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

**of 16.2.2022**

**supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying rules of procedure for measures applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Regulation (EU) 2019/2175 (the Regulation), amending, among others, Regulation (EU) No 2016/1011 (the ‘Benchmark Regulation’ or ‘BMR’), was published in the Official Journal on 27 December 2019. It grants new supervisory powers to ESMA in relation to benchmark administrators. In particular, the new Article 40(1) of BMR states that, starting on 1 January 2022, ESMA will be the competent authority for:

- administrators of a critical benchmark as referred to in points (a) and (c) of Article 20(1) of BMR; and
- third country administrators of benchmarks as referred to in Article 32 of BMR, *i.e.* third country administrators under the recognition regime of BMR.

Article 48i(10) of BMR, empowers the Commission to adopt a delegated act to further specify the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

On 18 June 2020, the Commission asked ESMA for an opinion (technical advice) on the Commission delegated regulations to be adopted under Article 48i(10) and 48l(3) of BMR.

Following an in-depth technical assessment, ESMA conducted a public consultation on the technical aspects of the envisaged delegated regulation on fines from 23 December 2020 to 23 January 2021. One stakeholder responded to ESMA's consultation.

ESMA submitted its technical advice on 23 March 2021.

The sole respondent to the consultation on ESMA's proposed procedure regarding fines provided feedback regarding the time limits within which the person subject to investigation may make written submissions throughout the investigation, the right to legal counsel, the lack of a cost bearing rule, the confidentiality of the enforcement file and the limitation periods for the imposition and enforcement of penalties, including periodic penalty payments.

Benchmark administrators will fall under ESMA's supervisory remit if they are administrators of critical benchmarks or benchmark administrators located in third countries and seeking to be recognised in the Union. For critical benchmarks, this transfer of competences, which will concern only EMMI as the administrator of EURIBOR, is without prejudice to international efforts to reduce the reliance on IBOR benchmarks and improve the liquidity of alternative risk-free rates.<sup>1</sup>

In February 2021, Regulation (EU) 2021/168 amended Regulation (EU) No 2016/1011, suspending the chapter governing the rules for use of third country benchmarks until at least 2023 (with a mandate to the Commission to extend this suspension until December 2025 if circumstances so require), and requiring the Commission, within the time indicated in Article

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<sup>1</sup> See e.g., the remarks made by ESMA at the 11 May 2021 meeting of the working group on euro risk-free rates, [https://www.ecb.europa.eu/paym/interest\\_rate\\_benchmarks/WG\\_euro\\_risk-free\\_rates/shared/pdf/20210511/2021\\_05\\_11\\_Minutes\\_WG\\_on\\_Euro\\_RFR\\_meeting\\_EDITED.pdf](https://www.ecb.europa.eu/paym/interest_rate_benchmarks/WG_euro_risk-free_rates/shared/pdf/20210511/2021_05_11_Minutes_WG_on_Euro_RFR_meeting_EDITED.pdf) or the most recent progress report on interest rate benchmark reform by the Financial Stability Board, <https://www.fsb.org/wp-content/uploads/P191120.pdf>.

54, paragraph 6, to act on its obligation to review the third country provisions in their entirety and more in general the scope of Regulation (EU) No 2016/1011, if deemed necessary, submitting a proposal to reform this chapter to Council and Parliament<sup>2</sup>. As a consequence, provisions on fines and on recognition and supervisory fees for third country benchmark administrators contained in this delegated act should apply only to administrators located in third countries which have voluntarily applied for recognition before the end of the transitional period and where the relevant national competent authority or ESMA has granted such recognition.

On 19 July 2021, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on ESMA's technical advice and on the content of this delegated act. EGESC has approved the Commission's approach.

The delegated act has been subject to a four week feedback period from 30 July to 27 August 2021 in line with the principles laid down in the Interinstitutional Agreement on Better Law-Making. No feedback was submitted on this DA.

