarks in financial instruments or financial contracts or in the determination of the performance of investment funds on the basis of all the range of maturities or tenors of the benchmark, where applicable.

Given the large scope of different instruments which can use benchmarks and are therefore to be taken into account in the determination of a benchmark as critical or significant, it is necessary to have a standardised way of determining the value of these financial instruments, financial contracts and investment funds.

The empowerment in paragraph 3 of Article 13 is limited to the specification of how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds can be determined. It does not mention other possible ways in which the total value of financial instruments, contracts and funds using a benchmark could be determined.

It does, however, address the question how indirect reference to a benchmark within a combination of benchmarks could be taken into account. The main issue to be discussed in the technical advice is whether the value of a financial instrument, contract or fund should be taken into account fully or only partially in the calculation of the total value of a benchmark if that financial instrument, contract or fund uses a combination of benchmarks.

ESMA is invited to provide technical advice on the appropriate measurement for measuring the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds in both the direct case and also in case of the indirect reference to a benchmark within a combination of benchmarks for the purposes of assessing benchmarks under the thresholds in Article 13(1) and Article 14b(1)(a).

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

3.3. Critical Benchmarks: measures to "specify how the criteria referred to in paragraph 1(c), subparagraph (iii) are to be applied, taking into consideration any figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member States" (Article 13, paragraph 3, point iii, of the Regulation)

One of the conditions for a benchmark to be deemed a critical benchmark under Article 13, paragraph 1, point (c), is noted in subparagraph (iii): namely that "In case the benchmark ceases to be provided or is provided on the basis of input data no longer fully representative of the underlying market or economic reality or unreliable input data, there would be significant and adverse impacts on market integrity, or financial stability, or consumers, or the real economy, or the financing of households and corporations in one or more Member State."

In order to ensure that these criteria can be applied by competent authorities across the Union in a consistent and harmonised manner it is necessary to provide some further specification of how these criteria are to be applied. ESMA is tasked to specify what would be significant and adverse impacts on a number of different economic factors: market integrity, financial stability, consumers, the real economy, and the financing of households and corporations in one or more Member States.

In particular, ESMA should consider whether numerical measures, in absolute or relative terms, could be developed to ensure objective consideration of these criteria. If so, ESMA should provide advice on such numerical measures and how they should be interpreted in the

respective economic and financial context. The technical advice should allow competent authorities to base their assessment on objective grounds instead of subjective reasoning which is hard to assess.

ESMA is invited to provide technical advice on how the criteria referred to in paragraph 1(c), subparagraph (iii), are to be applied. Consideration should be given to any numerical figure to assess on an objective ground the potential of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy, or the financing of households and corporations in one or more Member States. When developing its technical advice ESMA should take into account that these criteria might have to be applied to markets and market participants of very different nature and size.

3.4. Endorsement of an administrator in a third country: measures to "to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union." (Article 21b, paragraph 8, of the Regulation)

Article 21b provides for a regime of endorsement of third country benchmarks by EU entities. In order to be endorsed, three conditions listed in Article 21b, paragraph 1, have to be met by a third country benchmark. The third condition provides that "there is an objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union". This condition should ensure that the location of the provision of the benchmark to be endorsed is not dictated by factors such as legislation or non-business related factors, i.e. it should ensure that the endorsement regime is not misused to circumvent the direct application of the Regulation in the Union.

ESMA is invited to provide in its technical advice measures to determine the conditions on which the relevant competent authorities may assess whether there is objective reason for the provision of a benchmark or family of benchmarks in a third country and their endorsement for their use in the Union. The technical advice should take into account issues such as the need for (geographical) proximity, the availability of input data and of skills necessary for the provision of the benchmark in question. In this respect it should also take into account the diversity of types of benchmarks and of the market or economic reality they are intended to reflect.

In its advice ESMA should take into account existing definitions or use of these concepts in other pieces of European law or in international fora.

3.5. Transitional provisions: measures "to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark." (Article 39, paragraph 6, of the Regulation)

Article 39(3) provides a safeguard which allows relevant competent authorities to permit the continued use of a benchmark which does not meet the requirements of the Regulation in

financial instruments or financial contracts that already reference that benchmark at the date of the entry into application of the Regulation if "*ceasing or changing that benchmark to conform with the requirements of [the] Regulation would result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references that benchmark*".

It is necessary to develop a consistent approach for competent authorities on how to assess when these conditions arise. In the preparation of its technical advice, ESMA should consider, in particular, whether the methodology, the data gathering process or other elements of the benchmark provision could be changed without resulting in a break in the benchmark time series which would make it impossible or inappropriate to continue using that benchmark in the respective financial products, and whether appropriate substitutes exist or are already envisaged in the respective contracts or documentation accompanying financial products linked to the benchmark in question. The technical advice should outline conditions under which such outcome could be ensured.

ESMA is invited to provide technical advice on how to determine the conditions on which the relevant competent authority may assess whether the cessation or the changing of an existing benchmark to conform with the requirements of this Regulation could reasonably result in a force majeure event, frustrate or otherwise breach the terms of any financial contract or financial instrument which references such benchmark.

In doing so, ESMA should take into account on the one hand similar clauses in other EU law on financial services and on the other hand, to the extent possible, differences in relevant civil law in Member States.

4. INDICATIVE TIMETABLE

This mandate takes into consideration the expected date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 37 of the Regulation.

The delegated acts provided for by the Regulation and addressed in this mandate should be adopted so that they enter into application 18 months following the entry into force of the Regulation, taking into account the right of the European Parliament and the Council to object to a delegated act within 3 months (which can be extended by 3 months). Therefore it is of the utmost importance to start preparatory work on these measures as soon as possible.

The deadline set to ESMA to deliver the technical advice is four (4) months after the entry into force of the Regulation.

The establishment of the deadlines for the work set out in this mandate is based on the following timetable which is based on the assumption that the Regulation will enter into force in May or June 2016.

Indicative timetable

Deadline	Action
Entry into force of Benchmark Regulation [June 2016, (expected)]	Date of entry into force of the Regulation (day following that of its publication in the Official Journal of the European Union)
4 months after entry into force	ESMA provides its technical advice.
4 th to 7 th month after entry into force	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA
8 th to 12 th month after entry into force	<p>Adoption and translation process of draft delegated acts</p> <p>[The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) on the draft delegated acts.</p> <p>The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.]</p>
13 th to 18 th month after entry into force	Objection period for the European Parliament and the Council (three months which can be extended by another three months)
18 months after entry into force 2017	Date of application of the Benchmark Regulation and delegated acts