

Subsidiary Legislation made under s.118, s.53 of the Financial Services (Investment and Fiduciary Services) Act, s.79 of the Financial Services (Banking) Act, s.62 of the Financial Services (Markets in Financial Instruments) Act 2006 and s.53 of the Financial Services (Collective Investment Schemes) Act 2011.

BENCHMARKS REGULATIONS 2017

(LN. 2017/245)

Commencement **1.1.2018**

Implementing:

Regulation (EU) 2016/1011

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In exercise of the powers conferred upon the Minister by section 118 of the Financial Services (Insurance Companies) Act, section 53 of the Financial Services (Investment and Fiduciary Services) Act, section 79 of the Financial Services (Banking) Act, section 62 of the Financial Services (Markets in Financial Instruments) Act 2006, and section 53 of the Financial Services (Collective Investment Schemes) Act 2011, as read with section 23(g)(i) of the Interpretation and General Clauses Act, and upon the Government by section 23(g)(ii) of that Act and of all other enabling powers, and in order to implement 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, the Minister and the Government have made the following Regulations.

PART 1

PRELIMINARY

Title and commencement.

- 1.(1) These Regulations may be cited as the Benchmarks Regulations 2017.
- (2) Save as is set out below, these Regulations come into operation on 1st January 2018.
- (3) Regulations 33 and 34 come into operation on 1st July 2018.

Interpretation.

- 2.(1) In these Regulations—

“the EU Benchmarks Regulation” means 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, as amended from time to time;

“the FSC” means the Financial Services Commission established under section 3 of the Financial Services Commission Act 2007.

- (2) Expressions used in these Regulations that are also used in the EU Benchmarks Regulation have the same meaning in these Regulations as they have in the EU Benchmarks Regulation.

Meaning of infringement.

3. For the purposes of these Regulations “an infringement” means—

- (a) an infringement of Articles 4 to 16, 21, 23 to 29, or 34 of the EU Benchmarks Regulation; or
- (b) a failure to comply with a supervisory or investigatory power set out in Part 2.

Application of EU Benchmark Regulation.

4. The EU Benchmarks Regulation has effect in Gibraltar subject to these Regulations.

Designation of competent authority.

5. The FSC is designated as the competent authority for the purposes of the EU Benchmarks Regulation.

PART 2**SUPERVISORY AND INVESTIGATORY POWERS****Exercise of supervisory and investigatory powers.**

6. The FSC may exercise the powers under this Part in respect of its functions under the EU Benchmarks Regulation.

Access to documents and data.

7.(1) The FSC may require a person to give it any document or other data in any form, which relates to the provision of, or contribution to, a benchmark.

(2) The power under this regulation includes a power to take a copy of the document or other data.

Access to telephone and electronic records.

8.(1) This regulation applies in respect of supervised entities and is without prejudice to the generality of regulation 7.

(2) The FSC may require a supervised entity to give it existing records of–

- (a) telephone conversations;
- (b) electronic communications; and
- (c) other data traffic records,

held by the supervised entity.

Access to information and right to ask questions.

9.(1) This regulation applies in respect of–

- (a) a person involved in the provision of, or contribution to, a benchmark;
- (b) a service provider to which functions, services or activities in the provision of a benchmark have been outsourced;
- (c) a principal of such a service provider.

(2) The FSC may require a person to whom this regulation applies to–

- (a) supply information to it;
- (b) attend before it in order to be questioned.

Access to information on spot markets.

10.(1) This regulation applies in respect of contributors to commodity benchmarks.

(2) The FSC may require a person to whom this regulation applies to–

- (a) supply information on related spot markets (where applicable in standardised formats);
- (b) supply reports on transactions;
- (c) provide direct access to traders' systems.

On-site inspections and investigations.

11.(1) This regulation applies in respect all premises, other than the private residences of individuals.

(2) The FSC may carry out an on-site inspection or investigation, at reasonable times and with reasonable notice, of a place to which this regulation applies.

Entry of premises and seizure of documents under warrant.

