Commission Delegated Regulation (EU) 2018/65 of 29 September 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/65

of 29 September 2017

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Regulation

(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 3(2) thereof,

Whereas:

(1) According to the Regulation (EU) 2016/1011 a figure, in order to be considered as an ‘index’, must be published or made available to the public. The definition of an index is, in turn, the basis for the definition of a benchmark, as referred to in Regulation (EU) 2016/1011.

(2) It is therefore necessary to specify in which situations a figure is considered to be made available to the public in order to avoid regulatory arbitrage across the jurisdictions in the Union.

(3) The entity of the provider of the figure should not be considered to form the public for the purpose of Regulation (EU) 2016/1011 as otherwise there would not be any difference between ‘making available’ and ‘making available to the public’. For the same reasons, a narrowly defined number of recipients should not qualify as the public either.

(4) A figure should be considered to be made available to the public where it can be accessed by a wider group of persons directly or indirectly. The use of a benchmark providing the user access to the referenced figure should constitute indirect access.

(5) The making available of a figure can take place in various forms at the same time or subsequently, through the provider of the figure or through the passing on of the figure by any of the primary recipients.

(6) In order to ensure that the definition of ‘provision of a benchmark’ is applied in a uniform manner it is appropriate to specify that administering the arrangements for

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2018/65. (See end of Document for details)*

determining a benchmark, as referred to in Article 3(1)(5)(a), involves the ongoing management of the benchmark provision and the setting, adaptation and ongoing maintenance of the methodology,

HAS ADOPTED THIS REGULATION:

Article 1

Making available to the public

1 A figure shall be considered to be made available to the public for the purposes of Regulation (EU) 2016/1011 where the figure is made accessible to a potentially indeterminate number of legal and natural persons other than the index provider or other than a determined number of recipients connected or related to the index provider

2 A figure is made available to the public where it may be accessed by such persons either directly or indirectly as a result, inter alia, of its use by one or more supervised entities as a reference for a financial instrument it issues or to determine the amount payable under a financial instrument or a financial contract, or to measure the performance of an investment fund, or to provide a borrowing rate calculated as a spread or mark-up over such figure.

3 Access may take place through a variety of media and modalities, set out by the provider or agreed between the provider and the recipients, free of charge or upon payment of a fee, including, but not limited to, telephone, file transfer protocol, internet, open access, news, media, through financial instruments, financial contracts or investment funds referencing the figure or by way of request to the users.

Article 2

Administering the arrangements for determining a benchmark

For the purposes of Regulation (EU) 2016/1011, administering the arrangements for the determination of a benchmark shall include both of the following:

(a) the ongoing management of the provider's structures and of its personnel that are involved in the determination process of a benchmark;

(b) the setting, adaptation and ongoing maintenance of a specific methodology for determining a benchmark.

Article 3

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.