



STATUTORY INSTRUMENTS.

**S.I. No. 644 of 2017**

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EUROPEAN UNION (INDICES USED AS BENCHMARKS IN  
FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS OR TO  
MEASURE THE PERFORMANCE OF INVESTMENT FUNDS)  
REGULATIONS 2017

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I, PASCHAL DONOHOE, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving full effect to Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016<sup>1</sup>, hereby make the following regulations:

## PART 1

## PRELIMINARY AND GENERAL

*Citation and commencement*

1. (1) These Regulations may be cited as the European Union (Indices used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds) Regulations 2017.

(2) These Regulations come into operation on 1 January 2018.

*Interpretation*

2. (1) In these Regulations—

“Act of 1942” means the Central Bank Act 1942 (No. 22 of 1942);

“authorised officer” means a person appointed as an authorised officer by the Bank under Regulation 7;

“Bank” means the Central Bank of Ireland;

“Benchmarks Regulation” means Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016<sup>2</sup> 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>OJ L171, 29.6.2016, p. 1

<sup>2</sup>OJ L171, 29.6.2016, p. 1

*Notice of the making of this Statutory Instrument was published in  
“Iris Oifigiúil” of 23rd January, 2018.*

“competent authority” means the Bank or, in the case of another Member State, the authority designated by that state in accordance with Article 40 of the Benchmarks Regulation;

“Court” means the High Court;

“ESMA” means the European Securities and Markets Authority established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010;<sup>3</sup>

“Member State” means Member State of the European Union and, where relevant, includes a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 (as adjusted by the Protocol signed at Brussels on 17 March 1993), as amended;

“non-regulated financial service provider” means a person who is not a regulated financial service provider but who otherwise is a person subject to requirements under Regulations or the Benchmarks Regulation;

“place” means a place entered by an authorised officer pursuant to Regulation 5(4)(a) or (b) and includes—

- (a) a building or part thereof,
- (b) a vehicle, whether mechanically propelled or not, and
- (c) a vessel, whether sea-going or not,

but does not include a private dwelling;

“record” means any book, document or any other written or printed material in any form including any information stored, maintained or preserved by means of any mechanical or electronic device, whether or not stored, maintained or preserved in a legible form;

“regulated financial service provider” has the same meaning as it has in section 2(1) of the Act of 1942;

“relevant record” means a record relating to the subject matter of these Regulations and the Benchmarks Regulation.

(2) A word or expression that is used in these Regulations and is also used in the Benchmarks Regulation has, unless the context otherwise requires, the same meaning in these Regulations as it has in the Benchmarks Regulation.

### *Application*

3. (1) These Regulations apply to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the State.

<sup>3</sup>OJ L331, 15.12.2010, p. 34

(2) These Regulations shall not apply to:

- (a) the Bank;
- (b) a public authority, where it contributes data to, provides, or has control over the provision of, benchmarks for public policy purposes, including measures of employment, economic activity, and inflation;
- (c) a central counterparty (CCP), where it provides reference prices or settlement prices used for CCP risk-management purposes and settlement;
- (d) the provision of a single reference price for any financial instrument specified in Part 3 of Schedule 1 of the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. No. 375 of 2017);
- (e) the press, other media and journalists where they merely publish or refer to a benchmark as part of their journalistic activities with no control over the provision of that benchmark;
- (f) a person that grants or promises to grant credit in the course of that person's trade, business or profession, only insofar as that person publishes or makes available to the public that person's own variable or fixed borrowing rates set by internal decisions and applicable only to financial contracts entered into by that person or by a company within the same group with their respective clients;
- (g) a commodity benchmark based on submissions from contributors the majority of which are non-supervised entities and in respect of which both of the following conditions apply:
  - (i) the benchmark is referenced by financial instruments for which a request for admission to trading has been made on only one trading venue (within the meaning of Regulation 3(1) of the European Union (Markets in Financial Instruments) Regulations 2017, or which are traded on only one such trading venue;
  - (ii) the total notional value of financial instruments referencing the benchmark does not exceed €100 million;
- (h) an index provider in respect of an index provided by such provider where that index provider is unaware and could not reasonably have been aware that that index is used for the purposes referred to in point (3) of Article 3(1) of the Benchmarks Regulation.

## PART 2

## THE BANK AS COMPETENT AUTHORITY

## Chapter 1

*Designation, powers and redress procedures**Designation of Bank as competent authority*

4. The Bank is designated as the competent authority in the State responsible for the carrying out of the functions of a competent authority referred to in the Benchmarks Regulation.

*Powers of Bank*

5. (1) The Bank shall have all the powers necessary for the performance of its functions under the Benchmarks Regulation and these Regulations.

(2) The powers provided for in this Part in respect of the Bank shall not be exercised in a manner or for a purpose inconsistent with the Bank's obligations pursuant to the Benchmarks Regulation or these Regulations.

(3) Without limitation to the generality of paragraph (1), the Bank shall, in particular, have the powers set out in this Part.

