

Amendments to the Benchmark Regulation



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Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices and financial contracts or to measure the performance of investment funds (the "Regulation") represents a common framework for indices within the meaning of the Regulation to be used as benchmarks: (i) in financial instruments and financial contracts; or (ii) to measure the performance of investment funds in the European Union. It came into force on 1 January 2018.

It should be noted, that for the purpose of the Regulation, an 'index' means any figure:

- that is published or made available to the public;
- that is regularly determined:

(i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and

(ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.

The aim of the Regulation is to establish a preventive regulatory framework, to avoid conflicts of interest, which implies the existence of opportunities and incentives to manipulate benchmarks, especially in light of the recent cases of manipulation of interest rate benchmarks such as LIBOR and EURIBOR.

In the offering documents of Luxembourg funds vehicles, such as alternative investment funds, reference should be made to the use of a reference value, if applicable.

The Regulation is about to be amended to include:

- new benchmarks for low-carbon investments (introduced as part of a broader Commission initiative on sustainable development);
- a two-year extension in favour of providers of "critical benchmarks" (i.e. interest rates such as EURIBOR) for the implementation of the Regulation; and
- a two-year extension of the deadline for the use of third-country reference values â€ˆâ€ˆnot currently abiding by the Regulation.

It shall be noted that so far no precise timing can be given regarding the confirmation of the amendment of the Regulation. The final review by the European Parliament as well as the adoption and publication of the envisaged amendments are still pending. However, it is difficult to set a precise timing for the implementation of the amendments due to the fact that elections have just taken place at the European level.

Environmental Benchmarks

Regarding the new benchmarks for low-carbon investments, benchmarks for climate-friendly investments and a special benchmark that aligns investment portfolios with the objectives of the Paris Agreement should be created. These two new environmental benchmarks will be voluntary markings designed to reduce the phenomenon of "green-washing". For example, the benchmark for compliance with the climate objectives of the Paris Agreement can only be used by companies that demonstrably aim to achieve the 1.5 degree Celsius target from the Paris Agreement. This is very much welcomed in light of a shift towards Environmental, Social and Governance (ESG) investing.

Extensions for Existing Benchmarks

The European Commission has agreed with the European Parliament and the European Council to allow providers of critical benchmarks to extend the compliance deadline under the Regulation by two years, until 31 December 2021, so that they can meet the requirements of the changes under the Regulation. It also provided for a two-year extension for benchmarks established outside the European Union to determine how such benchmarks could be used by third countries within the European Union.

It should also be noted that on 23 May 2019, the European Securities and Markets Authority (ESMA) updated its Q&A on the Regulation. Among other things, ESMA clarified that the reference Member State, pursuant to Article 32(4) of the Regulation, is the Member State in which an administrator is reported at the time of the application of such Article 32(4) of the Regulation.

New ESMA Guidelines

In addition to the update of 23 May 2019, ESMA has issued a new set of guidelines in respect of non-significant benchmarks under the Regulation (the "NSB Guidelines"). The NSB Guidelines have a focus on the following topics:

- procedures and characteristics of the oversight function (Article 5 of the Regulation);
- input data (Article 11 of the Regulation);
- transparency of methodology (Article 13 of the Regulation); and
- governance and control requirements for supervised contributors (Article 16 of the Regulation).

In accordance with the provisions of Article 16 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (the "ESMA Regulation"), the CSSF has decided to apply the NSB Guidelines accordingly.

The Investment Funds and Banking & Finance Practice Groups, would be delighted to assist you with any questions related to the Regulation. We would happily assist you with drafting a provision on benchmark and more generally with your entire investment funds project.