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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon
impact benchmarks

(Text with EEA relevance)

{SEC(2018) 257 final} - {SWD(2018) 264 final} - {SWD(2018) 265 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

This proposal is part of a broader Commission's initiative on sustainable development. It lays the foundation for an EU framework which puts Environmental, Social and Governance (ESG) considerations at the heart of the financial system to support transforming Europe's economy into a greener, more resilient and circular system. To make investments more sustainable ESG factors should be considered in the investment decision making process to make investments more sustainable, when taking into account gas emissions, resource depletion, or working conditions. This proposal and legislative acts proposed alongside aim at integrating ESG considerations into the investment and advisory process in a consistent manner across sectors. This should ensure that all financial market participants (UCITS management companies, AIFMs, insurance undertakings, IORPs, EuVECA managers and EuSEF managers), insurance distributors or investment advisors, who receive a mandate from their clients or beneficiaries to take investment decisions on their behalf, integrate ESG considerations into their internal processes and inform their clients in this respect. Furthermore, to help investors compare the carbon footprint of investments, the proposals introduce new categories of low carbon and positive carbon impact benchmarks. These proposals, which are mutually reinforcing should facilitate investments in sustainable projects and assets across the EU.

The Commission's package follows global efforts towards a more sustainable economy. Governments around the world chose a more sustainable path for our planet and our economy by adopting the **2016 Paris agreement on climate change** and the **United Nations (UN) 2030 Agenda for Sustainable Development**.

The EU is committed to a development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Sustainability has since long been at the heart of the European project. The EU Treaties give recognition to its social and environmental dimensions, which should be addressed together.

The 2016 Commission Communication on the next steps for a sustainable European future links the Sustainable Development Goals (SDGs)¹ of the UN 2030 Agenda for Sustainable Development to the European policy framework to ensure that all EU actions and policy initiatives, within the EU and globally, take the SDGs on board at the outset. The EU is also fully committed to reaching the EU 2030 climate and energy targets and to mainstream sustainable development into EU policies, as announced in the 2014 **Political Guidelines for the European Commission**² by Jean-Claude Juncker. Therefore, many of the European Commission's policy priorities for 2014-2020 feed into the EU climate objectives and implement the 2030 Agenda for Sustainable Development. These include the **Investment Plan for Europe**³, the **Circular Economy Package**⁴, the **Energy Union package**⁵, the

¹ The 17 SDGs provide qualitative and quantitative objectives for the next 15 years to prepare ourselves for the future and work towards human dignity, stability, a healthy planet, fair and resilient societies and prosperous economies.

² A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change - Political Guidelines for the next European Commission, Strasbourg, 15 July 2014 available at: https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: An Investment Plan for Europe (COM(2014) 0903 final).

Update of the EU Bioeconomy Strategy⁶, the Capital Markets Union⁷ and the EU budget for 2014-2020, including the **Cohesion fund** and research projects. In addition, the Commission launched a multi-stakeholder platform to follow-up and exchange best practices on SDGs implementation.

Achieving EU sustainability goals requires important investments. In the climate and energy space alone, it is estimated that an additional annual investment of EUR 180 billion is needed to meet climate and energy targets by 2030.⁸ A substantial part of these financial flows will have to come from the private sector. Closing this investment gap means significantly reorienting private capital flows towards more sustainable investments and requires a comprehensive rethinking of the European financial framework.

In this context, the Commission established in December 2016 a **High-Level Expert Group (HLEG)** to develop a comprehensive EU strategy on sustainable finance. The HLEG published its final report⁹ on 31 January 2018. This report provided a comprehensive vision on sustainable finance for Europe and identified two imperatives for Europe's financial system. The first is to improve the contribution of finance to sustainable and inclusive growth. The second is to strengthen financial stability by incorporating ESG factors into investment decision-making. The HLEG issued eight key recommendations, which it believes are the essential building blocks of a sustainable European financial system. Among these recommendations, the HLEG considers that index providers should be asked to disclose details of the index's exposure to sustainability parameters based on the securities included within the index and their weights. At the same time, ESMA should include references to sustainability considerations in its guidance on the 'Benchmark statement' that should clearly indicate how sustainability (ESG) considerations, including the transition to a low-carbon economy, are reflected in the methodology of the benchmark.

The HLEG pointed out that indices and benchmarks have an indirect but important impact on investments. Many investors rely on benchmarks in particular in portfolio allocation and to measure the performance of financial products. While index providers have been developing a wide range of indices aimed at capturing sustainability and climate considerations, their significance in overall portfolio allocation remains limited.

To follow-up on the work of the HLEG and in order to contribute to broader efforts to connect finance with the needs of the planet and society, the Commission published on 8 March 2018

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Closing the loop - An EU action plan for the Circular Economy COM(2015) 614 final.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM(2015) 80 final.

⁶ Ares(2018)975361

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union (COM(2015)468 final).

⁸ The estimate is a yearly average investment gap for the period 2021 to 2030, based on PRIMES model projections used by the European Commission in the Impact Assessment of the Proposal of the Energy Efficiency Directive (2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1483696687107&uri=CELEX:52016SC0405>.

