

Chapter 2

Commission Delegated Regulation (EU) 2018/1638

Preamble

THE EUROPEAN COMMISSION,
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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 596/2014, and in particular the fourth subparagraph of Article 11(5) thereof,

01/01/2021

Whereas:

(1) Article 11(1) of Regulation (EU) 2016/1011 requires the input data used for a benchmark to be appropriate to represent accurately and reliably the market or economic reality that the benchmark is intended to measure, and it also requires the data to be verifiable. In addition, where the input data is contributed from a front office function, Article 11(3)(b) of that Regulation requires the administrator to ensure that the contributor has adequate internal oversight and verification procedures in place.

(2) The correct calculation of a benchmark requires not only that the accurate values of the input data are submitted but also that they are in the unit of measurement and reflect the relevant features of the underlying assets.

(3) Whether input data is verifiable is linked to its level of accuracy, which in turn is highly dependent on the type of input data used. Input data which is neither transaction data nor comes from a regulated data source listed in point (24) of Article 3(1) of Regulation (EU) 2016/1011 may still meet the requirement of being verifiable if sufficient information is available to the administrator to enable it to conduct sufficient checks on the data. The administrator should therefore be required to ensure that it has available to it the information necessary to enable it to carry out the appropriate checks.

(4) In order to ensure that input data is appropriate and verifiable, the administrator should be required to monitor input data on a regular basis, to a degree that reflects the vulnerability of the particular input data type. In the case of regulated data, existing regulation and supervision of the relevant data provider already ensure the integrity of regulated data. That type of data should therefore be subject to less extensive monitoring requirements. Other types of input data require more verification and should be subject to more

extensive checks, notably input data that is not transaction data and especially if it is contributed from a front-office function.

(5) When input data is contributed, one important monitoring check is to ensure that the contributions are provided within a time-period set by the administrator. This is to ensure consistency between contributions from different contributors. When input data is not contributed, the time at which the input data is considered also has to be checked in order to ensure consistency between different input data. The administrator should therefore be required to check that input data is contributed, or selected from a specified source, within the time-period set by it.

(6) It is of particular importance that core features such as the currency, the tenor and the time to maturity of the underlying asset or the types of counterparties as specified by the benchmark methodology are properly checked.

(7) Effective internal oversight of the contribution of input data from a front office function relies on the establishment and maintenance of appropriate structures within the contributor's organisation. These structures should normally include three levels of control unless the size of the contributor's organisation does not reasonably allow for that number. The first level of control should include processes to ensure the effective checking of input data.

(8) Contributions from a front office function present a particular risk as a result of the inherent conflict of interest that exists between the commercial role of the front office and its role in contributing input data for a benchmark. It is therefore important for the contributor to establish, maintain and operate a conflict of interest policy as part of its second level of control, and to perform regular checks on the input data used. In addition, a notable tool that may be useful in bringing to light and escalating any misconduct, or in detecting activities potentially affecting the integrity of the benchmark, is the establishment of a whistle-blowing procedure that permits any staff member to report any instance of misconduct to the relevant compliance function or other appropriate internal function. The administrator should therefore be satisfied that the internal oversight and verification procedures of a contributor include the establishment, maintenance and operation of a conflict of interest policy and the establishment and maintenance of a whistle-blowing procedure.

(9) This Regulation applies to administrators of critical and significant benchmarks. In accordance with the principle of proportionality, it avoids putting an excessive burden on administrators of significant benchmarks by allowing these administrators to choose to apply the conflict of interest requirements solely for actual or potential conflicts of interest that are or would be material. In addition, administrators should be afforded additional discretion in how they ensure internal oversight and verification procedures at contributor level. In particular, they should be allowed to relax certain requirements for those procedures, having regard to the nature, scale and complexity of the contributor's organisation.

(10) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.

(11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(12) 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 opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council,

HAS ADOPTED THIS REGULATION: