

PROPOSED AMENDMENTS TO THE EU BENCHMARKS REGULATION

On 24 July 2020, the European Commission published a proposal for amending Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "**EU Benchmarks Regulation**").

The proposal aims notably at granting new powers to the European Commission to facilitate the transition of "tough legacy" contracts to replacement benchmarks.

BACKGROUND

The expected discontinuation of LIBOR by the end of 2021 has raised many concerns within the financial industry and regulators as to its impact on financial stability in a context where many financial contracts referencing LIBOR and maturing after 2021 do not have fall back rate provisions which would allow the parties to continue to comply with their contractual obligations. Although regulators and industry working groups have insisted on the need for financial institutions to amend their contracts to include such fall backs, it is clear that such an amendment process is a significant challenge due to its scale and the time remaining to implement it. It is widely expected that despite all the industry efforts, there will still be a stock of so-called "tough legacy" contracts which will be problematic by the end of 2021.

As a result, following a consultation launched earlier this year, the European Commission has published a proposal for amending the EU Benchmarks Regulation (the "Draft Amendments") in order to grant to the European Commission new powers aiming at facilitating the transition of such tough legacy contracts to new replacement benchmarks.

PROPOSED AMENDMENT REGARDING REPLACEMENT BENCHMARKS

The Draft Amendments propose the introduction of a new Article 23a into the EU Benchmarks Regulation pursuant to which the Commission may designate a replacement benchmark for a benchmark that will cease to be published and where the cessation of that publication may result in significant disruption in the functioning of financial markets in the European Union. Such power may be exercised only if one of the following events has occurred:

- **non representativeness announcement:** the competent authority for the administrator of that benchmark has issued a public statement, or has published information, in which it is announced that the capability of that benchmark to measure the underlying market or economic reality cannot be restored through the exercise of any of the remedial powers referred to in Article 23 of the EU Benchmarks Regulation (such as imposing supervised entities to temporarily contribute input data to the administrator);
- **cessation announcement:** the administrator of a benchmark has issued a public statement, or has published information, or such public statement has been made or such information has been published on behalf of that administrator, in which it is announced that the administrator has ceased or will cease to provide the benchmark, permanently or indefinitely, provided that, at the time of the issuance of the statement or the publication of the information, there is no successor administrator that will continue to provide the benchmark; or

- **insolvency / cessation of business of the administrator:** the competent authority for the administrator of a benchmark or any entity with insolvency or resolution authority over the administrator of that benchmark has issued a public statement or has published information in which it is stated that the administrator of that benchmark has ceased or will cease to provide that benchmark permanently or indefinitely, provided that, at the time of the issuance of the statement or the publication of the information, there is no successor administrator that will continue to provide that benchmark.

Pursuant to paragraph (2) of the new Article 23a, the replacement benchmark shall, by operation of law, replace all references to the terminated benchmark in financial instruments, financial contracts and measurement of the performance of an investment fund provided that all the following cumulative conditions are met by the relevant financial instrument, financial contract or performance measurement:

- it is referencing the terminated benchmark on the date on which the implementing act designating the replacement benchmark enters into force; and
- it does not contain suitable fall back provisions.

Finally, paragraph (3) of the new Article 23a provides that when designating a replacement benchmark, the Commission shall take into account, where available, recommendations made by the relevant alternative reference rate working groups working under the auspices of the central bank responsible for the currency in which the interest rates of the replacement benchmark are denominated.

CALENDAR

The proposal is expected to be adopted by the European Parliament and Council by the end of this year.

BREXIT CONSIDERATIONS

The adoption of the proposal this year would make it automatically part of English law whereas if it were to be adopted in 2021, the United Kingdom would have to adopt its own legislation. In this respect, the UK government made an announcement on 23 June 2020 confirming its intent to consider its own legislative adjustments to the FCA powers in order to facilitate the transition of tough legacy contracts away from LIBOR.

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