⁹ Final Report 2018 by the High-Level Expert Group on Sustainable Finance: "Financing A Sustainable European Economy".

an **Action Plan on Financing Sustainable Growth**¹⁰. In this Action Plan, the Commission announced forthcoming measures to enhance the ESG transparency of benchmark methodologies and an initiative to put forward standards for the methodology of low-carbon benchmarks in the Union.

The common standards for low carbon benchmarks would seek to address the risk of 'greenwashing', whereby all low carbon indices are being equally promoted as environmentally relevant despite having different characteristics. In addition, different levels of ESG transparency in the methodology make it difficult for market players to compare indices in order to choose the adequate benchmarks for their investment strategy.

In order to address the issues identified, this proposal puts forward an amendment to the Benchmark Regulation. It establishes two categories of benchmarks: (i) low-carbon benchmarks and (ii) positive carbon impact benchmarks.

- **Consistency with existing policy provisions in the policy area**

The proposal will amend the Benchmarks Regulation by introducing rules establishing and governing the provision of low carbon and positive carbon impact benchmarks. It is consistent with the objective of the Benchmarks Regulation, which seeks to ensure that benchmarks ensure an accurate and reliable representation of economic realities, and that they can be easily understood by all stakeholders, thus supporting a high level of consumer and investor protection. The proposal introduces further requirements for making the methodology of the new categories of benchmarks transparent, so as to make them more comparable and to enable better decision making by portfolio managers.

- **Consistency with other Union policies**

The proposal complements the existing EU environmental and climate policies by improving ESG transparency of benchmark methodologies and introducing harmonised rules for low carbon benchmarks that should lead to more efficient channelling of investment towards sustainable assets.

This proposal is part of a package of measures on sustainable finance that is a priority action under the Capital Markets Union project. It contains measures to harness the transformative power of financial technology and to shift private capital towards sustainable investment. It contributes to the development of more integrated capital markets by making it easier for investors to benefit from the single market whilst taking informed decisions.

This proposal is also part of a more comprehensive EU strategy to deliver on the EU's climate and sustainable development agenda and feeds into the Union's energy and climate goals for 2014-2020, such as the Clean Air Policy, the Circular Economy Package, the Energy Union Strategy, including the Clean Energy for All Europeans Package and the EU Strategy on Adaptation to Climate Change.

This proposal is consistent with the review of the European System of Financial Supervision¹¹ that foresees the European Banking Authority,¹² the European Insurance and Occupational

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan: Financing Sustainable Growth (COM(2018)097 final).

¹¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1093/2010, 1094/2010, 1095/2010, 345/2013, 346/2013, 600/2014, 2015/760, 2016/1011, 2017/1129 (COM(2017) 536 final).

Pensions Authority¹³ and the European Securities and Markets Authority¹⁴ to take account of risks related to environmental, social and governance factors when carrying out their tasks so that financial market activities are more consistent with sustainable objectives. Finally, this proposal is consistent with the Commission proposal on a pan-European Personal Pension Product (PEPP) that also foresees several disclosures in relation to environmental, social and governance factors¹⁵.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Article 114 of the Treaty on the Functioning of the European Union (TFEU) confers to the European Parliament and the Council the competence to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which relate to the establishment and functioning of the internal market. Article 114 TFEU allows the EU to take measures not only to eliminate current obstacles to the exercise of the fundamental freedoms and to prevent such obstacles from emerging, including those that make it difficult for economic operators, including investors, to take full advantage of the benefits of the internal market.

The absence of EU harmonised rules for low carbon benchmarks created divergent standards for these benchmarks, potentially leading to investor confusion and suboptimal choice of indices to measure the performance of low carbon funds and products. Article 114 of the TFEU gives the EU the right to act in order to (i) ensure the functioning of the internal market with regard to low carbon indices that are used to measure the performance of low carbon investment portfolios, (ii) reduce the obstacles to the smooth functioning of the internal market, and (iii) facilitate cross-border investments into sustainable activities throughout the Union.

• Subsidiarity (for non-exclusive competence)

The Commission proposal to amend the Benchmark Regulation is in line with the principle of subsidiarity as laid down in Article 5(3) of the Treaty on European Union (TEU), which requires the Union to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union.

While some benchmarks are national, the use of benchmarks in financial contracts and products is often cross-border. While action at national level in relation to an index may help ensure that it is appropriately tailored to the specific national considerations, it risks missing

¹² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

¹³ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

¹⁴ 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).

¹⁵ Commission Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP) (COM(2017) 343 final).

the cross-border dimension and may ultimately lead to a patchwork of divergent rules, creating an un-level playing field within the single market and resulting in an inconsistent approach across the EU. Action at national level would also be inconsistent with the objectives of the Benchmark Regulation that aims at harmonising rules governing the production and use of benchmarks across the Union. This problem has been recognised by the G20 and FSB which charged IOSCO with producing a global set of principles to apply to financial benchmarks. An amendment of the Benchmarks Regulation would help enhance the single market by improving the common framework for reliable and appropriately used benchmarks across different Member States.