12.(1) A justice of the peace may issue a warrant authorising a person to enter and search premises if the justice of the peace is satisfied, on information on oath, that there are reasonable grounds for suspecting that–

- (a) an infringement is being, has been or is about to be committed on the premises; or
 - (b) evidence is to be found on the premises of the commission of an infringement.
- (2) An application for a warrant–
- (a) may be made by a person acting under the authority of the FSC or of a constable; and
 - (b) must specify the premises to which it relates.
- (3) A warrant–
- (a) continues in force for one month beginning with the date on which it was issued;
 - (b) authorises a person acting under the authority of the FSC or a constable to–
 - (i) enter the premises specified in the warrant, using such force as may be reasonably necessary;
 - (ii) search the premises and inspect any relevant information found on the premises;
 - (iii) take copies of or seize and remove any relevant information found on the premises or take any other steps which may appear to be necessary for preserving or preventing interference with any relevant information;
 - (iv) require any person on the premises to provide an explanation of any relevant information or to state where it may be found.
- (4) Any relevant information of which possession is taken may be retained–
- (a) for up to three months; or
 - (b) if within that time enforcement action under Part 3 is commenced, until the conclusion of that action.
- (5) In this regulation, “relevant information” means any document or information which a person acting under a warrant issued under this

regulation reasonably believe may be required as evidence for the purposes of an enforcement action under Part 3.

Freezing and sequestration orders.

13.(1) The FSC may apply to the Supreme Court for an order freezing or sequestering assets if it is of the opinion that the grounds set out in sub-regulation (3) are satisfied.

(2) The Court may make the order if the grounds in sub-regulation (3) are satisfied.

(3) Those grounds are that the order is necessary for the FSC to effectively fulfil its functions under these Regulations or the EU Benchmarks Regulation, and–

- (a) failure to do so would jeopardise the stability or security of financial markets;
- (b) the assets are being used for an infringement;
- (c) failure to do so may result in evidence of an infringement being disposed of; or
- (d) it is necessary for the protection of consumers.

Temporary cessation order.

14.(1) The FSC may order a person to temporarily cease any conduct which, in the opinion of the FSC constitutes an infringement.

(2) The order must specify the date upon which it expires.

(3) This action may be taken against the administrator or supervised entity responsible for the infringement.

Temporary prohibition on person carrying out professional activity.

15.(1) The FSC may temporarily prohibit an individual from carrying out professional activity in relation to benchmarks if it is of the opinion that the grounds set out in sub-regulation (4) are satisfied.

(2) The prohibition must specify the date upon which it expires.

(3) The FSC may–

- (a) withdraw a prohibition; or

- (b) vary a prohibition so as to reduce the period for which it has effect.

(4) Those grounds are that the order is necessary for the FSC to effectively fulfil its functions under these Regulations or the EU Benchmarks Regulation, and–

- (a) failure to do so would jeopardise the stability or security of financial markets;
- (b) the assets are being used for an infringement;
- (c) failure to do so may result in evidence of an infringement being disposed of; or
- (d) it is necessary for the protection of consumers.

Power to keep public informed about benchmarks.

16.(1) The FSC may take all necessary measures to ensure that the public are correctly informed about the provision of a benchmark.

(2) Without prejudice to the generality of sub-regulation (1), the FSC may require–

- (a) an administrator;
- (b) a person who has published or disseminated a benchmark;

to publish a corrective statement about past contributions to, or figures of, the benchmark.

PART 3

ENFORCEMENT AND SANCTIONS

Enforcement powers

Sanctions for infringements.

17. The FSC may take any of the actions specified in regulations 18 to 23 if it is satisfied that there has been an infringement.

Public warning.

18.(1) The FSC may publish a statement specifying–

- (a) the nature of the infringement; and
- (b) the identity of the person responsible for it.

(2) Publication under this regulation may take any form, or combination of forms, that the FSC thinks appropriate.

(3) This action may be taken against the administrator or supervised entity responsible for the infringement.

Cease and desist order.

19.(1) The FSC may order a person–

- (a) to cease any conduct which constitutes an infringement; and
- (b) to desist from any repetition of that conduct.

(2) This action may be taken against the administrator or supervised entity responsible for the infringement.

Disgorgement of profits.

20.(1) The FSC may order a person–

- (a) to account for the profits gained or losses avoided, where those can be determined, by the infringement; and
- (b) to make restitution payments to those who have suffered loss, where this can be determined, as a result of the infringement.

(2) This action may be taken against the person responsible for the infringement.

Withdrawal or suspension of authorisation.

21.(1) The FSC may withdraw or suspend the authorisation or registration of an administrator.

(2) A suspension must specify date upon which it expires.