An impact assessment has not been carried out for the following reasons:

- This proposed Regulation follows largely the measures proposed by ESMA in its technical advice.
- The decision to impose fines and periodic penalty payments on administrators of benchmarks under ESMA's competence, which is the main policy decision, was taken in the Benchmark Regulation, which already sets out the method for calculating these penalties and the situations when they should be imposed. The Regulation also establishes benchmarks administrators' rights of defence. The overall objectives and the need for these rules were outlined in the impact assessment accompanying the Commission proposal for Regulation (EU) 2019/2175.
- The provisions for fines included in this delegated act are of a procedural nature. This Regulation follows the logic from previously adopted Regulations on fines and periodic penalty payments that are in ESMA's supervisory remit.

### **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

Article 1 of the delegated regulation sets out the relevant definition.

Articles 2 - 9 of the delegated regulation sets out the provisions on fines and penalties. The articles describe the procedure for the exercise of power to impose fines or penalties.

Article 10 of the delegated regulation sets out the final provisions.

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<sup>2</sup> Article 54(6) of Regulation (EU) 2021/168 reads as follows: “By 15 June 2023, the Commission shall submit a report to the European Parliament and to the Council on the scope of this Regulation, in particular with respect to the continued use by supervised entities of third-country benchmarks and on potential shortcomings of the current framework. That report shall assess in particular whether there is a need to amend this Regulation in order to reduce its scope to the provision of certain types of benchmarks or to the provision of benchmarks that are widely used in the Union and shall be accompanied, where appropriate, by a legislative proposal”. Article 54(7) reads as follows: “The Commission is empowered to adopt a delegated act in accordance with Article 49 by 15 June 2023 in order to extend the transitional period referred to in Article 51(5) until 31 December 2025 at the latest if the report referred to in paragraph 6 of this Article demonstrates that, otherwise, the continued use in the Union of certain third-country benchmarks by supervised entities would be significantly impaired or would pose a threat to financial stability.”

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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<sup>3</sup>, and in particular Articles 48i(10) thereof,

Whereas:

- (1) In accordance with Article 48f and 48g of Regulation (EU) 2016/1011 the European Securities and Markets Authority ('ESMA') is empowered to impose fines and periodic penalty payments under certain conditions on the benchmark administrators under its supervision. Article 48i(10) of Regulation (EU) 2016/1011 requires the Commission to specify the rules of procedure for the exercise of the power to impose these fines or periodic penalty payments including the rights of the defence, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalties.
- (2) When ESMA finds that there are serious indications of possible existence of facts liable to constitute one or more infringements of the requirements set out in Article 42 of (EU) 2016/1011 for benchmark administrators under its supervision, ESMA appoints an independent investigation officer within ESMA to investigate the matter. Upon completion of its work, the investigation officer should transmit a complete file to ESMA. Being informed of these findings and having the opportunity to respond to them is integral to the right of defence. Therefore, the person under investigation should be informed of the investigation officer's findings, and should have the opportunity to respond to these findings within a reasonable time limit. The persons subject to the investigation should be allowed to be assisted by a counsel of their choice. The investigation officer should consider, whether, as a result of the submissions made by the person subject to the investigation, it is necessary to amend the statement of findings before submitting it to ESMA.
- (3) ESMA should assess the completeness of the file submitted by the investigation officer based on a list of documents. To ensure that the person subject to the investigation is able to adequately prepare their defence, before adopting a final decision with regard to fines or supervisory measures, ESMA should make sure that they are given the opportunity to provide further written comments.

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<sup>3</sup> OJ L 171 29.6.2016, p. 1.