- **Proportionality**

The proposed amendment to the Benchmark Regulation is proportionate, as required by Article 5(4) of TEU. It targets those indices that include sustainability considerations, in particular low-carbon indices. Only those providers will be affected by this proposal.

The proposal follows a proportionate approach making sure that new obligations are imposed on the administrators of benchmarks who already are subject to similar requirements under the Benchmarks Regulation. The administrative burden should therefore not increase disproportionately. Furthermore, in some cases it may even reduce the burden of administrators of low-carbon benchmarks as the proposal puts forward clear and harmonised rules for such benchmarks, thus possibly reducing the costs of developing internal policies.

- **Choice of the instrument**

An amendment to the Benchmark Regulation is the most appropriate legal instrument to introduce ESG disclosure rules as well as harmonised minimum standards for low-carbon benchmarks across the Union, given the cross-border nature of many benchmarks. The use of a Regulation, which is directly applicable without requiring national legislation, will restrict the possibility of divergent measures being taken by competent authorities at national level, and will ensure a consistent approach and greater legal certainty throughout the EU.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

HLEG was set up in December 2016 to help develop an EU strategy on Sustainable Finance through recommendations: it published a HLEG interim report on "Financing a Sustainable European Economy" in mid-July 2017 and presented the report at a stakeholder event on 18 July 2017, followed by a consultation questionnaire. A feedback statement was published along with the HLEG final report on Financing a Sustainable European Economy on 31 January 2018. The feedback statement summarises the respondents' answers, notably regarding the role of ESG benchmarks.

In addition, the Commission consulted some stakeholders on i) the need for harmonisation of standards for methodologies at European level; ii) barriers to the use of low-carbon indices; and iii) key elements that should be included in a methodology for low-carbon benchmarks. Stakeholders' opinions are summarised below.

Targeted interviews with stakeholders

A diverse group of stakeholders was interviewed, including respondents from asset management, benchmarks administrators, market infrastructure, banking, and advocacy/think tanks.

The interviews revealed that asset managers generally use two types of low carbon indices: a 'mainstream low-carbon' index and a 'pure-play low-carbon' index. Asset managers see low-carbon indices as a tool for managing the risk of possible future regulatory intervention that might lead to 'stranded' assets. They largely focus on "decarbonised" indices. These indices are construed on the basis of a standard or 'parent' benchmark, removing or underweighting the companies with relatively high carbon emission footprints.

The providers of low-carbon indices seek to reduce the overall carbon footprint of the index underlying portfolio when compared to the standard indices that generally apply weighting based on market capitalisation. For examples, they could aim at a 40% reduction in the carbon footprint compared to the standard or 'parent' index. 'Pure-play' index providers argue that these mainstream 'decarbonised' indices are not aligned with the 2C° objectives of the Paris Climate Agreement; they advocate for a more stringent methodology for selecting benchmark components, such as a carbon impact ratio.

The interviews also revealed significant differences in how index providers measure carbon footprint. Most mainstream index providers tend to look at carbon emissions directly caused by a company's production activities ('scope 1 emissions') and indirect emissions generated by the supply of raw materials or other 'inputs' procured by the company upstream in order to produce its products or deliver its services ('scope 2 emissions'). Representatives of 'pure-play' index providers believe, however, that this approach is insufficient to reflect a company's carbon footprint as emissions caused by a company's customers are completely disregarded ('scope 3 emissions').

Questionnaire

Asset managers, reinsurance companies, benchmark providers and one banking association replied to questions on the usefulness of harmonised standards for the methodology for low-carbon indices.

The respondents stated that they do not use a low-carbon index because: (i) current methodologies do not reflect all sources of carbon emissions; (ii) their clients (investors) have no confidence in the methodology employed by available low-carbon indices; and (iii) there is an absence of low-carbon indices reflecting their investments approach and style.

The respondents observed that there is merit in developing harmonised standards for the low carbon index methodology at EU level and stressed the importance of reliable data on indirect carbon emissions by users or suppliers of a company.

When asked what the main features of low-carbon indices should be, the majority of respondents observed that scope 3 emissions should be included in assessing the carbon emissions. Some respondents noted that the methodology of a low-carbon index should be aligned with a potential upcoming EU taxonomy. However, some respondents were sceptical about the development of a harmonised methodology at EU level, mentioning concerns about the available data, the unclear link between the carbon footprint and environmental risks with financial impact (e.g. transition risk), and the backward-looking nature of most methods.

- **Collection and use of expertise**

The proposal is built on the HLEG report on sustainable finance which recommends taking steps to improve financial market benchmark transparency and guidance. This proposal also

carefully considers the alignment with other HLEG recommendations, such as disclosure and the taxonomy of what is considered sustainable.

The proposal also builds upon the study *Defining 'green' in the context of green finance* commissioned by the Commission in 2017. The study presents:

- an overview and analysis of worldwide efforts on defining 'green' for green bonds, lending and listed equity;
- the means and scope for identifying green assets and activities through conceptual definitions, taxonomies, ratings methodologies and other mechanisms and the need to reflect these in the methodologies used to construct green benchmarks and funds, and
- a comparison of the vast differences in methodologies underlying green equity and green bond indices

For the preparation of delegated acts designing the parameters of the methodology for selecting underlying assets for the low-carbon and positive carbon impact indices, the Commission will rely on advice of the group of technical experts on sustainable finance set up by the Commission.

