

Comments

Review of the EU Benchmark regulation

Register of Interest Representatives

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Dear Madam or Sir,

On 24 July, the Commission published its [legislative proposal](#) for a review of the Benchmark Regulation.

The proposal is limited to two key aspects, namely

- the introduction of a tool allowing the designation of a statutory replacement rate for a benchmark, whose cessation would result in a significant disruption in the functioning of financial markets in the Union (BMR statutory replacement option), and
- exemptions for FX transactions.

We welcome this proposal, however, subject to the following comments and observations:

1. BMR statutory replacement option:

The GBIC welcomes the European Commission's decision to provide for the possibility to designate a statutory replacement rate for benchmarks, whose cessation would result in a significant disruption in the functioning of financial markets in the Union (BMR statutory replacement).

In this context we do, however, assume that the BMR statutory replacement option will cover and address the following key elements:

- A clear/precise definition of the personal and material scope (which should be as broad as possible) as well as the jurisdictional scope (which should cover agreements governed by the law of an EU member state as well as agreements under the laws of a third country where both parties are residing/established in the EU) in order to define as clearly as possible the exact point where the members state replacement tools have to interface with this BMR base tool.
- The designated replacement benchmark serving as statutory fallback will not be a temporary synthetic benchmark (such as synthetic LIBOR on the basis of mandatory contributions) but rather will be based on a new benchmark accepted / used in the market and recommended by the relevant working groups (with any adjustments suggested by this working group which ensure that this statutory fallback resembles the benchmark it replaces economically as much as possible).
- The designated replacement benchmark will (as already set out in the proposal) be based on industry-agreed replacement rates (which may include adjustments such as spreads) that are likely to be recommended by the risk-free rate working groups that have been convened by the central banks in several currency areas.
- Replacements or mechanisms for replacements bilaterally agreed between the parties (including replacements or mechanism for replacements based on solutions developed for standard market documentations or introduced by protocols for such standard documentations, however, excluding general contractual provisions which are limited to calling for or requiring agreement between the parties) will not be overwritten by / take precedence over such BMR statutory replacement. The relevant provisions in the Delegated Act introducing BMR statutory replacement would have to specify the types of contractual replacement provisions taking into account market practices and developments at the relevant time.
- The Delegated Act also includes a conflict rule regarding possible statutory replacements by third country jurisdictions which could potentially conflict with the relevant BMR statutory replacement.

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The proposal, with the above listed key elements, will add an additional layer of protection regarding critical benchmarks: The statutory replacement option, together with the already existing tools for mandatory continuation of benchmarks for a certain period of time, will provide market participants with the required additional time for a bilateral contractual replacement while at the same time ensuring legal certainty by providing for a statutory fallback benchmark as a backstop.

We understand that the proposal intends to limit the scope of this tool to entities and/or contractual agreements falling within the scope of the BMR, and accordingly, to agreements only covered by the BMR and/or entered into with supervised entities only. It would therefore not cover agreements between other market participants nor agreements, typically regarded as "tough legacy", such as most loans, where these are outside the scope of the BMR. The proposal recognizes the issue of the limited scope and therefore urges member states to complement any statutory replacement on the basis of the BMR by corresponding member state initiatives in order to expand the reach and prevent gaps which could impede the intended effect. The proposal, however, currently does not expressly address the issue of "tough legacy" agreements not covered by the BMR.

We, of course, would prefer a statutory replacement option with a broader scope in order to ensure legal certainty and greater uniformity across product types and the whole of the EU. However, we acknowledge that the suggested approach can achieve largely the same effect, if the member states assume their responsibility to complement any replacement benchmark designated by the Commission under the new BMR statutory replacement option by corresponding member state initiatives to introduce statutory replacements. This applies also to "tough legacy" agreements not covered by the BMR and/or agreements between non-supervised entities.

Considering the importance of such complementary member state legislation, it should be considered to stress even more clearly that the intended effect of providing legal certainty and avoiding potentially systemic risks can only be achieved via a concerted effort and that such concerted effort is necessary to avoid discrepancies and competitive distortions within the EU.

2. FX-exemption

We also welcome the proposed exemption for FX transactions. However, the proposal may be too narrow: The relevant recital appears to limit the scope to "non-deliverable currency forwards and swaps". As these terms can be interpreted very narrowly this could mean that many other types of FX-transactions which face the same challenges may not be covered by the exemption. In addition, institutions will not be able to clearly delineate transactions which would be covered, and which would not be covered. We therefore suggest a broader/wider definition in order to avoid such difficulties.

3. Necessity for a further evaluation of the BMR

We also note that the proposal does not address several issues, which market participants expected to be resolved in connection with the BMR review. The relevant issues have been addressed in detail in the GBIC response to the original consultation and included, inter alia, the following:

- Suggestions for improving the effectiveness of the ESMA benchmark register (improving search-capabilities, requiring additional information on benchmarks and administrators, including pending authorisations/registrations and withdrawals/suspensions, newsletter functionality etc.)

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- Extension of the powers of NCAs to permit the use of non-compliant benchmarks in legacy contracts even in cases where the authorization is withdrawn.

If these further issues cannot be resolved in connection with the present proposal, they will have to be addressed in a further review. Such review should take place as soon as possible, ideally within the next year.