- (4) In order to ensure that the person subject to the investigation cooperates with an investigation, ESMA should be able to take certain coercive measures. When ESMA has taken a decision requiring a person to bring an infringement to an end, or has requested to supply complete information or to submit complete records, data or any other material, or has taken a decision to conduct an on-site inspection, it may impose periodic penalty payments in order to compel the person subject to the investigation to comply with the decision taken. Before imposing periodic penalty payments ESMA should provide the person the opportunity to provide written submissions.
- (5) As the investigation officer carries out their work independently, ESMA should not be bound by the file they prepared. However, to ensure that the person subject to the investigation is able to adequately prepare their defence, where ESMA disagrees, they should, be informed and should be given the opportunity to respond.
- (6) To ensure that the person subject to the investigation is able to adequately prepare their defence, they should be informed and should have the opportunity to respond where ESMA agrees with all or part of the findings of the investigation officer.
- (7) The right to be heard should be weighed against the need, under specific circumstances, for urgent action by ESMA. Where urgent action pursuant to Article 48e of Regulation (EU) 2016/1011 is warranted, the right to be heard of the person subject to the investigation should not be an impediment to ESMA taking urgent measures. In such cases, the right to be heard of the person subject to the investigation should be assured as soon as possible after taking the decision. The procedure should nonetheless grant the right of the person subject to the investigation to be heard by the investigation officer.
- (8) ESMA's power to impose a periodic penalty payment should be exercised with due regard for the right to defence and should not be maintained beyond the period necessary. Where ESMA makes a decision to impose a periodic penalty payment, the person concerned should therefore have the opportunity to be heard and any penalty payment should no longer be due as of the moment the person concerned complies with ESMA's order to which it relates.
- (9) The files prepared by ESMA and the investigation officer contain information that is indispensable to the person concerned in preparing for judicial or administrative proceedings. After a person subject to investigation has received the notification of statement of finding either from the investigation officer or from ESMA, the person should be entitled to have access to the file subject to the legitimate interest of other persons in the protection of their business secrets. The use of file documents accessed should only be permitted for judicial or administrative procedures in relation to infringements of Article 42 of Regulation (EU) 2016/1011.
- (10) Both the power to impose fines and periodic penalty payments and the power to enforce fines and periodic penalties should be exercised within a reasonable time, and should therefore be subject to a limitation period. For reasons of consistency, limitation periods for the imposition and enforcement of fines or periodic penalty payments should take into account existing Union legislation applicable to the imposition and enforcement of penalties on supervised entities and ESMA's experience in applying such legislation. In order for ESMA to ensure safekeeping of collected fines and periodic penalties, ESMA should deposit them on interest-bearing accounts that are opened exclusively for the purpose of a single fine or periodic penalty payments aiming at ending a single infringement. As a matter of budgetary

prudence, ESMA should only transfer the amounts to the Commission once the decisions are final due to the rights to appeal being exhausted or lapsed.

- (11) In accordance with Regulation (EU) 2021/168 of the European Parliament and of the Council<sup>4</sup> third country benchmarks can be used in the Union without the need for the relevant administrators to seek equivalence, recognition or endorsement in a transitional period extended until 2023. During this transitional period, recognition in the Union is an opt-in regime for benchmark administrators located in third countries, which indicates that their benchmarks will remain available for use in the Union after the transitional period ends. As a consequence, during such period, provisions on fines should apply only to administrators located in third countries which have voluntarily applied for recognition before the expiry of the transitional period introduced by Regulation (EU) 2021/168 and where the relevant national competent authority or ESMA has granted recognition.
- (12) In order to ensure the smooth application of the new supervisory powers attributed to ESMA, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

### *Article 1* **Definitions**

For the purpose of this Regulation, the following definitions applies:

- (1) “critical benchmark” means a critical benchmark pursuant to article 20(1), points (a) and (c), of Regulation (EU) 2016/1011;
- (2) “third country benchmark” means a benchmark whose administrator is located outside the Union.

### *Article 2* **Rules of procedure in infringement proceedings before the investigation officer**

1. Upon completion of an investigation of potential infringements listed in Article 42(1), point (a), of Regulation (EU) 2016/1011, and before submitting a file to ESMA, the investigation officer as referred to in Article 48i(1) of that Regulation, shall inform the person subject to investigation in writing of its findings and shall provide that person with the opportunity to make written submissions pursuant to paragraph 3. The statement of findings shall set out the facts liable to constitute one or more of the infringements of the requirements set out in Title VI of Regulation (EU) 2016/1011, including an assessment of the nature and seriousness of those infringements, taking into account the criteria laid down in Article 48e(2) of that Regulation.
2. The statement of findings shall set a reasonable time limit for the person subject to investigation to make its written submissions. In investigations other than those referred to in Article 6, this time limit shall be at least four weeks. The investigation officer shall not be obliged to take into account a written submissions received after that time limit has expired.

