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EBF RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON THE DESIGNATION OF A STATUTORY REPLACEMENT RATE FOR THE EONIA BENCHMARK

The European Banking Federation (EBF), the voice of the European banking sector bringing together national banking associations from across Europe, welcomes the opportunity to comment on this consultation.

The EBF has stressed in various opportunities the need to find legal solution and assess the potential terms by which a replacement benchmark would be nominated for EONIA, as well as for LIBOR (in all its currencies). The EBF, therefore, fully supports the Commission's initiative to designate a statutory replacement rate for EONIA as part of a comprehensive solution for cash and derivative products, as this will provide legal certainty to the transition from EONIA to €STR.

It is important to note that despite numerous efforts and active engagement by market participants as well as coordinated industry solutions, such as ISDA's EONIA Collateral Agreement Fallbacks Protocol or the development of templates for other standard market documentations, the transition risks faced by the market are still significant. First, because it requires the engagement and renegotiations between counterparties. As the Euro Risk Free Rates Working Group (EUR RFR WG) acknowledged (in its recent letter to the Commission), the global pandemic and Brexit have hampered efforts to conclude these renegotiations effectively and efficiently, with many clients unable to prioritize requests, unable to commit to the transition before the end of the year, or simply unresponsive.

It should be noted that the ISDA Protocol does not cover all local collateral agreements or non-derivative agreements and that there will always be portion of counterparties who fail to accede to a protocol. Likewise, in the case of other standard market documentations and the templates for supplements with fallback provisions it will not be possible to agree on the application of such supplement with all counterparties.

Although the private sector has been negotiating the transition towards €STR or €STR+8,5bp during the last months/years, the percentage of transitioned collateral agreement is still very low[1].

With the deadline for use of the EONIA ending on 31 December 2021, the fallback statutory solution is therefore necessary to ensure the replacement of EONIA in contracts and transactions without a successful renegotiation.

The statutory fallback will help to eliminate uncertainty that clients would face about the future performance of their contracts. It will also help to eliminate the potential for parties to implement divergent operational solutions resulting in disadvantageous outcomes for end users and ultimately in contract frustration or protracted legal uncertainties.

[1] According to a survey by the EUR RFR WG among its members, the 19 members that provided input estimate that they are, on average, 46% of the way through their EONIA derivative transition effort with six months remaining.

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Therefore, the EBF fully supports the content of the draft Implementing Regulation.

Having said this, we suggest considering the following additional clarifications in order to prevent misconceptions and uncertainties regarding the manner in which the statutory replacement tool is intended to apply (the suggestions are consistent with similar suggestions for clarifications in our response to the parallel consultation regarding the CHF LIBOR):

- It could be clarified that the statutory replacement tool is not intended to displace replacements or suitable fallback provisions agreed by the parties and other contractual provisions concerning interest rates. This already follows from Art. 23b (3) (a) and (b) of the BMR. However, and especially considering that the personal and material scope also extends to a broad range of contracts and instruments, such clarification could be helpful to prevent any uncertainty or misconception in the market. Such clarification would also serve as a further encouragement to market participants to implement necessary replacements and fallback provisions, including for other IBOR rates, bilaterally or by way of protocols.
  In this connection it could further be clarified that the replacement only affects the reference to the EONIA to be replaced and that other contractual provisions continue to apply, such as provisions on the interest rate period or the composition and calculation of the applicable interest. The legal substitution instrument should not imply a contract modification nor that the parties are entitled to claim modification or termination of the contract due to its application.

- The reference to *"Credit Support Annexes"* could be replaced by *"Collateral Agreements"* to indicate more clearly that this is intended to address all forms of collateral arrangements and not only the ISDA Credit Support Annex is only a solution of those published by ISDA.

Finally, we would like to point out that similar challenges may also exist in respect of other IBORs which could also merit further action. However, in view of the significantly different situation, the solutions to be applied in these cases may require a more differentiated approach, including a differentiation regarding tenors and product classes. We may therefore approach the Commission in due course accordingly.