- **Impact assessment**

In line with the Better Regulation policy, the Commission conducted an impact assessment of policy alternatives.

The general policy alternatives examined in the impact assessment consisted of the following options:

- (1) no EU action (Option 1);
- (2) improving the transparency of the methodology and establishing minimum standards for 'decarbonised' or 'low-carbon' indices¹⁶ - generalist approach with minimum harmonisation (Option 2);
- (3) harmonised EU rules for 'pure-play' low-carbon or 'positive carbon impact' indices that align with the 2°C objective - specialist approach with a detailed rulebook (Option 3);
- (4) minimum standards for harmonising the methodology to be applied to low-carbon indices and 'positive carbon impact' indices (Option 4, sub-option a) or harmonised EU rules for different types of low-carbon indices - comprehensive regulatory approach (Option 4, sub-option b)

Under option 1, market fragmentation is likely to further increase over time, while the related search costs to investors would remain high. Investors, who would like to invest with a real impact in assets that are aligned with the 2 °C objective would still not have the appropriate tools (benchmarks) to assess the performance of their low-carbon funds/portfolio. The lack of harmonisation of methodologies of low-carbon indices would continue to affect their comparability and relevance. In addition, it will not incentivise companies to align their corporate strategies with climate goals.

¹⁶ These indices are typically constructed by taking a standard benchmark, such as the S&P 500 or NASDAQ 100, and removing or underweighting companies with relatively high carbon footprints. For more details, please refer to Annex 9 of the Impact Assessment [link].

Option 2 would improve the transparency of the benchmark methodology and align some of its elements. Under this option, investors would be provided with details on the inclusion of climate-related parameters, the description of the constituents of the benchmark, and the criteria used for selecting and weighing them. This option would be relatively straightforward for benchmark administrators to adopt and relatively cost-efficient, as it would only require benchmark administrators to comply with minimum standards in their methodology and give them some flexibility to add other elements/criteria. However, this harmonised methodology would only apply to a segment of low carbon indices that do not aim to align with the 2° C objective, and hence may not result in a significant contribution to climate mitigation policies by providing clarity at EU level on what are sustainable assets/investments. Thus this option is not aligned with the full achievement of EU sustainability goals.

Under option 3, the Commission would create a harmonised set of rules covering 'pure-play' low-carbon or 'positive carbon impact' indices¹⁷. These indices would allow asset managers/institutional investors to properly track/assess the performance of their funds selected in accordance with the 2°C objective of the Paris Climate Agreement and demonstrate compliance with this investment strategy to their clients/beneficiaries. The methodology would, in contrast with option 2, enable the inclusion of the assets of those companies that contribute significantly to the reduction of emissions, therefore channelling more investment flows to such issuers¹⁸. However, 'pure play' low-carbon indices may concentrate investments only in some sectors and are not perceived as suitable for building a core equity portfolio by a large group of stakeholders, resulting in a risk of limited market uptake of the benchmark.

Under option 4, harmonised rules would be introduced for (1) 'decarbonised' or 'low-carbon' versions of standard indices and (2) 'pure-play' low-carbon or 'positive carbon impact' indices. Hence, this option would apply to a broader range of indices than options 2 or 3. It would allow institutional investors and asset managers to properly track/assess the performance of more types of low carbon funds and provide a relatively large choice of tools to demonstrate their compliance with their clients' low-carbon preferences.

This option was analysed under two different sub-options.

Sub-option 4a (the preferred option): according to the approach set forth in this sub-option, the new framework would introduce minimum standards for harmonising the methodology to be applied to low-carbon indices and 'positive carbon impact' indices. This option would set up some minimum key elements of the methodology used to determine decarbonised benchmarks and 'positive carbon impact' benchmarks, providing standards for the criteria and methods used to select and weight the underlying assets of the benchmark, and to calculate the carbon footprint and carbon savings associated with the underlying assets, leveraging on existing European methodologies approved by the Commission and largely used by companies to calculate their environmental performance such as the Product Environmental Footprint (PEF) and the Organisation Environmental Footprint (OEF)¹⁹.

Sub-option 4b: this would introduce arrangements for maximum harmonisation, where the methodology of the two newly introduced categories of benchmarks would be fully harmonised on the basis of a detailed and comprehensive set of rules provided at Level 1 and

¹⁷ These indices typically select companies from the investable universe which contribute to a significant reduction of carbon footprints based on ratios such as the Carbon Impact Ratio or (CIR). For a detailed explanation, please refer to Annex 9 of the Impact Assessment.

¹⁸ For an explanation, please refer to Annex 9 of the Impact Assessment [link].