(4) In addition to the foregoing powers of the Bank, the Bank may for the purposes of the Benchmarks Regulation and these Regulations—

- (a) subject to Regulation 9, at all reasonable times enter any place at which the Bank reasonably believes there are relevant records,
- (b) subject to Regulation 9, enter any place without prior notice, at which the Bank reasonably believes that a person to whom the Benchmarks Regulation or these Regulations apply, is carrying on, or has carried on, business activities which are relevant to the Benchmarks Regulation, in order to ensure that obligations under the Benchmarks Regulation and these Regulations are being complied with,
- (c) request any person to permit the Bank to inspect or have access to any document or other data, in any form, in the possession, or under the power or control, of the person, being any document or other data which the Bank considers could be relevant for the performance of its duties and may receive or take a copy of any such document or other data accordingly,
- (d) require any person involved in the provision of, and contribution to, a benchmark, including any service provider to which functions, services or activities in the provision of a benchmark have been outsourced as provided for in Article 10 of the Benchmarks Regulation, as well as their principals, to provide information to it, being any document or other data which the Bank considers could be relevant

for the performance of its duties, and if necessary to summon and question a person with a view to obtaining information,

- (e) request, in relation to commodity benchmarks, information from contributors on related spot markets according, where applicable, to standardised formats and reports on transactions, and direct access to traders' systems,
- (f) carry out on-site inspections or investigations at places,
- (g) require supervised entities to furnish to it existing recordings of telephone conversations or electronic communications or other data traffic records held by the supervised entities,
- (h) require, in accordance with the Central Bank Acts 1942 to 2015, the freezing or the sequestration of assets, or both,
- (i) require, in accordance with the Central Bank Acts 1942 to 2015, the temporary or permanent cessation of any practice or conduct that the Bank considers to be in contravention of a provision of the Benchmarks Regulation or these Regulations and prevent, in accordance with those Acts, the repetition of that practice or conduct,
- (j) require any person carrying on a professional activity and to whom the Benchmarks Regulation or these Regulations apply to cease, for a specified period, the carrying on of an activity, and
- (k) adopt any necessary measure to require the relevant administrator or person that has published or disseminated the benchmark or both to publish a corrective statement about past contributions to or figures of the benchmark so as to ensure that the public is correctly informed about the provision of a benchmark.

(5) Where not specifically provided for in paragraph (4), an obligation to produce a relevant record or report, or to provide information or assistance, under that paragraph extends to—

- (a) an examiner, liquidator or receiver of, or any person who is or has been an officer or employee or agent of, a person to whom the Benchmarks Regulation or these Regulations apply, or
- (b) any other person who appears to the Bank to have the relevant record or report in his or her possession or under his or her control or the ability to provide information or assistance, as the case may be.

(6) Where a person from whom production of a relevant record is required under this Regulation claims a lien over it, its production does not affect the lien.

*Imposition of conditions by Bank*

6. (1) Where the Bank authorises a person under Article 34 of the Benchmarks Regulation, it may impose such conditions in the authorisation of such

person and with respect to the conduct of the business of that person as it considers appropriate having had regard to paragraph (4).

(2) While the authorisation of a person has effect, the Bank may, having had regard to paragraph (4), by notice in writing given to the person concerned, impose such conditions as it considers appropriate with respect to the conduct of the business of that person.

(3) The Bank may, from time to time, by notice in writing given to a person vary or revoke a condition imposed in accordance with paragraph (1) or (2) in such manner as it considers appropriate having had regard to paragraph (4).

(4) In imposing or varying a condition under paragraph (1), (2) or (3), the Bank shall ensure that the condition, or the condition as varied, is consistent with the objects of the Benchmarks Regulation and these Regulations and, in particular, is imposed or varied to ensure that the person concerned carry out his or her respective responsibilities in a proper manner.

## Chapter 2

### *Authorised officers, their powers and related matters*

#### *Power to appoint authorised officers*

7. (1) The Bank may, in writing, appoint persons to be authorised officers for the purposes of monitoring compliance with the Benchmarks Regulation and these Regulations.

(2) The Bank may, at any time in writing, revoke the appointment of a person to be an authorised officer under this Regulation.

(3) Subject to paragraph (2), the appointment of an authorised officer under this Regulation may be for a specified, or an unspecified, period or for a specified purpose.

(4) The Bank shall provide every authorised officer with a certificate of appointment as an authorised officer.

(5) When exercising a power conferred on an authorised officer under this Part, an authorised officer shall produce his or her certificate of appointment, together with some form of personal identification, if requested to do so by a person affected by the exercise of the power.

(6) The appointment of an authorised officer made under this Regulation ceases—

- (a) where the Bank revokes the appointment, at the time of revocation,
- (b) where the person appointed dies, at the time of death,
- (c) where the person resigns, at the time of resignation,

- (d) where the appointment is for a specified period, at the end of that period,
- (e) where the appointment is for a specified purpose, on the completion of that purpose, or
- (f) where the person appointed is, when appointed, an officer of the Bank, when the person ceases to be such an officer.

*Function of authorised officer and powers in that regard*

8. (1) It shall be the function of an authorised officer to monitor compliance with the Benchmarks Regulation and these Regulations and, for that purpose, where appropriate, to carry out in accordance with these Regulations investigations in relation thereto.

(2) For the purpose of paragraph (1), an authorised officer shall, subject to paragraph (3), have each of the powers that are conferred on the Bank by Regulation 5(4).

(3) So far as a provision of Regulation 5(4) provides that a power thereunder is exercisable in accordance with the Central Bank Acts 1942 to 2015, then paragraph (2) shall be construed and have effect, in relation to the particular power concerned, as only enabling an authorised officer to advise the Bank that particular circumstances have arisen that warrant, in the officer's opinion, the exercise of the power by the Bank and not as enabling the authorised officer to exercise the power himself or herself.

