

Targeted consultation on the designation of a statutory replacement rate for CHF LIBOR**CONSULTATION QUESTIONS****1. ON THE EFFECTIVE NEED FOR A REPLACEMENT FOR CHF LIBOR**

Pursuant to article 23a of the EU BMR, the Commission may only designate replacement rates for third-country benchmarks “if their cessation or wind-down would significantly disrupt the functioning of financial markets in the Union or pose a systemic risk to the financial system in the Union.”.

Question 1. Do market participants agree that the situation as described above, requires that the Commission exercises the statutory replacement powers for the CHF LIBOR?

Please explain and provide data if available.

a) Yes

1. General Suggestions

We appreciate the possibility to comment on the above cited Consultation.

First of all, we would like to give some suggestions on consultation procedures according to Art. 23b para 10 BMR.

Taking into account the new powers granted to the Commission under the recent amendment of the Benchmark Regulation in order to designate a statutory replacement rate for a benchmark under a discontinuation or a non-representative scenario. We persuade the Commission to adopt a broad view of the global relevance of the LIBOR discontinuation proposing a comprehensive pragmatic solution for discontinuation of LIBOR currencies and tenors aligned to the recommendations and solutions adopted by the UK, US and other third countries competent authorities and central banks in order to make sure that the European market solution will be consistent with those adopted by the international authorities. A mismatch among the solutions adopted by the relevant international authorities can create new market risks that would be difficult to anticipate and mitigate.

Given these circumstances, the only solution, to mitigate impacts on financial stability of the LIBOR discontinuation, avoid potential contract disruptions and to protect the consumers, is to designate statutory replacement rates for LIBOR currencies and tenors that will be discontinued by December 2021.

One member of ESBG considers that the EC should also extend the scope of the current implementing act to include 1M tenor of CHF LIBOR.

Any further statutory replacements regarding other problematic benchmarks may require a significantly broader scope. It should be considered that as a starting point for further public consultations (Art. 23b

para. 10 (EU) 2021/168) contracts and financial instruments according to Art. 23a (EU) 2021/168 should be included.

As to the cut-off date, we strongly believe that the intended positive effects on financial markets and legal certainty could be significantly improved by choosing the Cessation Announcement of a benchmark as a cut-off date for the statutory replacement.

Furthermore, if possible, the methodologies of the benchmark to be replaced and the fallback should correspond.

2. Detailed justification of the question

Regarding the CHF LIBOR the discontinuation would pose challenges to the contracting parties. We therefore very much welcome and support the envisaged approach of the Commission to designate a replacement rate by adopting an implementing act pursuant to Article 23b para. 8 of the Amending Regulation ((EU) 2021/168). Such a statutory replacement of the 3M CHF LIBOR would provide the necessary legal certainty for market participants. Considering that 3M CHF LIBOR is mainly used in savings accounts, mortgages and loans, narrowing the scope of the statutory replacement rate as proposed by the Commission seems in principle to be appropriate in this particular case.

3. Data and evidence

In Spain, the CHF LIBOR has been used in foreign exchange mortgages. Due to the fact, that most of these contracts are with consumers, this is why the intervention of the Commission is key.

In Austria, the CHF LIBOR used to play an important role in granting mortgages to private households. By the end of December 2020, an amount of EUR 10,8 bn of such CHF LIBOR linked loans to private households was still outstanding in the Austrian market (source: OeNB: (<https://www.oenb.at/isaweb/report.do?lang=EN&report=3.78>)). Virtually none of the existing contracts contains a fallback language covering the permanent cessation of CHF LIBOR as most contracts were concluded in the years up until 2010, when a concrete replacement indicator was not known/predictable.

4. Cut Off Date

As to the cut-off date, we strongly believe that the intended positive effects on financial markets and legal certainty could be significantly improved by choosing a later cut-off date for the statutory replacement. Currently, it is proposed that only contracts concluded before the full applicability of the Benchmark Regulation ((EU) 2016/1011, BMR) on 1 January 2018 are included in the scope of the replacement rate. This date is, however, not an appropriate cut-off date. Even though supervised entities have been required to establish and maintain robust written plans after entry into force of the BMR, a successor benchmark for CHF LIBOR (and other LIBOR tenors and currencies) was unknown for a long time. The absence of recommended and publicly available substitutes led to uncertainty over what successor benchmark would be appropriate and accepted in the market. Market participants therefore had to resort to very recently – after the cessation announcement by the Financial Conduct Authority as of 5 March 2021 – been in a position to introduce suitable/detailed and market accepted fallback provisions and/or replacement rates. Especially as it was only on this date that a reasonable spread adjustment could be made. This central element is essential to ensure an economically neutral outcome for the contracting parties in the transition. Such an approach is also in line with the recommendations of all major RFR working groups. These see the inclusion of the spread as a central element in the transition. Against this background, the more appropriate and practically relevant cut-off date would be the 5 March 2021. This event marks the official

end of CHF LIBOR for all market participants and is also communicated in the contractual relationships in accordance with the contingency plans.