(3) The FSC may–

- (a) cancel a withdrawal or suspension; or
- (b) vary a suspension so as to reduce the period for which it has effect.

(4) This action may be taken against the person responsible for the infringement.

Temporary prohibition on person exercising management functions.

22.(1) The FSC may temporarily prohibit an individual from exercising management functions in administrators or supervised contributors.

(2) The prohibition must not exceed 12 months.

(3) The FSC may–

- (a) withdraw a prohibition; or
- (b) vary a prohibition so as to reduce the period for which it has effect.

(4) This action may be taken against the individual responsible for the infringement.

Civil penalty.

23.(1) The FSC may impose a penalty for an infringement.

(2) The maximum penalty is three times the amount of profits gained or loss avoided by the infringement, where those can be determined, even if this exceeds the amounts set out in sub-regulation (3) or (4).

(3) For an individual, the maximum penalty is–

- (a) EUR 100,000 (or the Sterling equivalent based upon the exchange rate as at 30 June 2016) in respect of an infringement of Article 11(1)(d) or Article 11(4) of the EU Benchmarks Regulation;
- (b) EUR 500,000 (or the Sterling equivalent based upon the exchange rate as at 30 June 2016) in respect of any other infringement.

(4) For a person who is not an individual, the maximum penalty is–

- (a) in respect of an infringement under Article 11(1)(d) or Article 11(4) of the EU Benchmarks Regulation, the greater of–
 - (i) EUR 250,000 (or the Sterling equivalent based upon the exchange rate as at 30 June 2016); or

(ii) 2% of the total annual turnover of the person according to the most recent accounts approved by the management body;

(b) in respect of any other infringement, the greater of—

(i) EUR 1,000,000 (or the Sterling equivalent based upon the exchange rate as at 30 June 2016); or

(ii) 10% of the total annual turnover of the person according to the most recent accounts approved by the management body.

(5) Sub-regulation (6) applies in respect of the calculation of turnover where the person is a—

(a) parent undertaking; or

(b) subsidiary of a parent undertaking;

which has to prepare consolidated annual accounts in accordance with Directive 2013/34/EU.

(6) Where this sub-regulation applies, total annual turnover is—

(a) total annual turnover;

(b) in respect of banks, the corresponding amount of income in accordance with Council Directive 86/635/EEC;

(c) in respect of insurance companies, the corresponding amount of income in accordance with Council Directive 91/674/EEC;

according to the last available set of consolidated accounts approved by the management body of the ultimate parent undertaking.

(7) Where the person is an association, total annual turnover is 10% of the aggregate turnovers of its members.

(8) A penalty imposed under this regulation may be enforced in the same manner as a debt owed to the FSC.

Procedure for enforcement

Criteria for exercise of enforcement powers.

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24. The FSC must ensure that the type and level of any enforcement action is effective, proportionate and dissuasive, taking account of all relevant circumstances, including where appropriate—

- (a) the gravity and the duration of the infringement;
- (b) the criticality of the benchmark to financial stability and the real economy;
- (c) the degree of responsibility of the person against whom the enforcement power is being exercised;
- (d) the financial strength of the person, for example as indicated by total annual turnover or annual income;
- (e) in so far as they can be determined, the level of the profits gained or losses gained by reason of the infringement;
- (f) the level of cooperation with the FSC by the person, without prejudice to the need to ensure disgorgement of profits gained or losses avoided;
- (g) previous infringements by the person;
- (h) measures taken after the infringements by the person to prevent its repetition.

Warning notices.

25.(1) Before taking action under these Regulations in respect of an infringement, the FSC must give the person concerned a warning notice, stating the action proposed and the reasons for it.

(2) Sub-regulation (1) does not apply if the FSC is satisfied that a warning notice—

- (a) cannot be given because of urgency;
- (b) should not be given because of the risk that steps would be taken to undermine the effectiveness of the action to be taken;
or
- (c) is superfluous having regard to the need to give notice of legal proceedings or for some other reason.

(3) A warning notice—

- (a) must give the recipient not less than 14 days to make representations; and
 - (b) must specify a period within which the recipient may decide whether to make oral representations.
- (4) The period for making representations may be extended by the FSC.

Decision notices.

