

**COMMISSION DELEGATED REGULATION (EU) 2022/805****of 16 February 2022****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying fees applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators****(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 <sup>(1)</sup>, and in particular Article 48l(3) thereof,

Whereas:

- (1) Article 48l of Regulation (EU) 2016/1011 requires ESMA to charge administrators of critical benchmarks and third-country benchmark administrators fees associated with applications for authorisation pursuant to Article 34 and for recognition under Article 32 of that Regulation and annual fees associated with the performance of its tasks in accordance with that Regulation in relation to critical benchmarks and recognised third-country benchmark administrators. Article 48l(2) of Regulation (EU) 2016/1011 requires that such fees be proportionate to the turnover of the benchmark administrator concerned and cover all costs incurred by ESMA for the authorisation or recognition and the performance of its tasks in relation to critical benchmark administrators and third-country benchmark administrators in accordance with that Regulation.
- (2) Fees charged for ESMA's activities related to administrators of critical benchmarks and of third country benchmarks should be set at a level such as to avoid a significant accumulation of deficit or surplus. Where there is a recurrent significant surplus or deficit, the level of fees should be revised.
- (3) Fees associated with applications for authorisation ('authorisation fees') and recognition ('recognition fees') should be charged to administrators of critical and of third-country benchmarks to cover ESMA's costs for processing applications for authorisation and recognition, including costs for verifying that applications are complete, requesting additional information, drafting of decisions and costs relating to the assessment of the systemic importance of critical benchmarks as well as the compliance of third-country benchmark administrators.
- (4) Considering that the assessment of applications are equally resource intensive whether submitted by large or small administrators, the recognition fee should be a lump-sum recognition fee identical for all third country administrators.
- (5) On the basis of the expected workload and the cost this represents for ESMA, to be fully covered by the one-off recognition fee, the cost of assessing a recognition application should be set to EUR 40 000.
- (6) Critical benchmarks are subject to more intense scrutiny under Regulation (EU) 2016/1011, and their administrators need to comply with more stringent organisational requirements. As a result, the authorisation process represents a higher workload for ESMA. Therefore, the authorisation fee for the administrator of a critical benchmark should be significantly higher than the fee for assessing an application for recognition.
- (7) In order to promote the quality and completeness of applications received and in line with ESMA's approach towards the registration of entities it supervises, the recognition fee should be due at the time of the submission of the application.

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

- (8) Annual fees are also to be charged to administrators of critical benchmarks and of recognised third-country benchmark to cover ESMA's costs for the performance of its tasks under Regulation (EU) 2016/1011 as regards the ongoing supervision of such administrators. For third country benchmarks, such fees should cover the implementation and maintenance of cooperation arrangements with third-country authorities and the monitoring of regulatory and supervisory developments in third countries. For critical benchmarks, the fees should also cover the expenses sustained by ESMA with respect to the supervision on an ongoing basis of compliance by those administrators with the requirements set out in Article 48l and Titles VI of Regulation (EU) 2016/1011, including through comparable compliance, where granted.
- (9) The cost of ongoing supervision of a critical benchmark depends on whether it requires ESMA to constitute and chair a college of supervisors for that benchmark, which represents a considerable additional workload. As a result, it is appropriate to differentiate between both cases in establishing supervision fees. By contrast, within the category of critical benchmarks, it should not be necessary to differentiate the supervision fees in accordance with the annual turnover of the administrator, as critical benchmarks by definition have a systemic impact in the Union.
- (10) Applying for recognition in the Union is a decision taken by third country benchmark administrators on commercial grounds, as offering their benchmarks in the Union is expected to generate revenue. Therefore, for recognised third country benchmark administrators, supervisory fees should be modulated as a function of the revenue they derive from the use of these benchmarks in the Union. In cases where no revenue is generated, a minimum supervisory fee should be set at EUR 20 000.
- (11) In order to discourage repeated or unfounded applications, recognition fees and authorisation fees should not be reimbursed in the case where an applicant withdraws its application. As the administrative work required in the case of an application for recognition or for authorisation that is refused is the same as that required in the case of an application that is accepted, recognition fees and authorisation fees should not be reimbursed if authorisation or recognition is refused.
- (12) In accordance with Regulation (EU) 2021/168 of the European Parliament and of the Council <sup>(2)</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 recognition and supervisory fees 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.
- (13) 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*

#### **Subject matter and scope**

This Regulation lays down rules on fees that ESMA can charge to benchmark administrators in relation to authorisation, recognition and supervision.

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<sup>(2)</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).

*Article 2***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 3***Recognition fees and authorisation fees**

1. A benchmark administrator established in a third country that applies for recognition pursuant to article 32 of Regulation (EU) 2016/1011 shall pay a recognition fee of EUR 40 000.
2. The administrator of a critical benchmark that applies for authorisation in accordance with article 34 of Regulation (EU) 2016/1011 shall pay an application fee of EUR 250 000.
3. The authorisation fee and the recognition fee shall be paid at the time of the submission of the application, upon receipt of ESMA's debit note.
4. In the case of the applications received by national competent authorities after 1 October 2021 and transferred to ESMA, the recognition fees shall be paid at the beginning of 2022.
5. Recognition fees and authorisation fees shall not be reimbursed.

