



Public consultation by the working group on
euro risk-free rates

on EURIBOR fallback trigger events

23 November 2020

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1 Executive summary

Fallback measures mitigate the risk linked to the temporary or permanent cessation of a benchmark rate. Without the inclusion of a euro interbank offered rate (EURIBOR) fallback measure to an alternative benchmark rate, a party to a financial instrument or contract referencing EURIBOR could potentially dispute the contract due to the unavailability of the referenced benchmark rate and any action taken in response to that unavailability. In accordance with a high-level recommendation made by the working group in November 2019¹, new contracts and financial instruments referencing EURIBOR should include provisions covering both permanent and temporary cessation trigger events.

As a general principle, trigger events should be objectively drafted in precise terms and refer to events made publicly available. In this consultation paper, the working group identifies a generic set of potential permanent EURIBOR fallback trigger events that market participants could consider including in fallback provisions in their contracts and financial instruments referencing EURIBOR. Market participants are invited to give feedback on the proposed EURIBOR fallback trigger events.

If the feedback received suggests market consensus being achieved, this would support the final recommendations from the working group. However, the working group advises all market participants that their application of the recommendations from the working group is on a voluntary basis. Each market participant must make their own independent decision about whether any suggested recommendations are adopted and used in their respective contracts and, if so, to what extent.

Responses to this consultation should be sent to eurorfr@ecb.europa.eu by 15 January 2021, 17:00 CET. The European Central Bank (ECB) and European Securities and Markets Authority (ESMA) will evaluate all the responses and prepare an anonymised summary of the feedback. This summary will be published on the ECB's website and will be considered by the working group at its meeting on 18 February 2021. Final recommendations on the EURIBOR fallback measures are expected shortly thereafter.

¹ See *Report by the working group on euro risk-free rates. High level recommendations for fallback provisions in contracts for cash products and derivatives transactions referencing EURIBOR*, ECB, 6 November 2019.

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This paper discusses a variety of options relating to the introduction of €STR-based fallback clauses for new contracts and financial instruments referencing EURIBOR. Recipients of this public consultation are responsible for making their own assessments as to the suitability of the various options discussed herein. Recipients must continue to operate in an independent and competitive manner and they should not use the content of this document to coordinate their activities in breach of applicable law.

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2 Background, objectives and scope

2.1 Background

In September 2017, the ECB, the Belgian Financial Services and Markets Authority (FSMA), the ESMA and the European Commission announced the launch of the working group on euro risk-free rates (“the working group”). The working group was tasked with identifying and developing an adoption plan for a “risk-free overnight rate” that could serve as a basis for an alternative to the current benchmarks used in a variety of financial instruments and contracts in the euro area.

As part of its mandate, **the working group is expected to identify best practices for contract robustness in contracts and financial instruments referencing EURIBOR**. The working group will consider best practices for contract design that ensure that new contracts are robust and resilient to the possible cessation of the underlying benchmark.

The working group has recently published the following texts.

- On 21 January 2019, the working group published a set of guiding principles for fallback provisions in new contracts for euro-denominated cash products.² These guiding principles cover both euro benchmarks: EURIBOR and EONIA.
- On 6 November 2019, the working group published high-level recommendations for fallback provisions in contracts for EURIBOR-referencing cash products and derivatives transactions.³

These publications offer an overview of the legal frameworks and market practices applicable to different asset classes, such as consumer loans, bonds and derivatives transactions, with a specific focus on fallback clauses, and propose a set of guiding principles and high-level recommendations for the use of effective fallback provisions in contracts for euro-denominated cash products. **The development of more robust fallback language addressing the permanent discontinuation of the benchmark for cash product contracts referencing EURIBOR can help to enhance legal certainty and reduce the risks stemming from the worst-case scenario in relation to EURIBOR.**

In the light of this, the working group recommended that market participants consider incorporating fallback provisions in all new financial instruments and contracts referencing EURIBOR, regardless of whether they fall within the scope of the EU Benchmarks Regulation (BMR)⁴.

In respect of legacy instruments and contracts referencing EURIBOR entered into after 1 January 2018 and falling within the scope of the BMR, this should be covered by the “robust written plans” prepared by supervised entities in accordance with Article 28(2) of the BMR. For legacy contracts that do not contain fallback provisions or that do not contain appropriately worded fallback

² See *Guiding principles for fallback provisions in new contracts for euro-denominated cash products*, ECB, January 2019.