(4) Regulation 5(5) and (6) shall apply for the purpose of this Regulation as they apply for the purpose of Regulation 5.

(5) When exercising a power under this Part, an authorised officer may, where the officer considers it necessary, be accompanied by one or more—

- (a) members of the Garda Síochána, or
- (b) other authorised officers.

*Search warrant*

9. (1) Where an authorised officer in the exercise of the authorised officer's powers under Regulation 8 is prevented from entering any place, where he or she believes that there are relevant records, the authorised officer may apply to a judge of the District Court for a warrant under this Regulation authorising the entry by the authorised officer into the place.

(2) Without prejudice to the powers conferred on an authorised officer by or under any provision of these Regulations, an authorised officer may, for the purposes of an investigation into an offence under these Regulations, apply to a judge of the District Court for a warrant in relation to any place.

(3) Where, on the hearing of an application under paragraph (1) or (2), a judge of the District Court is satisfied on sworn information of the authorised officer that he or she—

- (a) has been prevented from entering any place, or
- (b) has reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under these Regulations is to be found in any place,

that judge may issue a warrant under the judge's hand authorising one or more authorised officers accompanied, if the judge considers it appropriate to so provide, by such number of members of the Garda Síochána as may be specified in the warrant, at any time within 4 weeks from the date of issue of the warrant, to enter, if necessary by force, the place and exercise any of the powers referred to in Regulation 8.

*Power of Bank to issue directions to non-regulated financial service providers*

10. (1) Without prejudice to the power of the Bank to impose directions, conditions or other requirements under any enactment, where the Bank considers it necessary to do so in order to—

- (a) ensure the integrity of financial markets in—
  - (i) the State, or
  - (ii) where relevant, another Member State,
- (b) enhance consumer and investor confidence in those markets, or
- (c) prevent any person from contravening or continuing to contravene the Benchmarks Regulation or these Regulations,

the Bank may, subject to paragraphs (2) and (3), issue a direction in writing to a non-regulated financial service provider.

(2) A direction under paragraph (1) shall—

- (a) subject to subparagraph (b), take effect on and after such date, or the occurrence of such event, as is specified in the direction for the purpose, and
- (b) shall cease to have effect—
  - (i) on such date, or the occurrence of such event, as is specified in the direction for the purpose, or
  - (ii) on the expiration of the period of 12 months immediately following the day on which the direction takes effect,

whichever is the earlier.

- (3) A direction under paragraph (1) shall be a direction to do one or more of the following:
- (a) take such actions relating to any provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark as may be specified in the direction;
  - (b) not to carry on a business relating to any provision of benchmarks, the contribution of input data to a benchmark or the use of a benchmark (whether on the person's behalf or another's behalf), in a specified manner, or otherwise than in a specified manner;
  - (c) not to engage in any practice that contravenes the Benchmarks Regulation or these Regulations;
  - (d) not to provide benchmarks, contribute input data to a benchmark or use a benchmark of a specified kind or to enter into such transactions except to a specified extent or where specified conditions are complied with.
- (4) A non-regulated financial service provider may apply to the Court for, and the Court may, if it considers it appropriate to do so, grant an order setting aside or varying a direction under paragraph (1).
- (5) The Bank may, as respects a direction under this Regulation which, in its opinion, has not been complied with or is unlikely to be complied with, apply to the Court in a summary manner for such order as may be appropriate by way of enforcement of the direction and the Court may, as it thinks fit, on the hearing of the application, make, or refuse to make, an order providing for such relief.
- (6) An application for an order under paragraph (5) shall be by motion and the Court, when considering the motion, may make such interim or interlocutory order as it considers appropriate.
- (7) An application under paragraph (4) may not be made if the direction concerned has been the subject of an order granted under paragraph (5) (but without prejudice to the right of a non-regulated financial service provider, the subject of an order granted under paragraph (5), to apply subsequently to the Court to have the order varied or discharged).
- (8) The Court may direct the hearing together of applications made under paragraphs (4) and (5) that relate to the same direction.
- (9) The Court may, if it thinks fit, vary or discharge an order made under paragraph (5).
- (10) If the Court is satisfied that it is desirable that the whole or part of proceedings relating to an application under paragraph (4) or (5) be heard otherwise than in public because of the nature or the circumstances of the case or having regard to the interests of justice then the Court may make an order that the proceedings shall, in whole or part, be heard otherwise than in public.

(11) Without prejudice to the powers of the Court to enforce an order made under paragraph (5), a non-regulated financial service provider who fails to comply with such an order shall be guilty of an offence and shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.

(12) The Bank may give a direction amending or revoking a direction given by it under paragraph (1) but this power may not be exercised—

(a) if an order under paragraph (5) is for the time being in force in relation to the direction, or

(b) to extend the period specified in the direction for which it is to have effect.

(13) On the expiry of the period specified in a direction for which it is to have effect, the Bank may give another direction under paragraph (1) (if it considers it necessary to do so on the grounds specified in paragraph (1)), in like or different terms, to the non-regulated financial service provider concerned.

(14) The powers of the Bank under this Regulation are in addition to those conferred on it by any other enactment to give directions or impose conditions or requirements.

(15) In this Regulation, “enactment” includes an instrument made under an enactment.

