EFAMA

European Fund and Asset Management Association

EFAMA[1] VIEWS ON EC PROPOSAL TO AMEND THE BENCHMARKS REGULATION (BMR) AS REGARDS THE EXEMPTION OF THIRD COUNTRY FX BENCHMARKS AND DESIGNATION OF REPLACEMENT BENCHMARKS

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Asset managers represent an important group of benchmark users, either in the case of index funds and exchange traded funds (ETFs) - where benchmarks are used as a target for index tracking funds - or in the case of the evaluation of an active manager's performance - where the fund performance is measured against a selected index or a set of indices.

As representative of the asset management industry, **EFAMA supports the European Commission's proposal to ensure continuation of existing contracts referencing critical benchmarks such as the LIBOR if and when their continuity is at risk.** Asset managers as supervised entities are mandated under BMR to have in place robust written plans in the case a benchmark ceases to exist or materially changes, targeting at ensuring such continuity. At the same time in the case of a critical benchmark it is not only of higher relevance but also necessary to **ensure legal certainty as regards the fallback arrangements that will ensure such continuity.**

Identification of appropriate fallback rates

- In the case of EURIBOR or LIBOR, identifying the appropriate alternative is a task that may require further involvement than the sole decision of the contractual parties, i.e. the existence of a market alternative that covers the underlying market.

- We welcome the EC's legislative proposal to designate statutory rates in the absence of contractual clauses as this provides legal certainty to the market as to the fallback rates that EU and national regulators would consider as efficient replacement of a certain critical benchmark.

[1] EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 60 Corporate Members and 23 Associate Members. At end Q2 2020, total net assets of European investment funds reached EUR 17.1 trillion. These assets were managed by almost 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and more than 29,100 AIFs (Alternative Investment Funds).. More information available at www.efama.org.

- **It should however be underlined that the choice of the fallback rate remains primarily with the contractual parties who are best placed to assess the specific rate that can ensure a smooth transition**. Should such fallback not exist the suggestion to designate a replacement rate as a standard approach can indeed fill in an important vacuum.

- As already envisaged by the EU Commission and agreed within the EU Council, it is of utmost importance that the designation of the fall back rate should take also into consideration the recommendations made by the private sector working group of the relevant central banks (e.g ECB working group on risk free rates).

Clarification of 'adverse impact on financial stability'

- We also note that the current Council position foresees the possibility for the EC to designate a replacement rate also in cases there is a contractually agreed fallback rate, as long as this rate does no longer reflect the underlying market or the economic reality the benchmark is intended to measure, and could have an adverse impact on financial stability; and one of the parties to the contract has objected to the contractually agreed fallback provision at the latest within [3 months] before the permanent cessation or winding down of the benchmark, while the contracting parties have not agreed on an alternative fallback provision following the objection.
- We recognise the need for critical benchmarks and their replacements to remain reliable and robust in terms of covering the underlying market or economic reality they intend to measure. At the same time, **it is important that such interventions from the competent authority needs to be properly calibrated and clear in terms of what it is considered as "adverse impact on financial stability".** Safeguarding a clear understanding of this criteria would be critical to avoid any undue consequences to the contractual terms.

Third country spot FX rates

- We also fully support – as short term measure - that supervised entities can continue to use certain third country spot FX rates as benchmark for hedging foreign currency risks where there is no EU alternative available after the expiry of the end of the deadline for non-EU based benchmark administrators to register their products in the EU.
- We **welcome the Council's efforts in clarifying application to contracts**, including those between EU supervised entities and those entities not subject to EU regulation (incl. those entities incorporated or regulated by another jurisdiction) and between EU supervised entities but governed by laws of a third country.

Timing: 2025 extension

- From a timing perspective, we note that the Council takes the view that the current rules allowing EU supervised entities to make use of third-country benchmarks should continue to apply until end of 2025.
- We encourage if the European Parliament could also support the extension of the transition period, in order to allow for a smooth transition to a list of exempted benchmarks to be drawn up by the EC.

Until the next review…

- Finally, we encourage the co-legislators to recognise, and clearly state in the upcoming review that registered administrators of all benchmarks take adequate steps to ensure that licenses of, and information on, benchmarks are provided on a cost-based, fair, reasonable, transparent and non-discriminatory basis to all supervised entities.

- We believe that **the BMR review will be an important opportunity to modernise the benchmark framework and strengthen the global competitiveness** of the EU financial services industry and we stand available to engage with the EU institutions in this process as soon as possible.

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