26.(1) This regulation applies where the FSC has–

- (a) issued a warning notice, or
 - (b) dispensed with the requirement to give a warning notice in accordance with regulation 25(2).
- (2) After considering any representations made in accordance with regulation 25, the FSC must issue–
- (a) a decision notice stating that the FSC will take the action specified in the warning notice;
 - (b) a discontinuance notice stating that the FSC does not propose to take that action; or
 - (c) a combined notice consisting of a decision notice stating that the FSC will take certain action specified in the warning notice and a discontinuance notice in respect of the remaining action.
- (3) A decision notice takes effect, and the specified action may be taken–
- (a) at the end of the period for bringing an appeal if no appeal is brought; or
 - (b) when any appeal is finally determined or withdrawn.

Appeals.

27.(1) The person on whom a decision notice is served may appeal to the Supreme Court.

(2) An appeal must be brought within 28 days of the date of the decision notice.

Interim orders.

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28. The FSC may apply to the Supreme Court for permission to take action under these Regulations where a decision notice has been given and has not yet taken effect (whether or not a warning notice has been given).

Publication.

29.(1) Subject to regulations 30 and 31, the FSC must publish on its website details of any action taken under this Part in respect of an infringement.

(2) Publication must take place immediately after the person has been informed of the decision.

(3) The information published must include at least—

- (a) the identity of the person against whom the action has been taken; and
- (b) the type and nature of the infringement.

(4) The FSC must ensure that any publication is of proportionate duration and remains on its website for a minimum of five years, but that personal data is only retained on the website for so long as is necessary, in accordance with the Data Protection Act 2004.

Restrictions on publication.

30.(1) The FSC must take one of the steps in sub-regulation (2) where—

- (a) following an obligatory prior assessment, it considers that it would be disproportionate to publish, in accordance with regulation 29, the identity of the person, or personal data of an individual; or
- (b) it considers that publication, in accordance with regulation 29, would jeopardise the stability of financial markets or an ongoing investigation.

(2) Those steps are—

- (a) to defer publication until the reasons for non-publication cease to exist;
- (b) to publish on an anonymous basis if doing so ensures effective protection of the personal data concerned; or
- (c) not to publish if the steps in paragraphs (a) and (b) are considered to be insufficient to ensure—

- (i) that the stability of the financial markets would not be put in jeopardy; or
- (ii) the proportionality of the publication with regard to measures which are deemed to be of a minor nature.

(3) In the case of a decision to publish on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.

Publication, annulments and appeals.

31.(1) Where an enforcement action is appealed, the FSC must–

- (a) immediately publish on its website the fact that the decision is being appealed; and
- (b) when the appeal is concluded, immediately publish the outcome of the appeal.

(2) Where an enforcement action is annulled for any reason, that annulment must also be published.

FSC's powers.

32. Part V of the Financial Services (Investment and Fiduciary Services) Act applies to these Regulations as it applies to that Act and the FSC may exercise any power under that Part for the purpose of supervising or investigating compliance with or enforcing the EU Benchmarks Regulation or these Regulations.

PART 4

AMENDMENTS

Amendment to Financial Services (Consumer Credit) Act 2011.

33. (1) Section 7 of the Financial Services (Consumer Credit) Act 2011 is amended as follows.

(2) After subsection (1)(u) insert–

- “(v) in the case of a credit agreement which references a benchmark, the name of the benchmark and of its administrator, and the potential implications for the

consumer, and for these purposes “benchmark” and “administrator” have the same meanings as in Regulation (EU) 2016/1011 of the European Parliament and of the Council.”.

(3) After subsection (2) insert–

“(2A) But the information required by subsection (1)(v) shall be supplied in a separate document which may be annexed to the form contained in Schedule 1.”.

Amendments to the Financial Services (Mortgage Credit) Regulations 2016.

34.(1) In regulation 25 of the Financial Services (Mortgage Credit) Regulations 2016, after sub-regulation (2)(e) insert–

“(ea) where contracts that reference a benchmark are available, the names of the benchmarks and of their administrators and the potential implications for the consumer, and for these purposes “benchmark” and “administrator” have the same meanings as in Regulation (EU) 2016/1011 of the European Parliament and of the Council.”.

(2) In regulation 46 of the Financial Services (Mortgage Credit) Regulations 2016, after sub-regulation (1) insert–

“(1A) Regulation 25(2)(ea) does not apply to a mortgage credit agreement which was entered into before 1 July 2018.”.