³ See *Report by the working group on euro risk-free rates. High level recommendations for fallback provisions in contracts for cash products and derivatives transactions referencing EURIBOR*, ECB, 6 November 2019.

⁴ Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJ L 171, 29.6.2016, p.1.

provisions, market participants should, to the extent practicable, consider including EURIBOR fallback provisions or enhancing existing provisions when such financial instruments and contracts are amended or during any scheduled future update.

To do so, the working group recommends that the development of EURIBOR fallback provisions take into account the characteristics described below:

- contracts should include provisions covering both permanent and temporary cessation trigger events;
- contracts should include EURIBOR fallback provisions that comply with the BMR, where applicable, and with any other applicable national or European law;
- contracts should contemplate spread adjustments to address differences between the value of EURIBOR and the value of the fallback rate;
- where possible and applicable, contracts should include fallback provisions that may be applied without the need for further consent or at least include flexible provisions to facilitate the application of new fallback provisions and/or should amend the consent levels required for future amendments to the agreements.

Finally, it should be noted that on 24 July 2020, the European Commission published a proposal for a Regulation of the European Parliament and of the Council amending the BMR as regards the exemption of certain third-country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation.⁵ It is expected that the EC Proposal will be the subject of interinstitutional negotiations between the European Parliament, the Council and the Commission during November/December 2020.

According to the proposed legislation, the European Commission would be empowered to designate a statutory rate to replace references to a critical or otherwise systemically relevant benchmark that will no longer be published at a given moment in the future. In particular, the empowerment would ensure that statutory or mandated replacement rates published outside of the European Union could apply to all financial contracts, financial instruments and performance measurement tools entered into or used by a supervised entity subject to the BMR if fallbacks are not already stipulated. However, **this statutory solution would be a solution of last resort and should not be interpreted by market participants as replacing due compliance with Article 28(2) of the BMR.**

The legislative proposal, if endorsed by the European Parliament and the Council, would require that, in exercising the new powers, the European Commission take into account the recommendations of the risk-free rate working groups convened by the public authorities of the relevant currency areas covered by the benchmark in cessation. As the designation powers are premised on the relevant working groups on risk-free rates recommending a replacement rate, applicable spread adjustment to avoid unwanted value transfer and conforming contract changes,

⁵ [Proposal for a Regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/1011 as regards the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation](#), 24 July 2020.

the European Commission invited the working group on euro risk-free rates to address these aspects in their final recommendations.⁶

2.2 Objective

Market participants should seek consistency when developing and introducing fallback provisions in different financial instruments and contracts, to the extent possible and appropriate, and therefore the language should be drafted in a way that would enable it to be introduced in as many contracts as practicable. However, there may also be special characteristics of certain products, financial instruments and market practices that should reasonably be recognised and that would allow recommendations to differ in certain circumstances.

In this consultation paper, the working group identifies and provides recommendations on a generic set of potential permanent EURIBOR fallback trigger events that market participants could consider including in future fallback provisions in their contracts and financial instruments referencing EURIBOR. Market participants are invited to give feedback on the proposed EURIBOR fallback trigger events.

In conjunction with this public consultation on EURIBOR fallback trigger events, the working group also launched a public consultation on [€STR-based EURIBOR fallback rates](#), which identifies certain appropriate EURIBOR fallbacks for cash products, while taking into account the end users' needs, with the aim to ensure a smooth transition in case EURIBOR ceases to exist. Both consultations are launched in parallel to allow market participants to have a comprehensive view of the two essential elements applying to fallback measures, i.e. the EURIBOR fallback trigger event and the EURIBOR fallback rate.

The working group strongly encourages market participants to respond to these public consultations; it hopes to receive feedback from a broad range of market participants, including stakeholders in EURIBOR-linked products and financial instruments from different sectors and product categories.

Responses to this consultation should be sent to eurorfr@ecb.europa.eu by 15 January 2021, 17:00 CET. The ECB provides the secretariat for the working group and is publishing the public consultation document solely in this capacity. The ECB does not, however, accept any responsibility or liability for the contents of the document and the fact that the ECB provides the secretariat for the working group should not be taken as implying in any way that it shares the views expressed in the document. The ECB and ESMA will evaluate all the responses and prepare an anonymised summary of the feedback. This summary will be published on the ECB's website and considered by the working group at its meeting on 18 February 2021. Final recommendations on the EURIBOR fallback measures are expected shortly thereafter.