#### *Privilege*

11. (1) Where a person refuses to produce information or give access to it, pursuant to a requirement under these Regulations, on the grounds that the information contains privileged legal material, the Bank may, at any time not later than 6 months (or such longer period as the Court may allow) after the date of such refusal, apply to the Court for a determination as to whether the information, or any part of the information, is privileged legal material where in relation to the information concerned—

(a) the Bank has reasonable grounds for believing that it is not privileged legal material, or

(b) due to the manner in which, or extent to which, such information is presented together with any other information, it is impossible or impractical to extract only such information.

(2) A person who refuses to produce information or give access to it, pursuant to a requirement under these Regulations, on the grounds that the information contains privileged legal material shall preserve the information and keep it in a safe and secure place and manner pending the determination of an application under paragraph (1) and shall, if the information is so determined not to be privileged legal material, produce it in accordance with such order as the court considers appropriate.

(3) A person shall be considered to preserve information, where the person has complied with such requirements as may be imposed by an authorised officer under paragraph (c), (d) or (e) of Regulation 5(4).

(4) Where an application is made by the Bank under paragraph (1), the Court may give such interim or interlocutory directions as the Court considers appropriate including, without limiting the generality of the foregoing, directions as to the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the Court considers to be appropriate for the purpose of—

- (a) examining the information, and
- (b) preparing a report for the Court with a view to assisting or facilitating the Court in the making by the Court of its determination as to whether the information is privileged legal material.

(5) An application under paragraph (1) shall be by motion and where the Court is satisfied that it is desirable, because of the nature or the circumstances of the case, or having regard to the interests of justice, the whole or any part of proceedings relating to an application under this Regulation before it may be heard otherwise than in public.

(6) In this Regulation, “privileged legal material” means information which, in the opinion of the Court, a person is entitled to refuse to produce on the grounds of legal professional privilege.

### Chapter 3

#### *Enforcement in relation to non-regulated financial service providers*

##### *Interpretation (Part 2, Chapter 3)*

12. (1) In this Part—

“adverse assessment” means an assessment in which the assessor has decided that the assessee is committing or has committed a prescribed contravention;

“assessee” means the person the subject of an assessment;

“assessment” means an assessment referred to in Regulation 13;

“assessor” means an assessor appointed under Regulation 13;

“contravention” includes, in relation to any provision, a failure to comply with that provision;

“personal data” has the same meaning as in the Data Protection Act 1988;

“prescribed contravention” means a contravention by a non-regulated financial service provider of any of the following provisions of the Benchmarks Regulation:

- (a) Article 4;
- (b) Article 5;
- (c) Article 6;
- (d) Article 7;
- (e) Article 8;
- (f) Article 9;
- (g) Article 10;
- (h) Article 11;
- (i) Article 12;
- (j) Article 13;
- (k) Article 14;
- (l) Article 15;
- (m) Article 16;
- (n) Article 21;
- (o) Article 23;
- (p) Article 24;
- (q) Article 25;
- (r) Article 26;
- (s) Article 27;
- (t) Article 28;
- (u) Article 29;
- (v) Article 34;

“sanction” means any sanction referred to in Regulation 19(3);

“specified sanction”, in relation to an adverse assessment, means a sanction or sanctions referred to in Regulation 13(8)(c) that may be imposed on the assessee.

*Bank may appoint assessor*

13. (1) Where the Bank has reason to suspect that a prescribed contravention is being committed or has been committed, the Bank may appoint an assessor

(or, if the Bank thinks fit to do so, more than one assessor) to conduct an assessment as to—

- (a) whether or not the assessee is committing or has committed the contravention, and
    - (b) if the assessor finds that the assessee is committing or has committed the contravention, the specified sanction, or sanctions, if any, which the assessor considers is or are appropriate to be imposed on the assessee in respect of the contravention.
  - (2) The Bank may appoint an assessor who is not an officer, employee or official of the Bank and any such assessor so appointed is an agent of the Bank for the purpose of performing the functions of an assessor under this Part.
  - (3) The Bank shall provide the assessor with such administrative services (including technical and legal advice) as the Bank considers necessary to enable the assessor to perform the assessor's functions.
  - (4) The assessor shall, as soon as is practicable after the assessor's appointment as an assessor, give notice of the appointment to the assessee.
  - (5) The notice under paragraph (4) given to the assessee by the assessor shall contain—
    - (a) a statement that the assessor is appointed by the Bank under this Regulation,
    - (b) a statement in summary form of the grounds for conducting the assessment,
    - (c) a statement that, within a reasonable period specified by the assessor in the notice, the assessee may—
      - (i) make submissions in writing to the assessor, and
      - (ii) request the assessor to be permitted to make oral submissions about the matters to which the notice relates,and
  - (d) a statement that the assessor shall conduct the assessment even if no submissions referred to in subparagraph (c) are made.
- (6) The assessor shall—
  - (a) consider any submissions referred to in paragraph (5)(c) made by the assessee, and
  - (b) conduct such investigations relating to the assessment as the assessor considers appropriate before issuing the assessment.

(7) The assessor shall issue the assessment to the Bank when the assessment is made.