*Article 4***Annual supervisory fees**

1. The administrator of one or more critical benchmarks shall pay an annual supervisory fee:
  - (a) of EUR 250 000, in cases where ESMA has to chair a college of supervisors pursuant to article 46 of Regulation (EU) 2016/1011;
  - (b) of EUR 200 000, in cases where ESMA does not have to chair a college of supervisors pursuant to article 46 of Regulation (EU) 2016/1011.
2. A benchmark administrator established in a third country recognised by ESMA shall pay an annual supervisory fee calculated as follows:
  - (a) the annual supervisory fee for a given year (n) shall be the total annual fee for recognised third country administrators adjusted by the turnover coefficient;
  - (b) the total annual fee for recognised third country administrators for a given year (n) shall be equal to the ESMA supervisory budget for Regulation (EU) 2016/1011 for that year (n) minus the annual supervisory fees to be paid to ESMA by critical benchmark administrators for the year (n);
  - (c) for each third country administrator, the turnover coefficient shall be its share of the applicable turnover in the aggregate turnover generated by all recognised third country administrators

$$\text{Turnover Coefficient 'administrator i'} = \frac{\text{applicable turnover of administrator i}}{\sum \text{applicable turnover of all third country administrators}}$$

- (d) the minimum annual supervisory fee for recognised third country administrators shall be EUR 20 000, including when the applicable turnover of the recognised third country administrator is equal to zero.

3. Benchmark administrators shall pay their relevant annual supervisory fees to ESMA at the latest on 31 March of the calendar year in which they are due. If information for the previous calendar years are not available, the fees shall be calculated on the basis of the latest available information for annual fees. The annual fees paid are not reimbursed.

#### Article 5

##### **Annual supervisory fees in year of recognition or authorisation**

By way of derogation from article 4, the supervisory fee in the first year for recognised third country administrators and for authorised critical benchmark administrators, with reference to the year in which they have been recognised or authorised shall be calculated by reducing the supervisory fee, adjusting it by the following coefficient:

$$\text{Coefficient} = \frac{\text{Number of calendar days from the date of registration until 31 December}}{\text{Number of calendar days in year (n)}}$$

The supervisory fee of the first year shall be paid after the administrator has been notified by ESMA that its application has been successful and within 30 days from the date of issuance of ESMA's relevant debit note.

By way of derogation, where a benchmark administrator is authorised during the month of December, it shall not pay first-year supervisory fee.

#### Article 6

##### **Applicable turnover**

The turnover of a recognised third country benchmark administrator shall be its revenues accrued in relation to the use of its benchmarks by supervised entities in the Union during the benchmark administrator's most recently completed financial year.

A recognised third country benchmark administrator shall provide ESMA, on an annual basis, with audited figures confirming its revenues accrued in relation to the use of its benchmarks in the Union. The figures shall be certified by an external audit and shall be submitted to ESMA by electronic means before 30 September every year. If a third country administrator is recognised after 30 September of a calendar year, it shall provide the figures immediately upon recognition and by end of the calendar year of recognition. The documents containing audited figures shall be provided in a language customary to financial services.

If the revenues reported are expressed in a currency other than the euro, ESMA shall convert them into an amount in euro using the average euro foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank shall be used.

Third country administrators recognised before 1 January 2022 shall provide ESMA with their turnover of 2020 by 31 January 2022.

#### Article 7

##### **General payment modalities**

1. All fees shall be payable in euro.
2. Any late payments shall incur a daily penalty equal to 0,1 % of the amount due.

#### Article 8

##### **Payment of application and authorisation fees**

1. The fees for application, authorisation or extension of authorisation shall be due at the time the benchmark administrator applies and shall be paid in full within 30 days from the date of issuance of ESMA's invoice.

2. ESMA shall not reimburse fees to a benchmark administrator that decides to withdraw its application for authorisation.

#### *Article 9*

##### **Payment of annual supervisory fees**

1. The annual supervisory fee referred to in Article 4 for a financial year shall be paid to ESMA before 31 March of the calendar year for which they are due. The fees shall be calculated on the basis of the latest available information for annual fees.
2. ESMA shall not reimburse annual supervisory fees.
3. ESMA shall send the invoice to the benchmark administrator at least 30 days before the payment is due.

#### *Article 10*

##### **Reimbursement of national competent authorities**

1. In case of a delegation of tasks by ESMA to national competent authorities, only ESMA shall charge the recognition fee and the annual supervisory fees for third country administrators and administrators of critical benchmarks.
2. ESMA shall reimburse a national competent authority for the actual costs incurred as a result of work carried pursuant to Regulation (EU) 2016/1011, with an amount which fulfils the following conditions:
  - (a) the amount is agreed by ESMA and the competent authority before the delegation of tasks takes place;
  - (b) the amount is lower than the total amount of supervisory fees paid to ESMA by the relevant administrators of benchmarks.

#### *Article 11*

##### **Transitional provisions**

1. Article 3 shall not apply to administrators of critical benchmarks and of third country benchmarks already authorised or recognised by national competent authorities prior to the entry into force of this regulation.
2. In derogation of Article 12(1), in case this Regulation enters into force after the third month of 2022, the annual supervisory fees over 2022 applicable to administrators of benchmarks under ESMA supervision shall be due within 30 days from the date of issuance of ESMA's invoice.
3. For the purposes of the calculation in Article 4(2) of the annual supervisory fees applicable to benchmark administrators under ESMA supervision for the year 2022 the applicable turnover shall, in derogation of Article 4(2)(a)-(d), be provisionally based on revenue generated in 2021. When the audited accounts over 2021 become available the benchmark administrators shall submit them to ESMA without delay. ESMA will recalculate the annual supervisory fees over the year 2021 based on the audited accounts and will submit a final invoice, for the difference, to each benchmark administrator.

#### *Article 12*

##### **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 February 2022.

*For the Commission*  
*The President*  
Ursula VON DER LEYEN

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