⁶ See the [Minutes](#) of the working group's meeting on 10 September 2020.

2.3 Scope

The scope of this consultation covers cash products and derivatives transactions.

The working group acknowledges that several market associations have been developing new fallback provisions to deal with benchmark reform. The working group seeks to take advantage of the work already done by these market associations for other asset classes and avoid duplicating their efforts.

- For syndicated loans, since November 2014, the Loan Market Association's (LMA) facility documentation has included an optional "replacement of screen rate" clause, which may be helpful in terms of any discontinuation of EURIBOR. This clause qualifies the "All Lender matters" clause by stipulating that if a screen rate is unavailable, any amendment replacing that screen rate may be made with the consent of the majority lender and the obligor. In order to facilitate further flexibility than the November 2014 clause allows, the LMA published the Revised Replacement of Screen Rate Clause in May 2018, which permits amendments to the benchmark rate to be made to documents with the consent of a specified majority of lenders and borrowers in a wider range of circumstances than the November 2014 clause (i.e. not just in the case of the unavailability of a screen rate)⁷. In particular, it allows amendments to be made to facilitate the inclusion of a replacement benchmark that: (a) is formally selected as a replacement for the screen rate by the administrator or by an appropriate regulator, (b) is otherwise accepted by the relevant markets, or (c) is deemed appropriate by the requisite majority of lenders and the obligors.
- It is worth noting that the triggers set out in the LMA's Revised Replacement of Screen Rate Clause are not triggers of specific fallback rates, but rather suggested triggers of an amendment process. They should be seen in that context and thus allow amendments relating to the benchmark rate to be made with a lower consent level than would otherwise be the case. On 11 September 2020, the LMA published an exposure draft multi-currency rate switch facility agreement, which contains an inbuilt switch mechanism from LIBOR and EURIBOR to risk-free rates.
- For securitisations, the Association for Financial Markets in Europe published model wording for new issues of securitisation bonds to help facilitate the transition from IBORs to new risk-free rates. The model wording provides an easier mechanism for the transition to an alternative rate in case EURIBOR ceases to be available. It does not identify a new rate, but makes the procedure for moving to such a rate (once identified) easier by avoiding the need to undertake a consent solicitation.
- For international offers of floating rate notes, there is no standardised market language, but alternative fallback provisions envisaging benchmark discontinuation and related events are now common in new issues and new and updated debt issuance programmes, and there is a certain degree of consistency in such provisions. They do not identify a new rate, but rather leave the issuer or an independent adviser with the task of selecting a successor or alternative rate (typically based on objective criteria) as well as any adjustment spread and amendment to the terms of the floating rate notes.

⁷ See *Syndicated loan replacement of screen rate clause*, Working Group on Sterling Risk-Free Reference Rates, Loan Market Association, 16 October 2018.

- For derivatives transactions, the working group acknowledges that the International Swaps and Derivatives Association (ISDA) has launched the *ISDA IBOR Fallbacks Supplement*⁸ and *IBOR Fallbacks Protocol*⁹ which, once they are effective on 25 January 2021¹⁰ will provide fallbacks for derivatives referencing LIBOR, EURIBOR and other key interest rate benchmarks (ISDA IBOR fallbacks) addressing the event of permanent cessation and, in respect of LIBOR only, non-representativeness. The working group considers this to be a convenient way to include fallback provisions. In addition, in 2018, ISDA published the *ISDA Benchmarks Supplement and Protocol*, which market participants may use to provide generic fallbacks for derivatives in the event of cessation of an index.
- Additionally, for derivatives transactions executed under European master agreements, which may be outside the scope of the ISDA master agreement, the sponsors of European master agreements¹¹ are advised to consider amending these agreements to include EURIBOR fallback provisions addressing the permanent EURIBOR cessation in line with ISDA advice, if possible.

⁸ [IBOR Fallbacks Supplement](#), 23 October 2020.

⁹ [IBOR Fallbacks Protocol](#), 23 October 2020.

¹⁰ From that date, all new derivatives contracts that incorporate the *2006 ISDA Definitions* and reference one of the covered IBORs will contain the new fallbacks. Derivatives contracts existing as at 25 January 2021 will incorporate the new fallbacks if both counterparties have adhered to the protocol or otherwise bilaterally agreed to include the new fallbacks in their contracts. The protocol will remain open for adherence after this effective date.