(8) Where the assessor decides that a prescribed contravention is being committed or has been committed, the assessor shall ensure that the assessment includes—

- (a) a statement of the grounds upon which the assessor made the assessment that the assessee is committing or has committed the contravention,
- (b) a statement in summary form of the evidence upon which the assessment is based, and
- (c) a statement of the sanction or sanctions, if any, which the assessor considers is or are appropriate to be imposed on the assessee in respect of the contravention.

(9) The appointment of an assessor may be for a specified or unspecified period.

(10) Subject to Regulations 18 and 21(2), the assessment shall constitute the decision of the Bank, and references in this Part to an adverse assessment shall be construed accordingly.

*Revocation of appointment of assessor*

14. (1) Where the Bank is satisfied that the assessor has contravened paragraph (2) or is incapacitated, the Bank may revoke the appointment of the assessor at any time.

(2) The assessor (including a person proposed to be appointed as an assessor) shall—

- (a) disclose to the Bank any material interest that the assessor may have in any matter that may arise during the assessment,
- (b) disclose to the Bank any actual or potential conflict of interest that the assessor may have in conducting an assessment,
- (c) not use any inside information obtained during an assessment for any purpose other than the performance of the assessor's functions under this Part,
- (d) not engage in misconduct during the assessment,
- (e) perform the assessor's functions in accordance with the procedures and requirements set out in this Part, and
- (f) issue an assessment that is not contrary to law.

*Power to require witnesses to appear and give evidence*

15. (1) The assessor may, by notice given in or outside the State to a person, require the person to—

- (a) appear before the assessor to give evidence (including evidence on oath),
- (b) produce documents specified in the notice that are in the person's custody or control, or
- (c) for the purposes of subparagraph (a) or (b), attend before the assessor from day to day unless excused from attendance or released from further attendance by the assessor.

(2) The assessor may administer oaths for the purposes of the evidence referred to in paragraph (1)(a).

(3) A witness at a hearing before the assessor has the same liabilities, privileges and immunities as a witness before the Court.

(4) Where a person (in this paragraph referred to as the "person concerned")—

- (a) fails to comply with a notice under paragraph (1),
- (b) threatens or insults the assessor or any witness or person required to attend before the assessor,
- (c) interrupts the proceedings of, or does not behave in an appropriate manner before, the assessor,
- (d) obstructs or attempts to obstruct the assessor,
- (e) discloses, or authorises the disclosure of, evidence given before the assessor or any of the contents of a document produced to the assessor that the assessor has instructed not to be published, or
- (f) does anything else that, if the assessor were a court of law having power to commit for contempt, would be contempt for that court,

then—

- (i) the assessor may apply to the Court for an order requiring the person concerned to—
  - (I) comply with the notice under paragraph (1), or
  - (II) discontinue or not repeat the behaviour falling within any of the provisions of subparagraphs (b) to (f), or behaviour of any similar kind,

and

- (ii) the Court, if satisfied that there is no reasonable excuse for the failure to comply with the notice under paragraph (1) or for the behaviour concerned, as the case may be, may grant the order and such other orders as it considers appropriate to ensure that the person concerned cooperates with the assessor.

*Referral to the Court on a question of law*

16. (1) The Bank or the assessor may (including at the request of the assessee) refer a question of law arising in the assessment to the Court for determination by the Court.

- (2) Where a question of law is referred under paragraph (1)—
  - (a) the assessor shall send to the Court all documents before the assessor that are relevant to the matter in question, and
  - (b) at the end of the proceedings in the Court in relation to the reference, the Court shall cause the documents to be returned to the assessor.

*Assessee to be issued copy of any adverse assessment, etc.*

17. (1) Where the assessment of the assessor is that the assessee is committing or has committed a prescribed contravention, the Bank shall—

- (a) issue the assessee with a copy of the adverse assessment (or, as the Bank thinks fit, so much of the adverse assessment as constitutes the statements referred to in Regulation 13(8)), and
- (b) advise the assessee that—
  - (i) the assessee may appeal against the adverse assessment to the Court under Regulation 18, and
  - (ii) the Bank may apply to the Court under Regulation 23 for an order confirming the adverse assessment (including the specified sanctions).

(2) Where the assessment of the assessor is that the assessee is neither committing nor has committed a prescribed contravention, the Bank shall issue the assessee with a statement to that effect.

*Right of appeal against adverse assessment (including specified sanctions)*

18. (1) The assessee may appeal against the adverse assessment (including the specified sanctions) to the Court not later than 28 days after the Bank has complied with Regulation 17(1) in relation to the assessee or within such further period as the Court allows.

(2) If the Court is satisfied that it is desirable that the whole or part of proceedings relating to an appeal under paragraph (1) be heard otherwise than in public because of the nature or the circumstances of the case or having regard to the interests of justice then the Court may make an order that the proceedings shall, in whole or part, be heard otherwise than in public.

(3) The Court may, pending the hearing and determination of an appeal under paragraph (1), make such interim or interlocutory orders as the Court considers necessary in the circumstances.

(4) The Court shall determine an appeal under paragraph (1) by making—

- (a) subject to paragraph (6), an order confirming, varying or setting aside the adverse assessment (including the specified sanctions), whether in whole or in part, or
- (b) an order remitting the case to be decided again by the Bank in accordance with the directions of the Court.

(5) The determination of the Court on the hearing of an appeal under paragraph (1) shall be final, except that a party to the appeal may apply to the Court of Appeal to review the determination on a question of law.