Additionally, we consider that this replacement rate should be applied to any contract referred to CHF-LIBOR without a fallback or with a fallback that for whatever reason is impossible to apply.

5. significantly disruption of the financial markets

The replacement rate shall be the SARON Compound with the Adjustment Spread as proposed by the Swiss National Working group and applied according to the “last-reset” convention. This is the only way to assure legal certainty for both borrowers and lenders and to prevent any event being disruptive to financial stability and contractual continuity in the European financial market.

The Swiss National Working Group has identified compounded SARON as the replacement rate for CHF LIBOR, which will be officially calculated and published by SIX, the SARON administrator. In order to prevent contractual frustration, European law provides that the resulting gap created by the loss of a benchmark is to be filled by the closest comparative measure. Hence, if a contractually agreed value indicator, e.g. the reference interest rate for loans, ceases to be available, the economically closest reference value should be used instead. This ensures that the contract remains valid and a value transfer between contract parties is prevented. In case existing contracts referencing e.g. 3M CHF LIBOR, the economically closest rate would be the above-mentioned 3M SARON Compound, whereas an adjustment spread (calculated according to ISDA methodology) shall be applied on top, which is also recommended by the Swiss National Working Group and was confirmed by expert opinions from Prof. Pichler and Prof. Jankowitsch from the Vienna Business University and Prof. Graf from the University of Salzburg.

Since neither the working group recommendations nor the expert opinions have been officially endorsed by authorities and consumer protection groups, any contractual conversion according to the procedure described above does not offer the necessary legal certainty, as this would ultimately only be achieved by a court decision.

If there is no legal certainty when converting affected loans with consumers to SARON Compound + adjustment spread upon the end of CHF LIBOR, there is still an open risk that such an approach would be deemed inappropriate or illegal by a court decision. Without any doubt, a situation like this would be disruptive to financial stability and contractual continuity. Therefore, it is important for borrowers and lenders to have clarity on the reference rate + adjustment spread replacing CHF-LIBOR rates.

2. ON THE FAIRNESS AND ACCEPTABILITY OF THE SOLUTION RECOMMENDED BY THE SWISS NATIONAL WORKING GROUP

Question 2. Do consumers, small and medium enterprises and relevant consumer bodies agree that the proposed replacement rate (3M SARON calculated as a compounded SARON under a last reset methodology) plus the ISDA adjustment spread (calculated as a historical median approach over a five-year lookback period) is a fair and equitable solution for a replacement of CHF LIBOR in mortgages and small business loans and consumer credit agreements?

Please explain and, if necessary, provide alternative solutions.

a) Yes

Regarding SARON Compound: SARON Compound is the economically closest alternative to CHF LIBOR. This was also confirmed by an expert opinion via statistical assessment from Prof. Pichler and Prof. Jankowitsch from the Vienna Business University, where alternative rates (e.g. central bank rate) were examined as well (the document was already delivered to the EU Commission). Hence, its application shall find acceptance and be regarded as fair.

Regarding the application of the “last-reset” convention: this convention is the only way to assure the compatibility with the requirements of the MCD and CCD (and their national implementation laws) to inform consumers on the change of the borrowing rate before the start of an interest period. Hence, there shall be no doubt that this will find acceptance and be regarded as fair.

Regarding the ISDA adjustment spread: the replacement of the 3M CHF LIBOR by the 3M compounded SARON plus the ISDA Spread-Adjustment seems in principle appropriate and fair. However, this requires that the final Spread-Adjustment (for 3M CHF LIBOR = 0.0031 %) is directly included and published in the implementing act - instead of a mere reference to the ISDA/Bloomberg website. This is imperative. It is not reasonable for consumers to have to search for the information required to check the interest rate in different places (SIX and Bloomberg webpage). This could be seen as a violation of the legal requirement for transparency.

Finally, we remind the Commission that it is important the date of publication of the Commission’s Implementing Act should be as soon as possible, considering that financial institutions have to carry out different changes in IT systems and inform properly the customers. Consequently, the publication in the Official Journal should take place before September.

3. ON THE COMPATIBILITY OF THE CHOSEN METHODOLOGY WITH EU AND MEMBER STATES LAWS PROTECTING CONSUMERS

Question 3. Do market participants agree that the proposed calculation method (so called last reset) is compatible with the requirements of the MCD, the CCD, Directive 93/13/EEC and of other legislation protecting consumer credit and national implementation laws and with any other applicable legislation? Please explain.

a) Yes

If the forward looking approach cannot be used, the last reset method is an acceptable way to inform customers of the relevant interest rate at the beginning of the contractual relationship (“in-advance”). In our opinion, this procedure is in line with the requirements of European civil law.

In this context, it is important that the interest rate is made available by the administrator in a manner, that gives a central and public access which is e.g. the case since 30 March 2021 by the SIX Index Data Center. Furthermore, the relevant spread has to be fixed in the implementing act. If these requirements are fulfilled, contract parties can verify their interest rate. Only such a comprehensible, transparent approach can meet the relevant civil law requirements. Also, the use of the last reset methodology is necessary to comply with the legal requirements in some Member states.