

Indices used as benchmarks in financial instruments and financial contracts

2013/0314(COD) - 28/04/2016 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 505 votes to 113 with 31 abstentions a legislative resolution on the proposal for a regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts. The vote had been put back at the plenary sitting of 19 May 2015.

The amended text stressed that serious cases of manipulation of interest rate benchmarks such as LIBOR and EURIBOR, as well as allegations that energy, oil and foreign exchange benchmarks have been manipulated, demonstrate that **benchmarks can be subject to conflicts of interest**. The use of discretion, and weak governance regimes, increase the vulnerability of benchmarks to manipulation.

Parliament's position adopted in first reading following the ordinary legislative procedure amended the Commission proposal as follows:

Subject matter: the Regulation introduces a common framework to ensure the accuracy and integrity of indices used as benchmarks in financial instruments and financial contracts, or to measure the **performance of investment funds** in the Union.

Governance and conflict of interest requirements: an administrator, being the natural or legal person that has control over the provision of a benchmark, shall have in place **robust governance arrangements** and:

- **publish** or disclose all existing or potential conflicts of interest to users of a benchmark, to the relevant competent authority and, where relevant, to contributors;
- establish and **operate adequate policies and procedures**, as well as effective organisational arrangements, for the identification, disclosure, prevention, management and mitigation of conflicts of interest in order to protect the integrity and independence of benchmark determinations;
- ensure that: (a) their employees and any other natural persons whose services are placed at their disposal or under their control and who are directly involved in the provision of a benchmark **have the necessary skills, knowledge and experience** for the duties assigned to them and are subject to effective management and supervision; (b) the **compensation** and performance evaluation of those persons do not create conflicts of interest.
- establish specific internal control procedures to ensure the integrity and reliability of personnel.

Oversight, methodology and transparency: administrators shall maintain a permanent and effective oversight function and **robust procedures** to ensure oversight of all aspects of the provision of their benchmarks.

The oversight function shall operate **with integrity and shall have certain responsibilities**, which include reviewing the benchmark's definition and methodology at least annually, overseeing any changes to the benchmark methodology and being able to request the administrator to consult on such changes.

The administrator shall adjust these responsibilities **based on the complexity, use and vulnerability of the benchmark**. The oversight function shall be carried out by a separate committee or by means of another appropriate governance arrangement.

The administrator shall also:

- have in place a **control framework** covering particularly: (i) management of operational risk; (ii) adequate and effective business continuity and disaster recovery plans; (iii) contingency procedures that are in place in the event of a disruption to the process of the provision of the benchmark;
- have in place an **accountability framework**, covering record-keeping, auditing and review, and a complaints process, that provides evidence of compliance with the requirements of the Regulation; an internal function with the necessary capability to review and report on the administrator's compliance with the benchmark methodology and the Regulation;
- **ensure record-keeping**, including inter alia, all input data, any exercise of judgement or discretion by the administrator and, where applicable, by assessors, in the determination of a benchmark, and telephone conversations or electronic communications between any person employed by the administrator and contributors or submitters in respect of a benchmark. These shall be kept for at least five years (three years for telephone conversations or electronic communication);
- have in place and publish procedures for receiving, investigating and retaining records concerning **complaints made**, including about the administrator's benchmark determination process.
- ensure that certain conditions are fulfilled when **outsourcing** takes place;
- publish the **key elements of the methodology** that the administrator uses for each benchmark provided and published or, when applicable, for each family of benchmarks provided and published;
- establish adequate systems and effective controls to ensure the integrity of input data in order to be able to **identify and report** to the competent authority any conduct that may involve manipulation or attempted manipulation of a benchmark,

Input data: the input data shall be **verifiable**. Controls in respect of input data shall include: (a) criteria that determine who may contribute input data to the administrator and a process for selecting contributors; (b) a process for evaluating a contributor's input data and for stopping the contributor from providing further input data, or applying other penalties for non-compliance against the contributor, where appropriate; and (c) a process for validating input data.

Code of conduct: where a benchmark is based on input data from contributors, its administrator shall develop a code of conduct for each benchmark clearly specifying contributors' responsibilities with respect to the contribution of input data. Members set out the main elements that must be included in the code of conduct. Administrators must ensure that supervisors adhere to the code of conduct.

Types and size of benchmarks: the text introduces proportionality in the Regulation to avoid putting an excessive administrative burden on administrators of benchmarks the cessation of which poses less threat to the wider financial system. Thus, in addition to the **regime for critical benchmarks** (used for financial instruments or contracts having a total average value of at least EUR 50 billion), two distinct regimes should be introduced: one for significant benchmarks and one for non-significant benchmarks (which do not fulfil the conditions for significant benchmark).

Administrators of non-significant benchmarks are subject to a less detailed regime, whereby administrators should be able to choose not to apply some requirements of the Regulation. In such a case, the administrator in question should explain why it is appropriate not to do so in a compliance statement, which should be published and provided to the administrator's competent authority.

Authorisation and supervision: certain administrators should be authorised and supervised by the competent authority of the Member State where the administrator in question is located. Entities that provide only indices that qualify as non-significant benchmarks should be registered and supervised by the relevant competent authority.

Benchmarks provided by administrators in third countries: the amended Regulation:

- introduces a **process for the recognition** of administrators located in a third country on condition that they comply with the requirements of the Regulation, and they apply the principles of the International Organization of Securities Commissions (IOSCO);
- introduces an **endorsement regime** allowing, under certain conditions, administrators or supervised entities located in the Union to endorse benchmarks provided from a third country in order for such benchmarks to be used in the Union.

Commodity benchmarks: certain commodity benchmarks are exempt from the Regulation but would need to nevertheless respect the relevant IOSCO principles.

Freedom of expression: the Regulation does not apply to the press, other media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with no control over the provision of that benchmark.