(6) No variation of an adverse assessment under paragraph (4)(a) may provide for the imposition of a sanction on the assessee which is not a sanction referred to in Regulation 19(3)(a) to (h).

## Chapter 4

### *Sanctions*

#### *Sanctions that may be imposed by Bank*

19. (1) Notwithstanding Part IIIC of the Act of 1942 and the sanctions set out in section 33AQ of the Act of 1942, any of the sanctions referred to in paragraph (3) may be imposed by the Bank—

(a) where the provisions of the Act of 1942 are invoked—

- (i) following an inquiry under section 33AO of the Act of 1942, or
- (ii) in accordance with section 33AR or 33AV of the Act of 1942,

or

(b) where an assessor has been appointed under Regulation 13(1) and an adverse assessment has been made by the assessor (being an adverse assessment that contains a statement of the kind referred to in Regulation 13(8)(c)),

in respect of any contravention by a person falling within paragraph (5) and, for the purposes of these Regulations, any reference in the Act of 1942 to the sanctions set out in section 33AQ of that Act is to be read as a reference to the sanctions set out in this Regulation.

(2) The Bank shall take all measures necessary to ensure that any such sanction is implemented.

(3) The sanctions mentioned in paragraph (1) are—

- (a) a direction ordering the assessee or the regulated financial service provider to cease the prescribed contravention and to take such measures as are necessary to prevent a repeat of the prescribed contravention;
  - (b) the disgorgement of the profits gained or losses avoided due to the prescribed contravention insofar as they can be determined;
  - (c) a public warning that identifies the assessee or the regulated financial service provider and the nature of the prescribed contravention;
  - (d) withdrawal and suspension of the authorisation of any regulated financial service provider or registration of an administrator;
  - (e) a temporary ban on any natural person who is held responsible for the contravention concerned, exercising management functions in administrators or supervised contributors;
  - (f) a direction to pay to the Bank a monetary penalty not exceeding three times the amount of the profits gained or losses avoided because of the prescribed contravention, where those profits or losses can be determined (even if that exceeds the maximum amount in subparagraph (g) or (h));
  - (g) subject to Regulation 25(2), where the assessee is a natural person, a direction to pay to the Bank a monetary penalty not exceeding—
    - (i) in the case of a contravention of Article 4, 5, 6, 7, 8, 9, 10, 11(1)(a), (b), (c) or (e), Article 11(2) or (3), 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 or 34 of the Benchmarks Regulation, €500,000,
    - (ii) in the case of a contravention of Article 11(1)(d) or (4) of the Benchmarks Regulation, €100,000,
  - (h) subject to Regulation 25(2), where the assessee is a legal person, a direction to pay to the Bank a monetary penalty not exceeding—
    - (i) in the case of a contravention of Article 4, 5, 6, 7, 8, 9, 10, 11(1)(a), (b), (c) or (e), 11(2) or (3), 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 or 34 of the Benchmarks Regulation, €1,000,000 or 10 per cent of the total annual turnover of the legal person according to the last available accounts approved by the management body,
    - (ii) in the case of a contravention of Article 11(1)(d) or (4) of the Benchmarks Regulation, €250,000 or 2 per cent of the total annual turnover of the legal person according to the last available accounts approved by the management body.
- (4) For the purposes of paragraph (3)(h)(i) and (ii)—
- (a) where a body corporate is a parent undertaking or a subsidiary undertaking which is required to prepare consolidated financial statements

pursuant to Directive 2013/34/EU, the relevant total annual turnover shall be—

(i) the total annual turnover, or

(ii) the corresponding type of income in accordance with—

(I) in the case of a bank, Council Directive 86/635/EEC, and

(II) in the case of an insurance company, Council Directive 91/674/EEC,

according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking, or

(b) where the person is an association, the relevant total annual turnover shall be 10 per cent of the annual turnover of its members.

(5) Each of the following is a contravention, referred to in paragraph (1), which falls within this paragraph, namely a contravention of Article 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 or 34 of the Benchmarks Regulation.

(6) In this Regulation—

“Directive 2013/34/EU” means Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013<sup>4</sup> on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC;

“Directive 86/635/EEC” means Council Directive 86/635/EEC of 8 December 1986<sup>5</sup> on the annual accounts and consolidated accounts of banks and other financial institutions;

“Directive 91/674/EEC” means Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings<sup>6</sup>.

*Exercise of supervisory powers and imposition of sanctions*

20. The assessor, when determining the appropriate sanction or sanctions under Regulation 13(8)(c), or the Bank, when determining the type and level of sanction or sanctions to be imposed under Regulation 19, in respect of a prescribed contravention, shall take into account all relevant circumstances, including, where appropriate—

(a) the gravity and duration of the contravention,

<sup>4</sup>OJ L182, 29.6.2013, p. 19

<sup>5</sup>OJ L372, 31.12.1986, p. 1

<sup>6</sup>OJ L374, 31.12.1991, p. 7

- (b) the criticality of the benchmark to financial stability and the real economy,
- (c) the degree of responsibility of the person responsible for the contravention,
- (d) the financial strength of the person responsible for the contravention, as indicated in particular by the total turnover of the person (in the case of a legal person) or the annual income and net assets of a natural person,
- (e) the level of the profits gained or losses avoided by the person responsible for the contravention, insofar as they can be determined,
- (f) the level of cooperation of the person responsible for the contravention with the assessor or the Bank, as the case may be, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person,
- (g) previous contraventions by the person responsible for the contravention, and
- (h) measures taken by the person responsible for the contravention to prevent its repetition.