¹⁹ Recommendation 179/2013 adopted by the College on 9th April 2013 and published on the Official Journal on 4th May 2013.

further specified with detailed requirements in Level 2. Those rules would set up detailed criteria for the selection and weighting of the underlying assets of the low-carbon and positive carbon impact benchmarks. This approach would allow a high degree of comparability of the methodologies of the new categories of benchmarks. However, benchmark administrators would lack a certain flexibility in the design of their methodology and suffer significant costs of compliance with the new strict requirements set by the EU legislation.

Under sub-option 4a, whereas investors would enjoy a little lower degree of comparability of benchmarks methodologies, a significant flexibility would be left to benchmark administrators in designing the formula for the calculation of their methodology. More in general, this approach will allow room for market players to develop new strategies for addressing the environmental concerns. Furthermore, benchmark administrators will incur minor costs in adapting their own established methodologies to the minimum standards provided by the EU legislation.

This sub-option is also compatible with the other Commission proposals in the area of sustainable finance²⁰, as it would contribute to improving the quality of information provided by asset managers to end investors in accordance with the investment objective. Similarly to option 3, sub-option 4a could also channel more investments into companies from highly carbon-intensive sectors that contribute significantly to the reduction of emissions. There are, however, several challenges related to this option: i) the available data is not stable and usually not complete; ii) comparing carbon emissions of companies from different sectors might be complex; and iii) there is a potential risk that establishing harmonised methodologies could hinder innovation.

The Commission envisages the following impacts of the preferred option in economic, environmental and social terms:

In terms of economic impacts, EU harmonised standards for transparent methodologies for low-carbon and positive carbon impact indices, coupled with the overall more detailed ESG disclosures for other benchmarks, would have the following impact: (i) it would reduce the asymmetry of information between investors and index providers, as asset managers and portfolio managers would have all the necessary information to select a low carbon or positive carbon impact index which reflects their investment style; (ii) it would reduce the current fragmentation of the market, because the methodologies for low carbon indices have not yet been standardised; and (iii) it would improve the quality and comparability of the climate-related information disclosed by corporate companies, which would now be incentivised to disclose this information to be included in the index. Therefore, the use of EU harmonised standards for transparent methodologies would result in the development of benchmarks which would be better suited to measuring the performance of a portfolio or financial product that either follows a 'low-carbon' or the '2° C objective' investment strategy, respectively.

In terms of **environmental impacts**, it will relatively quickly redirect financing into assets and projects with sustainable goals that have a positive impact in terms of greenhouse gas emissions and contribute to the objectives of the Paris Climate Agreement. For this reason, harmonising the standards for and disclosures of the methodology for different types of low-carbon and positive carbon impact indices would provide investors pursuing various low-carbon strategies with adequate tools to assess consistency between their fund/portfolios and the selected benchmark, and would enable these investors to better track/measure the performance against the appropriate low-carbon benchmark.

The proposal has no significant direct or indirect **social impacts**.

²⁰ LINK to other texts from the May package

The proposal takes into account the opinions (the positive opinion with reservations issued on 14 May 2018 and the previous two negative opinions) issued by the Regulatory Scrutiny Board (RSB). The proposal and revised impact assessment address the comments of the RSB, which concluded that adjustments were necessary before proceeding further with this initiative (link).

In its comments, the RSB suggested that the impact assessment did not appropriately consider the risks of requiring administrators of low-carbon benchmarks to use the taxonomy. The Board also expressed concerns that, with respect to the future development of the methodology for low carbon benchmarks, the impact assessment did not sufficiently address the cost considerations for administrators and users of these benchmarks.

In order to address the Board's concerns, the Commission has removed the obligation on administrators of low-carbon and positive carbon impact benchmarks to use the EU taxonomy when designing the parameters of the methodology for selecting underlying assets and complying with disclosure obligations. In addition, this proposal has been further adjusted to ensure that the cost considerations are duly taken into account in the development of the methodology for low-carbon and positive carbon impact benchmarks. The Commission will be empowered to adopt delegated acts that will just specify minimum standards for the harmonised methodology for low carbon and positive carbon impact benchmarks. These delegated acts, therefore, will not introduce a fully harmonised methodology, but rather minimum criteria, hence leaving the necessary flexibility to benchmark administrators. Therefore, the compliance costs would be limited.

- **Fundamental rights**

The proposal respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union given the obligation that the identified environmentally sustainable economic activity has to be carried out in compliance with minimum social, governance and ethical safeguards.

The right to freedom of expression and information requires that the freedom of the media shall be respected. This Regulation should be interpreted and applied in accordance with this fundamental right. Therefore where a person merely publishes or refers to a low-carbon or positive carbon impact benchmark as part of this or her journalistic activities, but does not have control over the provision of that benchmark, that person should not be subject to the requirements imposed on administrators by this Regulation. This therefore leaves journalists free when performing journalistic activities to report on financial and commodities markets. Accordingly the definition of the administrator of a benchmark has been tightly defined to ensure that it encompasses the provision of a benchmark, but does not capture within its scope journalistic activities.