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<sup>4</sup> Regulation (EU) 2021/168 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) 2016/1011 as regards the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation, and amending Regulation (EU) No 648/2012 (OJ L 49, 12.2.2021, p. 6)

3. In its written submissions, the person subject to investigation may set out the facts, which it considers relevant for its defence and shall, if possible, attach documents as proof of the facts set out. The person subject to investigation may propose that the investigation officer hears other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
4. The investigation officer may invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The person subject to investigation may be assisted by a counsel of their choice. Oral hearings shall not be public.

### *Article 3*

#### ***Rules of procedure in infringement proceedings before ESMA with regard to fines and supervisory measures***

1. The complete file to be submitted by the investigation officer to ESMA shall include the following documents:
  - the statement of finding and a copy thereof addressed to the benchmark administrator or the person subject to the investigation;
  - a copy of the written submission by the benchmark administrator or the person subject to the investigation;
  - the minutes of any oral hearing.
2. When a file is incomplete, ESMA shall make a reasoned request for additional documents to the investigation officer.
3. Where ESMA considers that the facts described in the statement of findings of the investigation officer do not constitute infringements of the requirements set out in Title VI of Regulation (EU) 2016/1011, it shall decide to close the case and it shall notify that decision to the person subject to investigation.
4. Where ESMA does not agree with the findings of the investigation officer it shall submit a new statement of findings to the person subject to investigation. That statement of findings shall set a time limit of at least four weeks within which the person subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Article 48e and 48f of Regulation (EU) 2016/1011.
5. Where ESMA agrees with all or some of the findings of the investigation officer it shall inform the person subject to investigation accordingly. Such communication shall set a time limit of at least two weeks in case ESMA agrees with all of the findings, and at least four weeks in case ESMA does not agree with all of the findings, within which period the person subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 48e and 48f of Regulation (EU) 2016/1011.
6. ESMA may invite the person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The person subject to

investigation may be assisted by a counsel of their choice. Oral hearings shall not be public.

7. If ESMA decides that one or more of the infringements of the requirements provided for in Title VI of Regulation (EU) 2016/1011 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 48f of that regulation, it shall notify immediately that decision to the person subject to investigation.

#### *Article 4*

#### ***Rules of procedure in infringement proceedings before ESMA with regard to periodic penalty payments***

1. Before making a decision imposing a periodic penalty payment pursuant to Article 48g of Regulation (EU) 2016/1011, ESMA shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a periodic penalty payment and the amount of the periodic penalty payment per day of non-compliance. The statement of findings shall set a time limit of at least four weeks within which the person subject to the proceeding may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.
2. Once the benchmark administrator or person subject to the proceeding referred to in article 48b(1) of Regulation (EU) 2016/1011 has complied with the relevant decision referred to in Article 48g(1) of Regulation (EU) 2016/1011, a periodic penalty payment shall no longer be imposed.
3. A decision by ESMA to impose a periodic penalty payment shall indicate the legal basis and the reasons for the decision and the amount and the starting date of the periodic penalty payment.
4. ESMA may invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by a counsel of their choice. Oral hearings shall not be public.

#### *Article 5*

#### ***Rules of procedure for interim decisions on supervisory measures***

1. By way of derogation from Article 3(4), (5) and (6) and Article 4(1) and (4), the procedure set out in this Article shall apply where ESMA adopts interim decisions pursuant to Article 48j(1), second subparagraph, of Regulation (EU) 2016/1011.
2. Where ESMA decides that an infringement of a requirement provided for in Title VI of Regulation (EU) 2016/1011 has been committed by a person subject to investigation and adopt an interim decision imposing supervisory measures pursuant to Article 48e of Regulation (EU) 2016/1011, it shall notify immediately that interim decision to the person subject to the interim decision.

ESMA shall set a time limit of at least four weeks within which the person subject to interim decision may make a written submission on the interim decision. ESMA shall not be obliged to take into account a written submission received after the expiry of that time limit.

