



Brussels, 29.9.2017
C(2017) 6469 final

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

of 29.9.2017

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

(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.

Overall, respondents to the ESMA consultation on the draft technical advice supported ESMA's approach. This approach establishes a non-exhaustive list of criteria that competent authorities should consider together on a case-by-case basis. Respondents did not consider it necessary to add further criteria to those listed in this Delegated Regulation. Some of their more detailed suggestions were taken into account in the final technical advice; other comments did not refer to the details of the advice but to related issues.

One respondent pointed out that the value of financial instruments, financial contracts and investment funds referencing a benchmark in a Member State could be inflated by the presence of major custodians. This has been clarified in a recital of this Delegated Regulation. Another comment on the issue of the substitutability of a benchmark when deciding whether or not it might be critical has been taken up in the Delegated Regulation. However, the absence of substitutes is already one of the mandatory criteria established in Article 20(1)(c)(ii) of the Benchmark Regulation.

ESMA asked specifically whether the concept of a 'significant share', as used in several of its proposed criteria, should be further developed in terms of percentages or ranges of values. Views among those who responded to this question were split. While some would prefer ESMA to develop the concept further, others agreed with ESMA that this would be very difficult and noted that such quantitative thresholds might require frequent adjustments in response to market and economic developments in Member States. Weighing the pros and cons of quantitative thresholds, it seems appropriate not to define them in the Delegated Regulation, as legislation would not be flexible enough to ensure that they could be adjusted in response to market and economic developments and other relevant factors. This is

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>

consistent with the Benchmark Regulation, which mentions using a combination of qualitative and quantitative criteria to give the competent authorities enough flexibility to designate benchmarks as critical even if they do not exceed quantitative thresholds.

For its part, the Commission held bilateral meetings with various stakeholders to discuss the content of this delegated Regulation 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. There were no specific comments on this Delegated Act.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This Delegated Regulation sets out how the criteria referred to in Article 20(1)(c)(iii) of the Benchmark Regulation are to be applied to assess the potential impact of the discontinuity or unreliability of the benchmark on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States.

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(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 20(6)(c) thereof,

Whereas:

- (1) In view of the general nature of the qualitative condition of Article 20(1)(c)(iii) of Regulation (EU) 2016/1011 and the need to ensure a consistent application by competent authorities of that condition, it is appropriate to set out how, in the context of critical benchmarks, (i) the cessation of the provision of a benchmark, or (ii) the provision of a benchmark on the basis of input data which are no longer fully representative of the underlying market or economic reality, or (iii) the provision of a benchmark on the basis of unreliable input data, could have a significant and adverse impact on market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in one or more Member States.
- (2) Critical benchmarks are often used in Member States other than the Member State where they are provided and are used in different ways, depending on the Member State in which they are used. Therefore there is potential for significant impact in either one or more Member States or at Union level. Similarly, there is potential for significant adverse impact with regard to only one or more of the criteria referred to in Article 20(1)(c)(iii) It is therefore important to conduct the assessment both at national or market level as well as at Union level.
- (3) Regulation (EU) 2016/1011 lists five areas where significant adverse impacts might arise. While market integrity focuses on the market for a specific financial product, financial stability refers to the financial system of a Member State or the Union as a whole. Consumers are primarily impacted through the financial instruments and investment funds, including pension funds, they have invested in and the financial contracts they have signed which reference the critical benchmark in question. The potential impact on the real economy is directly related to the value of financial instruments, financial contracts and investment funds that reference that benchmark.

¹ OJ L 171, 29.6.2016, p. 1.

The potential impact on the financing of households and businesses is likely to increase with the value of outstanding loans relative to the size of the economy. Consumers and the financing of households and businesses are more vulnerable to adverse impacts where the overall level of indebtedness of households and businesses is high,

HAS ADOPTED THIS REGULATION:

Article 1

Assessment by competent authorities

1. Competent authorities shall assess whether there is a significant and adverse impact on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States, as referred to in Article 20(1)(c)(iii) of Regulation (EU) 2016/1011, in accordance with the criteria referred to in Articles 2, 3, 4, 5 and 6.
2. Where competent authorities expect that such a significant and adverse impact shall occur in more than one Member State, they shall perform a separate assessment for each Member State concerned, as well as a general assessment for all Member States.