4. BUDGETARY IMPLICATIONS

The initiative is not expected to have an impact on the EU budget. The requirements for low-carbon and positive carbon impact benchmarks will supplement the already existing requirements for administrators of benchmarks and therefore will not have a significant impact on the costs incurred by relevant supervisory authorities, given their current capacity and resources under the Benchmark Regulation.

5. OTHER ELEMENTS

• **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will establish a programme for monitoring the outputs, results and impacts of this initiative one year after the legal instrument becomes effective. The monitoring programme shall set out the means by which the data and other necessary evidence is to be collected. An evaluation is envisaged five years after the implementation of the measures. The objective of an evaluation is to assess, among other things, how effective and efficient the measures have been in terms of achieving the objectives presented in this impact assessment and to decide whether new measures or amendments are needed.

Specific key performance indicators (KPIs) intended to measure the implementation and contribution of low-carbon and positive carbon impact benchmarks to the objectives outlined by the Action Plan on Financing Sustainable Growth and to solving the problems outlined in Section 1 of this Explanatory Memorandum are as follows:

- evolution in the number and size of funds/portfolios using low carbon and positive carbon impact benchmarks;
- number of complaints received by the Commission from the users of low-carbon and positive carbon impact benchmarks;
- the costs of producing low-carbon and positive carbon impact benchmarks;
- a Commission report under the Benchmark Regulation to review the functioning and effectiveness of low-carbon benchmarks and the appropriateness of their supervision (review clause Article 54).

Detailed explanation of the specific provisions of the proposal

Article 1, paragraph 1, introduces in the Benchmark Regulation the definitions of the new categories of benchmarks, namely the ‘low-carbon benchmark’ and the ‘positive carbon impact benchmark’.

Article 1, paragraph 2, amends article 13, paragraph 1, of the Benchmark Regulation, (“*Transparency of the methodology*”) adding a new point (d) to the list of information that a benchmark administrator has to publish or make available. In particular, according to the new obligation, in addition to the other information already to be disclosed, administrators of benchmarks or family of benchmarks which pursue or take into account ESG objectives would have to provide an explanation of how the key elements of the methodology reflect the ESG factors. The Commission is empowered to further specify the minimum content of such disclosure.

Under article 1, paragraph 3, a new Chapter 3A is inserted in Title III of the Benchmark Regulation laying down a single provision (Article 29a) setting out the key requirements applicable to the methodology for low-carbon or positive carbon impact benchmarks (listed in a newly introduced annex). The Commission initially considered introducing a fully harmonised regime for the methodology of the new benchmarks categories on the basis of a comprehensive set of rules. According to that approach, the key elements of the methodology set up in this legislative proposal, would have had to be further specified with detailed requirements for the selection and weighting of the underlying assets in delegated acts to be adopted by the Commission on the basis of the advice of the Expert Group. In addition, the bespoke delegated acts were meant to require administrators of low carbon and positive carbon impact benchmarks to make use of the EU Taxonomy Regulation, when designing the parameters of the methodology for selecting underlying assets.

However, in order to address the RSB's concerns on the possible costs entailed in the future development of such a stringent methodology, the Commission has adjusted this proposal so that to provide that the empowerment for the adoption of delegated acts is limited to specifying further the minimum standards for low-carbon and positive carbon impact benchmarks. This approach has also been favoured also because it would still allow a significant level of comparability of the low-carbon benchmark methodologies. At the same time benchmark administrators would not incur high costs in aligning their methodology with the EU standard and would maintain a certain degree of flexibility in the design of their methodology. More generally, this approach would allow room for the market to develop innovative strategies for addressing the environmental concerns.

In order to take into account the concerns raised by the Board about the risks of a mandatory use of the taxonomy by administrators of low-carbon benchmarks, the proposal was further adjusted so that the delegated acts specifying the minimum standards for harmonisation will not require administrators of low-carbon and positive carbon impact benchmarks to use the EU taxonomy when designing parameters of the methodology for selecting underlying assets. Unbundling the methodology from the EU taxonomy will also give administrators the necessary degree of flexibility they need.

Article 1, paragraph 4, amends Article 27 of the Benchmark Regulation (*'Benchmark statement'*) by introducing a new paragraph aimed at requiring, for each benchmark or family of benchmarks provided which pursue or take into account ESG objectives, administrators to explain in the benchmark statement how environmental, social and governance factors are reflected for each benchmark or family of benchmarks provided which pursue or take into account ESG objectives. The Commission is empowered to further specify the information to be given.

Paragraph 5 introduces a new Annex III to the Benchmark Regulation which lays down the key requirements for the methodology for low-carbon and positive carbon impact benchmarks listing the elements that administrators have to disclose and the procedure to be followed for amending their methodology.