Upon request, ESMA shall grant access to the file to the person subject to the interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) 2016/1011.

ESMA may invite the person subject to the interim decision to attend an oral hearing. The person subject to the interim decision may be assisted by a counsel of their choice. Oral hearings shall not be public.

3. ESMA shall take a final decision as soon as possible after the adoption of the interim decision.

Where ESMA considers, after having heard the person subject to interim decision, that an infringement of a requirement set out in Title VI of Regulation (EU) 2016/1011 have been committed by the person subject to the interim decision, it shall adopt a confirmatory decision imposing one or more supervisory measures laid down in Article 48e of Regulation (EU) 2016/1011. ESMA shall immediately notify that decision to the person subject to the interim decision.

4. Where ESMA adopts a final decision that does not confirm the interim decision, the interim decision shall be deemed to be repealed.

#### *Article 6*

##### *Access to the file and use of documents*

1. Upon request, ESMA shall grant access to the file to the person subject to the investigation to whom the investigation officer or ESMA has sent a statement of findings. Access shall be granted following the notification of any statement of findings.
2. File documents accessed shall be used by the person referred to in paragraph 1 only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) 2016/1011.

#### *Article 7*

##### *Limitation periods for the imposition of fines and periodic penalty payments*

1. Fines and periodic penalty payments on benchmark administrators and other persons subject to investigation shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall begin on the day following that on which the infringement is committed. In case of continued or repeated infringements, that limitation period shall begin on the day on which the infringement ceases.
3. Any action taken by ESMA or by the national competent authority acting at the request of ESMA in accordance with article 48m of Regulation (EU) 2016/1011 for the purpose of the investigation or proceedings in respect of an infringement pursuant to title VI of Regulation (EU) 2016/1011 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the benchmark administrators or the person subject to the investigation in respect of an infringement pursuant to Regulation (EU) 2016/1011.
4. Each interruption as referred to in paragraph 3 shall restart the limitation period. The limitation period shall expire at the latest on the day on which a period equal to twice

the limitation period has elapsed without ESMA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of ESMA is subject to proceedings pending before the Board of Appeal, referred to in Article 60 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>5</sup>, and before the Court of Justice of the European Union, in accordance with Article 48k of Regulation (EU) 2016/1011.

#### *Article 8*

##### ***Limitation periods for the enforcement of penalties***

1. The power of ESMA to enforce decisions taken pursuant to Articles 48e and 48g of Regulation (EU) 2016/1011 shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall be calculated from the day following that on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted by:
  - (a) a notification by ESMA to the person subject to the proceedings of a decision varying the original amount of the fine or periodic penalty payment;
  - (b) any action of ESMA, of a national competent authority acting at the request of ESMA in accordance with article 48m of Regulation (EU) 2016/1011, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
4. Each interruption referred to in paragraph 3 shall restart the limitation period.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
  - (a) time to pay is allowed;
  - (b) enforcement of payment is suspended pursuant to a pending decision of the ESMA Board of Appeal, in accordance with Article 60 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 48k of Regulation (EU) 2016/1011.

#### *Article 9*

##### ***Collection of fines and periodic penalty payments***

1. The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest-bearing account opened by ESMA until such time as they become final. Where several fines and periodic penalty payments are collected by ESMA in parallel, ESMA shall ensure that they are lodged to different accounts or subaccounts. Fines and periodic penalty payments paid shall not be entered into ESMA's budget or recorded as budgetary amounts.

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<sup>5</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

2. Once ESMA has established that the fines or periodic penalty payments have become final following the exhaustion of all appeal rights that accounting officer shall transfer those amounts and potential interest accruing to the Commission. These amounts shall then be entered in the union Revenue budget.
3. ESMA shall report on a regular basis to the Commission on the amounts of fines and periodic penalty payments imposed and their status.

*Article 10*

***Entry into force and date of application***

This Regulation shall enter into force and apply on the third 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, 16.2.2022

*For the Commission*

*The President*

*Ursula VON DER LEYEN*