*Power to correct assessments*

21. (1) Where the assessor or the Bank is satisfied that there is an obvious error in the text of an assessment, the assessor or the Bank, as the case may be, may alter the text of the assessment to remove the error.

(2) Where the text of an assessment is altered under paragraph (1), the text as so altered shall be taken to be the decision of the Bank under Regulation 13(10).

(3) In paragraph (1), “obvious error”, in relation to the text of an assessment, includes—

- (a) a clerical or typographical error,
- (b) an error arising from an accidental slip or omission, or
- (c) a defect of form.

*When specified sanctions take effect*

22. (1) Where—

- (a) no appeal under Regulation 18 against the adverse assessment (including the specified sanctions) is lodged with the Court within the period for lodging the appeal, or
- (b) an appeal under Regulation 18 against the adverse assessment (including the specified sanctions) has been lodged with the Court

within the period for lodging the appeal but is withdrawn or abandoned,

then the specified sanctions pursuant to Regulation 19(3)(a) to (h), as confirmed or varied in the order, if any, obtained under Regulation 23(2)(a), shall take effect on the date of that order or such other date as the Court may specify in that order.

(2) Where an appeal under Regulation 18 against the adverse assessment is lodged with the Court within the period for lodging the appeal, then the specified sanctions pursuant to Regulation 19(3)(a) to (h), as confirmed or varied in the order, if any, obtained under Regulation 18(4)(a), shall take effect on the date of that order or such other date as the Court may specify in that order.

*Enforcement of adverse assessment (including specified sanctions)*

23. (1) Where—

- (a) no appeal under Regulation 18 against the adverse assessment is lodged with the Court within the period for lodging the appeal, or
- (b) an appeal under Regulation 18 against the adverse assessment has been lodged with the Court within the period for lodging the appeal but is withdrawn or abandoned,

then the Bank may apply to the Court for an order confirming the adverse assessment (including the specified sanctions).

(2) The Court shall determine an application under paragraph (1) by making—

- (a) an order confirming, varying or setting aside the adverse assessment (including the specified sanctions), whether in whole or in part, or
- (b) an order remitting the case to be decided again by the Bank in accordance with the directions of the Court.

(3) The Court shall not hear an application under paragraph (1) unless—

- (a) the assessee appears at the hearing as respondent to the application, or
- (b) if the assessee does not so appear, the Court is satisfied that a copy of the application has been served on the assessee.

(4) If the Court is satisfied that it is desirable that the whole or part of proceedings relating to an application under paragraph (1) be heard otherwise than in public because of the nature or the circumstances of the case or having regard to the interests of justice then the Court may make an order that the proceedings shall, in whole or part, be heard otherwise than in public.

(5) The Court may, on an application under paragraph (1), make such interim or interlocutory orders as the Court considers necessary in the circumstances.

(6) The determination of the Court on the hearing of an application under paragraph (1) shall be final, except that the Bank or the respondent, if any, may apply to the Court of Appeal to review the determination on a question of law.

(7) For the avoidance of doubt, it is declared that no variation of an adverse assessment under paragraph (2)(a) may provide for the imposition of a sanction on the assessee that is not a sanction referred to in Regulation 19(3)(a) to (h).

*Publication of decisions*

24. (1) Subject to paragraph (5), the Bank shall publish any decision imposing a sanction or other measure for a contravention of the Benchmarks Regulation on its website without undue delay after the person on whom the sanction was imposed has been informed of that decision.

(2) The publication under paragraph (1) shall include at least information on the type and nature of the contravention and the identity of the person on whom the sanction or measure has been imposed unless the decision is one imposing measures that are investigatory in nature.

(3) Where the decision to impose a sanction or other measure is subject to an appeal, the Bank shall also publish immediately on its website such information and any subsequent information on the outcome of such appeal.

(4) The Bank shall publish on its website any decisions annulling a previous decision to impose a sanction or a measure.

(5) Where the publication of the identity of a legal person or the personal data of a natural person is considered by the Bank to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises an ongoing investigation or the stability of financial markets, the Bank shall—

- (a) defer publication of the decision to impose the sanction or measure until the reasons for non-publication cease to exist,
- (b) publish the decision to impose the sanction or measure on an anonymous basis, provided such anonymous publication ensures the effective protection of the personal data concerned, or
- (c) not publish the decision to impose the sanction or measure at all where the Bank is of the opinion that the options set out in subparagraphs (a) and (b) are insufficient to ensure—
  - (i) that the stability of financial markets would not be jeopardised, and
  - (ii) the proportionality of the publication of the decision where the sanctions or other measures concerned are deemed to be of a minor nature.

(6) Where the Bank decides to publish a decision to impose a sanction or other measure on an anonymous basis in accordance with paragraph (5)(b), it may postpone the publication of the relevant data for a reasonable period where it is foreseeable that the reasons for anonymous publication will cease to exist during that period.

(7) Where an adverse assessment is confirmed, varied or set aside by an order of the Court under Regulation 18(4)(a) or 23(2)(a), or the case is remitted to be decided by the Bank under Regulation 18(4)(b) or 23(2)(b), the Bank shall publish on its website information relating to such orders and any subsequent decision of the Bank relating to the case.