Pursuant to Article 2, this Regulation will enter into force the day after it is published in the Official Journal of the European Union.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank²¹,

Having regard to the opinion of the European Economic and Social Committee²²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 25 September 2015, the UN General Assembly adopted a new global sustainable development framework: the 2030 Agenda for Sustainable Development²³, having at its core the Sustainable Development Goals (SDGs). The Commission's Communication of 2016 on the next steps for a sustainable European future²⁴ links the SDGs to the Union policy framework to ensure that all Union actions and policy initiatives, within the Union and globally, take the SDGs on board at the outset. The European Council conclusions of 20 June 2017²⁵ confirmed the commitment of the Union and the Member States to the implementation of the 2030 Agenda in a full, coherent, comprehensive, integrated and effective manner and in close cooperation with partners and other stakeholders.
- (2) In 2015, the Union concluded the Paris Climate Agreement²⁶. Article 2(c) of that Agreement sets the objective to strengthen the response to climate change, among other means by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.
- (3) Sustainability and the transition to a low-carbon and climate resilient, more resource-efficient and circular economy are key in ensuring long-term competitiveness of the Union economy. Sustainability has long been at the heart of the Union project and the Union Treaties give recognition to its social and environmental dimensions.

²¹ OJ C [...], [...], p. [...].

²² OJ C , , p. .

²³ *Transforming our World: The 2030 Agenda for Sustainable Development* (UN 2015).

²⁴ COM(2016) 739 final.

²⁵ CO EUR 17, CONCL. 5.

²⁶ OJ L 282, 19.10.2016, p. 4.

- (4) In March 2018, the Commission published its Action Plan 'Financing Sustainable Growth'²⁷, setting up an ambitious and comprehensive strategy on sustainable finance. One of the objectives of that Action Plan is to reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth.
- (5) Decision No. 1386/2013/EU of the European Parliament and of the Council²⁸ called for an increase in private sector funding for environmental and climate-related expenditure, notably through putting in place incentives and methodologies that stimulate companies to measure the environmental costs of their business and profits derived from using environmental service.
- (6) Achieving SDG objectives in the Union requires the channelling of capital flows towards sustainable investments. It is important to exploit fully the potential of the internal market for the achievement of those goals. In that context, it is crucial to remove obstacles to the efficient movement of capital into sustainable investments in the internal market and to prevent such expected obstacles from emerging.
- (7) Regulation (EU) 2016/1011 of the European Parliament and of the Council²⁹ establishes uniform rules for benchmarks in the Union and caters for different types of benchmark. An increasing number of investors pursue low-carbon investment strategies and take recourse to low-carbon benchmarks to reference or measure the performance of investment portfolios.
- (8) A wide variety of indices is currently grouped together as low carbon indices. Those low carbon indices are used as benchmarks for investment portfolios and products that are sold across borders. The quality and integrity of low carbon benchmarks affect the effective functioning of the internal market in a wide variety of individual and collective investment portfolios. Many low carbon indices used as performance measures for investment portfolios, in particular for segregated investment accounts and collective investment schemes, are provided in one Member State but used by portfolio and asset managers in other Member States. In addition, portfolio and asset managers often hedge their carbon exposure risks by using benchmarks produced in other Member States.
- (9) Different categories of low carbon indices with various degrees of ambition have emerged in the marketplace. While some benchmarks aim to lower the carbon footprint of a standard investment portfolio, others aim to select only components that contribute to attaining the 2°C degree objective set out in the Paris Climate Agreement. Despite differences in objectives and strategies, all of these benchmarks are commonly promoted as low-carbon benchmarks.
- (10) Divergent approaches to benchmark methodologies result in fragmentation of the internal market because users of benchmarks do not have clarity on whether a particular low carbon index is a benchmark aligned to the 2C° objective or merely a benchmark that aims to lower the carbon footprint of a standard investment portfolio. To address potentially illegitimate claims by administrators about the low-carbon

²⁷ COM(2018) 97 final.

²⁸ Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' (OJ L 354, 28.12.2013, p. 171).

²⁹ 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 (OJ L 171, 29.6.2016, p. 1).

nature of their benchmarks, Member States are likely to adopt different rules to avoid the ensuing investors' confusion and ambiguity about the aims and level of ambition underpinning different categories of so called low carbon indices used as benchmarks for a low carbon investment portfolio.

