Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2018/1642. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2018 No. 1642 may be subject to amendment by EU Exit Instruments made by the Financial Conduct Authority under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 1. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2018/1642 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/1642

of 13 July 2018

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements

(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 596/2014 of the European Parliament and of the Council[(1)], and in particular the third subparagraph of Article 25(9) thereof,

Whereas:

(1) Article 25(1) of Regulation (EU) 2016/1011 allows the administrator of a significant benchmark to choose not to apply certain provisions of that Regulation. If an administrator chooses not to apply one or more of those provisions, the competent authority has power to decide that the administrator should nonetheless apply one or more of them. Article 25(3) of that Regulation specifies criteria that a competent authority must take into account in assessing whether it would be appropriate for the administrator to apply those provisions.

(2) The criteria that a competent authority is required to take into account should take into consideration the nature of the provisions under Regulation (EU) 2016/1011 that administrators of significant benchmarks may choose not to apply. Administrators of significant benchmarks may choose not to apply certain provisions that require them to put in place organisational measures to reduce the risk of conflicts of interest resulting from their employees' involvement in the provision of the benchmark. When taking into account the criteria specified in points (a), (c) and (i) of Article 25(3) of that Regulation, competent authorities should therefore also consider whether other adequate means are in place to protect the benchmark's integrity, instead of the organisational measures that are required by those provisions.

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(3) When taking into account the criteria specified in Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider the benchmark's impact on one or more specific markets, the economy more generally and the benchmark's importance in ensuring financial stability. For this purpose, competent authorities should use information which is in the public domain or has been made available to them through disclosure by the administrator or otherwise.

(4) When taking into account the criterion specified in point (f) of Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider whether the administrator has adequate alternative technical means and control mechanisms in place to maintain the continuity of the provision of the benchmark and its robustness, taking into account the nature of the provisions that the administrator has chosen not to apply.

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

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

(7) The 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[(2)],

HAS ADOPTED THIS REGULATION:

Article 1

Vulnerability of the benchmark to manipulation

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the vulnerability of the benchmark to manipulation shall include at least the following:

(a) whether the benchmark is based on transaction data;

(b) whether the contributors are supervised entities;

(c) whether measures apply that increase the robustness of the input data;

(d) whether the administrator's organisational structure reduces incentives to manipulation;

(e) whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark;

(f) whether there are proven cases of manipulation of the same benchmark or a benchmark with a similar methodology provided by an administrator of similar size and organisational structure.

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Article 2

Nature of the input data

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature of the input data shall include at least the following:

(a) in cases where the input data is transaction data, whether the administrator is a participant in the market or economic reality that the benchmark is intended to measure;

(b) in cases where the input data is provided by contributors, whether the contributors have a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;

(c) in cases where the input data is sourced from exchanges or trading systems located in a third country, whether a regulatory and supervisory framework applies to those exchanges or trading systems that maintains the integrity of the input data;

(d) in cases where the input data consists of quotes, whether the quotes are committed or indicative and whether adequate control mechanisms apply to them.

Article 3

Level of conflicts of interest

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the level of conflicts of interest shall include at least the following:

(a) whether the administrator has a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;

(b) in cases where the benchmark is based on input data contributions, whether the administrator's relationship with the contributors is governed by adequate control mechanisms;

(c) whether the administrator has controls or other measures in place that mitigate potential conflicts of interest effectively.

Article 4

Degree of discretion of the administrator

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the degree of discretion of the administrator shall include at least the following:

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(a) in cases where the benchmark methodology allows for expert judgement by the administrator, whether the use of judgement or exercise of discretion is sufficiently transparent;

(b) in cases where the benchmark is based on estimates, the effectiveness of the internal control measures that the administrator has in place.

Article 5

Impact of the benchmark on markets

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the impact of the benchmark on markets shall include at least the following:

(a) in cases where the benchmark has particular relevance for a specific market or markets, whether the unreliability of the benchmark would have a disruptive effect on the functioning of that market or those markets and whether there are adequate substitutes for that benchmark;

(b) in cases where the benchmark qualifies as a significant benchmark by virtue of point (b) of Article 24(1) of Regulation (EU) 2016/1011, and where the information is known to the competent authority, any relevant quantitative relation of financial instruments, financial contracts, or investment funds referencing the benchmark to the total value of the respective instruments in a Member State.

Article 6

Nature, scale and complexity of the provision of the benchmark

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature, scale and complexity of the provision of the benchmark shall include at least the following:

(a) the degree to which the input data is based on contributions, whether the input data is transaction data and how this degree is reflected in the control mechanisms that the administrator has in place;

(b) the amount of input data to be processed and the number of data sources;

(c) whether the administrator has sufficient technical means to process the input data continuously and robustly;

(d) whether the methodology gives rise to operational risks in processing the input data;

(e) the extent to which the administrator relies on contributors for the determination of the benchmark.

Article 7

Importance of the benchmark to financial stability

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the importance of the benchmark