(8) The Bank shall ensure that a decision published in accordance with this Regulation shall remain accessible on its website for a period of not less than 5 years after its publication, provided that any personal data contained in such publication shall be kept on the website for such period as is necessary in accordance with the Data Protection Acts 1988 and 2003.

(9) The Bank shall inform ESMA of all sanctions or measures imposed but not published in accordance with paragraph (5)(c), including any appeal in relation thereto and the outcome of any such appeal.

*Person not liable to be penalised twice for same contravention*

25. (1) Where—

- (a) a sanction referred to in Regulation 19(3)(f), (g) or (h) has been or is to be imposed on an assessee by virtue of an order obtained under Regulation 18(4)(a) or 23(2)(a), and
- (b) the acts that constitute the prescribed contravention to which the sanction relates also constitute an offence under a law of the State,

then the assessee shall not, in respect of those acts, be liable to be prosecuted or punished for that offence under that law.

(2) A sanction referred to in Regulation 19(3)(f), (g) or (h) in respect of a prescribed contravention shall not be imposed on an assessee where—

- (a) the assessee has been found guilty or not guilty of having committed an offence under a provision of these Regulations, and
- (b) all or some of the acts constituting that offence also constitute the prescribed contravention.

*Power of the Bank to resolve certain contraventions etc.*

26. (1) Where the Bank has reason to suspect that a person (in this Regulation referred to as the “relevant party”) is committing or has committed a prescribed contravention, it may enter into an agreement in writing with the relevant party to resolve the matter (including at any time before an assessment, if any, has been issued in respect of the relevant party).

- (2) An agreement entered into under paragraph (1)—
- (a) is binding on the Bank and the relevant party, and
  - (b) may include terms under which the relevant party accepts the imposition of sanctions.
- (3) An agreement entered into under paragraph (1) may be enforced by the Bank or the relevant party in a court of competent jurisdiction.

*Amendment of Act of 1942*

27. The Act of 1942 is amended—

- (a) in section 2(2A), by inserting the following paragraph:

“(ar) Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016<sup>7</sup>.”,

- (b) in section 33AK(10), in the definition of “supervisory EU legal acts”, by inserting the following subparagraph:

“(ac) Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016<sup>8</sup>.”,

- (c) in section 33AN—

- (i) in subsection (1)—

- (I) by inserting the following definition:

“ ‘Benchmarks Regulation’ means Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016<sup>9</sup> 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.”,

- (II) in the definition of “designated enactment”, by inserting “ the Benchmarks Regulation but (in relation to the Benchmarks Regulation) wherever and only in so far as it imposes a requirement on a person who is not a regulated financial service provider,” before “Regulation (EU) No 596/2014”,

and

- (III) in the definition of “designated statutory instrument”, by inserting “the European Union (Indices used as Benchmarks in Financial Instruments and Financial Contracts or to

<sup>7</sup>OJ, No L171, 29.6.2016, p. 1

<sup>8</sup>OJ, No L171, 29.6.2016, p. 1

<sup>9</sup>OJ No. L171, 29.6.2016, p. 1

Measure the Performance of Investment Funds) Regulations 2017 (S.I. No. 644 of 2017) but (in relation to the European Union (Indices used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds) Regulations 2017) wherever and only in so far as they impose a requirement on a person who is not a regulated financial service provider,” before “the European Union (European Markets Infrastructure) Regulations 2014”,

and

(ii) by inserting the following subsection:

“(5) In this Part 'prescribed contravention' means, in respect of the Benchmarks Regulation, a contravention of Article 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 or 34 of that Regulation.”,

(d) in section 33BC by inserting the following subsection:

“(13) This section does not apply where Regulation 24 of the European Union (Indices used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds) Regulations 2017 (S.I. No. 644 of 2017) applies.”,

and

(e) in Part 2 of Schedule 2 by inserting the following item after the last item:

“

70.	S.I. No. <b>644</b> of 2017	European Union (Indices used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds) Regulations 2017	The whole instrument
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”.

### PART 3

#### OFFENCES

##### *Offence — obstruction of authorised officer in exercise of officer's powers*

28. (1) A person who—

- (a) obstructs or interferes with an authorised officer in the exercise of the powers conferred under these Regulations, or
- (b) without reasonable excuse, refuses or fails to comply with a request or requirement of an authorised officer made under a power conferred by these Regulations,

shall be guilty of an offence and shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both.

*Offence — false, etc. information*

29. A person who, in purported compliance with a requirement imposed on such person under the Benchmarks Regulation or these Regulations, gives to the Bank information that the person knows to be false or misleading in a material particular, or that the person does not believe to be true shall be guilty of an offence and shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both.

*Prosecution of offences*

30. Summary proceedings for an offence under these Regulations may be brought and prosecuted by the Bank.

*Offence by body corporate*

31. (1) Where an offence is committed under these Regulations by a body corporate and is proved to have been committed with the consent, connivance or approval of any person, being—

(a) a director, manager, secretary or other officer of the body corporate,  
or

(b) a person who was purporting to act in any such capacity,

that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if that person were guilty of the first-mentioned offence.

(2) A person may be charged with having committed an offence under these Regulations even if the body corporate concerned is not charged with having committed an offence under these Regulations in relation to the same matter.



GIVEN under my Official Seal,  
22 December 2017.

PASCHAL DONOHOE,  
Minister for Finance.

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