Article 2

Significant and adverse impact on market integrity

Competent authorities shall assess whether there is a significant and adverse impact on market integrity in accordance with the following criteria:

- (a) the value of financial instruments that reference the benchmark, either directly or indirectly within a combination of benchmarks, and that are traded on trading venues in the Member States in question, both in absolute terms and relative to the total value of financial instruments that are traded on trading venues in those Member States;
- (b) the value of financial contracts that reference the benchmark, either directly or indirectly within a combination of benchmarks, in the Member States in question, both in absolute terms and relative to the total value of financial contracts outstanding in the Member States considered;
- (c) the value of investment funds referencing the benchmark for measuring their performance, either directly or indirectly within a combination of benchmarks, in the Member States considered, both in absolute terms and relative to the total value of investment funds authorised or notified for marketing in those Member States;
- (d) whether the benchmark has been nominated, in accordance with Article 28(2) of Regulation 2016/1011, as a potential substitute for, or has already been used as a successor to, other benchmarks that are included in the list of critical benchmarks referred to in Article 20(1) of Regulation (EU) 2016/1011;
- (e) with reference to standards for accounting purposes or other regulatory purposes:
 - (i) whether the benchmark is used as a reference for prudential regulation such as capital, liquidity or leverage requirements;
 - (ii) whether the benchmark is used in international accounting standards.

Article 3
Significant and adverse impact on financial stability

Competent authorities shall assess whether there is a significant and adverse impact on financial stability in accordance with the following criteria:

- (a) the value of financial instruments, financial contracts and investment funds that reference the benchmark, either directly or indirectly within a combination of benchmarks, in the Member States in question, both in absolute terms and relative to:
 - (i) the total assets of the financial sector in those Member States;
 - (ii) the total assets of the banking sector in those Member States;
- (b) the vulnerability of financial institutions having signed or invested in financial instruments, financial contracts and investment funds that reference the benchmark.

Article 4
Significant and adverse impact on consumers

Competent authorities shall assess whether there is a significant and adverse impact on consumers in accordance with the following criteria:

- (a) with reference to financial instruments and investment funds offered to consumers:
 - (i) the value of the financial instruments and investment funds referencing the benchmark, either directly or indirectly within a combination of benchmarks, sold to retail consumers in the Member States in question, both in absolute terms and relative to the total value of financial instruments and investment funds sold to retail investors in those Member States;
 - (ii) an estimate of the number of consumers who have bought financial instruments and investment funds referencing the benchmark, either directly or indirectly within a combination of benchmarks, in the Member States in question, both in absolute terms and relative to the total population in those Member States;
- (b) with reference to institutions for occupational retirement provision:
 - (i) the value of the pension schemes referencing the benchmark which are operated by institutions for occupational retirement provision in the Member States in question, both in absolute terms and relative to the total value of the pension schemes operated by institutions for occupational retirement provision in those Member States;
 - (ii) an estimate of the number of consumers participating in institutions for occupational retirement provision operating pension schemes referencing the benchmark in the Member States in question, both in absolute terms and relative to the total population in those Member States;
 - (iii) an assessment of the importance of the institutions for occupational retirement provision operating pension schemes referencing the benchmark for the retirement income of citizens of the Member States;
- (c) with reference to credit agreements for consumers:
 - (i) the value of credit agreements for consumers referencing the benchmark in the Member States in question, both in absolute terms and relative to the total value of the credit agreements for consumers in those Member States;

- (ii) an estimate of the number of consumers that have subscribed credit agreements for consumers referencing the benchmark in the Member States in question, both in absolute terms and relative to the total population in those Member States;
- (iii) the degree of indebtedness of consumers in the Member States in question.

Article 5

Significant and adverse impact on the real economy

Competent authorities shall assess whether there is a significant and adverse impact on the real economy by taking into account the value of financial instruments, financial contracts and investment funds that reference the benchmark, either directly or indirectly within a combination of benchmarks, in the Member States in question, both in absolute terms and relative to the gross national product of those Member States.

Article 6

Significant and adverse impact on the financing of households and businesses

Competent authorities shall assess whether there is a significant and adverse impact on the financing of households and businesses in one or more Member States in accordance with the following criteria:

- (a) the value of loans to households and non-financial corporates referencing the benchmark in the Member States in question, both in absolute terms and relative to the total value of loans to households or non-financial corporates in those Member States;
- (b) an estimate of the number of households that have subscribed loans referencing the benchmark in the Member States in question, both in absolute terms and relative to the total number of households in those Member States;
- (c) an estimate of the number of non-financial corporates that have subscribed loans referencing the benchmark in the Member States in question, both in absolute terms and relative to the total number of non-financial corporates in those Member States;
- (d) the degree of indebtedness of households and companies in the Member States in question.

Article 7

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