Commission Delegated Regulation (EU) 2018/67 of 3 October 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/67

of 3 October 2017

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks

(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[(1)], and in particular Article 51(6) thereof,

Whereas:

(1) To ensure that competent authorities apply Article 51(4) of Regulation (EU) 2016/1011 in the same manner, it is appropriate to set out in detail under which conditions the competent authorities may conclude that the cessation or changing of an existing benchmark could result in a force majeure event, or could frustrate or otherwise breach the terms of a financial contract or financial instrument, or the rules of an investment fund, referencing an existing benchmark.

(2) This is in particular the case in the event of a 'force majeure', a term which is interpreted in a different manner across the Member States.

(3) A significantly different value in the index is a major cause of frustration or breach of the terms of any financial contract or financial instrument or the rules of any investment fund, referencing a benchmark. Those significantly different values can be caused by a sudden discontinuity in time series of the index or a different degree of volatility of the index, which in turn can be caused by changes to the methodology for the provision of the benchmark or to the input data on which the benchmark calculation is based. Competent authorities should assess the potential impacts of such changes on a case-by-case basis since the magnitude of the discontinuity or the extent of the change in the volatility of the index depends very much on the nature of the benchmark and of the referencing financial instruments, financial contracts or investment funds.

(4) Changes to the type of input data used or the reliability of data sources can have an impact on the suitability of a benchmark for certain types of use. Competent authorities

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2018/67. 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) View outstanding changes*

should therefore assess whether those changes could cause a force majeure event, or frustrate or otherwise breach contractual terms.

(5) Force majeure events, the frustration or other breaches of contractual terms are less likely where there is an acceptable substitute benchmark or at least a procedure referenced in the relevant documents to select such a substitute benchmark.

(6) Indices measuring very particular markets might rely significantly on the reputation, judgement or expertise of the index provider. Competent authorities should therefore assess whether, in those circumstances, a change of the provider of an index could result in a force majeure event, or frustrate or otherwise breach contractual terms,

HAS ADOPTED THIS REGULATION:

Article 1

Conditions for assessment

1 A competent authority shall, for the purpose of Article 51(4) of Regulation (EU) 2016/1011, take into account the following conditions when assessing whether the cessation of or the changing of a benchmark that does not meet the requirements of that Regulation would result in a force majeure event, or would frustrate or otherwise breach the terms of any financial contract or financial instrument or the rules of any investment fund which references that benchmark:

a changing the benchmark would require a material change to the nature of the input data, to the methodology to determine those data, to the data gathering process itself or to other elements of the benchmark provision, which would lead to a significantly different value of the benchmark;

b changing the nature of the input data or the methodology to determine those data in order to make the benchmark compliant with Regulation (EU) 2016/1011 would undermine the representativeness of the benchmark of the market or the economic reality the benchmark is intended to measure, ultimately causing a change in the nature of the benchmark;

c there is no substitute benchmark for the benchmark that does not meet the requirements of Regulation (EU) 2016/1011 which:

(i) meets the requirements of Regulation (EU) 2016/1011;

(ii) measures the same market or the same economic reality;

(iii) is either included in the public register referred to in Article 36 of Regulation (EU) 2016/1011 or is provided by an administrator included in that register;

d existing financial contracts, financial instruments and investment funds referencing the benchmark, and their accompanying documents, do not provide for a substitute benchmark or do not contain rules on how such a substitute benchmark shall be determined or any other appropriate contingency measures;

e the transitioning of the benchmark from one administrator to another administrator would lead to a substantial change in the benchmark.

2 The conditions of paragraph 1 shall be applied on a case-by-case basis.