- (11) In the absence of a harmonised framework to ensure the accuracy and integrity of the main categories of low carbon benchmarks used in individual or collective investment portfolios, it is likely that differences in Member States' approaches will create obstacles to the smooth functioning of the internal market.
- (12) Therefore, to maintain the proper functioning of the internal market, to further improve the conditions of its functioning, and to ensure a high level of consumer and investor protection, it is appropriate to adapt Regulation (EU) 2016/1011 to lay down a regulatory framework for harmonised low carbon benchmarks at Union level.
- (13) It is furthermore necessary to introduce a clear distinction between low-carbon and positive carbon impact benchmarks. While the underlying assets in a low-carbon benchmark should be selected with the aim of reducing carbon emissions of the index portfolio when compared to the parent index, a positive carbon impact index should only comprise components whose emissions savings exceed their carbon emissions.
- (14) Each company whose assets are selected as underlying in a positive impact benchmark should save more carbon emissions than it produces, hence have a positive impact on the environment. The asset and portfolio managers who claim to pursue an investment strategy compatible with the Paris Climate Agreement should therefore use positive carbon impact benchmarks.
- (15) A variety of benchmark administrators claim that their benchmarks pursue environmental, social and governance ('ESG') objectives. The users of those benchmarks do however not always have the necessary information on the extent to which the methodology of those benchmark administrators takes into account those ESG objectives. The existing information is also often scattered and does not allow for effective comparison for investment purposes across borders. To enable market players to make well-informed choices, benchmark administrators should be required to disclose how their methodology takes into account the ESG factors for each benchmark or family of benchmarks that is promoted as pursuing ESG objectives. That information should also be disclosed in the benchmark statement. The administrators of benchmarks that do not promote or take into account the ESG objectives, should not be subject to this disclosure obligation.
- (16) For the same reasons, administrators of low-carbon and of positive carbon impact benchmarks should equally publish their methodology used for their calculation. That information should describe how the underlying assets were selected and weighted and which assets were excluded and for what reason. The benchmark administrators should also specify how the low carbon benchmarks differ from the underlying parent index, notably in terms of the applicable weights, market capitalisation and financial performance of the underlying assets. To assess how the benchmark contributes to the environmental objectives, the benchmark administrator should disclose how the carbon footprint and carbon savings of the underlying assets were measured, their respective values, including the total carbon footprint of the benchmark, and the type and source of the data used. To enable asset managers to choose the most appropriate benchmark for their investment strategy, benchmark administrators should explain the rationale behind the parameters of their methodology and explain how the benchmark contributes to the environmental objectives, including its impact on climate-change

mitigation. The published information should also include details on the frequency of reviews and the procedure followed.

- (17) In addition, administrator of positive carbon impact benchmarks should disclose the positive carbon impact of each underlying asset included in those benchmarks, specifying the method used to determine whether the emission savings exceed the investment asset's carbon footprint.
- (18) To ensure continued adherence to the selected climate-change mitigation objective, administrators of low-carbon and positive carbon impact benchmarks should regularly review their methodologies and inform users of the applicable procedures for any material change. When introducing a material change, benchmark administrators should disclose the reasons for that change and explain how the change is consistent with the benchmarks' initial objectives.
- (19) In order to enhance transparency and ensure an adequate level of harmonization, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to specify further the minimum content of the disclosure obligations that benchmark administrators that take into account the ESG objectives should be subject to, and to specify the minimum standards for harmonization of the methodology of low-carbon and positive carbon impact benchmarks, including the method for the calculation of carbon emissions and carbon savings associated with the underlying assets, taking into account the Product and Organisation Environmental Footprint methods as defined in points (a) and (b) of point 2 of Commission Recommendation 2013/179/EU³⁰. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (20) Regulation (EU) 2016/1011 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2016/1011

Regulation (EU) 2016/1011 is amended as follows:

1. in Article 3(1), the following points 23(a) and 23(b) are inserted:

“(23a) ‘low-carbon benchmark’ means a benchmark where the underlying assets, for the purposes of point 1(b)(ii) of this paragraph, are selected so that the resulting benchmark portfolio has less carbon emissions when compared to the assets that comprise a standard capital-weighted benchmark and which is constructed in

³⁰ Commission Recommendation 2013/179/EU of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (OJ L 124, 4.5.2013, p. 1).

accordance with the standards laid down in the delegated acts referred to in Article 19a(2);

(23b) ‘positive carbon impact benchmark’ means a benchmark where the underlying assets, for the purposes of point 1(b)(ii) of this paragraph, are selected on the basis that their carbon emissions savings exceed the asset's carbon footprint and which is constructed in accordance with the standards laid down in the delegated acts referred to in Article 19a(2).”;

2. Article 13 is amended as follows:

(a) in paragraph 1, the following point (d) is added:

“(d) an explanation of how the key elements of the methodology laid down in point (a) reflect environmental, social or governance (‘ESG’) factors for each benchmark or family of benchmarks which pursue or take into account ESG objectives;”;

(b) the following paragraph 2a is inserted:

“2a. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 to specify further the minimum content of the explanation referred to in point (d) of paragraph 1.”;

3. in Title III, the following Chapter 3a is inserted:

“Chapter 3a

Low-carbon and positive carbon impact benchmarks

Article 19a

Low-carbon and positive carbon impact benchmarks

(1) The requirements laid down in Annex III shall apply to the provision of, and contribution to, low-carbon or positive carbon impact benchmarks in addition to, or as a substitute for, the requirements of Title II, III and IV.

(2) The Commission shall be empowered to adopt delegated acts in accordance with Article 49 to specify further the minimum standards for low-carbon and positive carbon impact benchmarks, including:

(a) the criteria for the choice of the underlying assets, including, where applicable, the exclusion criteria for assets;

(b) the criteria and method for the weighting of the underlying assets in the benchmark;

(c) the method for the calculation of carbon emissions and carbon savings associated with the underlying assets.”;

4. in Article 27, the following paragraphs 2a and 2b are inserted:

“2a. For each requirement in paragraph 2, a benchmark statement shall contain an explanation of how environmental, social and governance factors are reflected for each benchmark or family of benchmarks provided and published which pursue or take into account ESG objectives.

2b. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 to specify further the information referred to in in paragraph 2a”.

5. the text of the annex to this Regulation is added.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President