¹¹ The Master Agreement for Financial Transactions, commonly known as the European Master Agreement, is sponsored by the European Banking Federation, in cooperation with the European Savings Bank Group and the European Association of Cooperative Banks; the French Master Agreement relating to transactions on forward financial instruments is sponsored by the French Banking Federation (Fédération Bancaire Française); the Spanish Master Agreement (Contrato Marco de Operaciones Financieras) is sponsored by the Spanish Banking Association (Asociación Española de Banca); and the German Master Agreement for Financial Derivatives Transactions (Deutscher Rahmenvertrag für Finanztermingeschäfte) was developed by German banks with the support of the Association of German Banks (Bundesverband deutscher Banken).

3 Fallback provisions: EURIBOR trigger events

3.1 General considerations and potential trigger events

Fallback measures mitigate the risk linked to the temporary or permanent cessation of a benchmark rate. Without the inclusion of a EURIBOR fallback measure to an alternative benchmark rate, a party tied to a financial instrument or contract referencing EURIBOR could potentially dispute any action taken in response to the unavailability of the referenced benchmark rate. In November 2019, the working group made a high-level recommendation that **new contracts and financial instruments referencing EURIBOR should include provisions covering both permanent and temporary cessation trigger events.**

Temporary trigger events seek to address the unavailability of EURIBOR over a limited period of time. The causes could be many and varied, such as a computer failure affecting the designated screen page or a temporary market disruption that may impede the European Money Markets Institute (EMMI), the EURIBOR administrator, to publish EURIBOR over a limited period of time. Under a temporary trigger event, the fallback provision would only apply for a limited period of time, and, after such period, the financial instrument and contract would go back to referencing EURIBOR. Temporary trigger events are usually covered by existing provisions included in some asset classes (e.g. screen rate determination clauses). **The definition of temporary trigger events and their effects lie beyond the scope of working group's mandate.**

Permanent trigger events seek to address the situation in which it would no longer be possible to continue applying EURIBOR in a contract or financial instrument referencing EURIBOR. **The working group has identified various potential permanent EURIBOR trigger events that could be included in a contract or financial instrument, as described in the table below.**

Any future potential EURIBOR discontinuation may apply to one, more or all EURIBOR tenors. In this regard, the EMMI has a policy¹² in place that applies to instances in which the EMMI decides, where appropriate or necessary, to cease the calculation and publication of any one of the EURIBOR benchmark tenors.¹³ **This consultation paper on trigger events only applies to the discontinuation of all EURIBOR tenors.**¹⁴ Note that the discontinuation of one or more, but not all, tenors does not trigger the discontinuation of all tenors.

As a general principle, **trigger events should be objectively drafted in precise terms and refer to events made publicly available.** The working group has identified the following permanent cessation events that market participants could consider including in fallback provisions in their contracts and financial instruments referencing EURIBOR. Market participants are invited to give feedback on the proposed EURIBOR fallback trigger events.

¹² *Benchmarks Changes and Cessation Policy*, EMMI, 31 January 2019.

¹³ EURIBOR has experienced the cessation of some tenors in the past: in 2013 and, more recently, in December 2018.

¹⁴ If there is a discontinuation of a particular EURIBOR tenor instead of EURIBOR as a whole, market participants might wish to consider either interpolation, as has traditionally been done, falling back to the EURIBOR fallback rate, or any other action that parties may wish to apply.

#	Description of events
1	A public statement or publication of information by or on behalf of the regulatory supervisor of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide EURIBOR.
2	A public statement or publication of information by or on behalf of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide EURIBOR.
3	An public statement by the supervisor of the EURIBOR administrator that, in its view, EURIBOR is no longer representative, or will no longer be representative, of the underlying market it purports to measure and no action to remediate such a situation is taken or expected to be taken as required by the supervisor of the EURIBOR administrator.
4	The EURIBOR administrator determines that EURIBOR should be calculated in accordance with its reduced submissions or other contingency or fallback policies or arrangements and either: i) the circumstance(s) or event(s) leading to such determination are not temporary, or ii) EURIBOR is calculated in accordance with any such policy or arrangement for a period of no less than one month.
5	It has become, for any reason, unlawful under any law or regulation applicable to relevant parties ¹⁵ to the agreement to use EURIBOR.
6	EURIBOR is permanently no longer published without a previous official announcement by the competent authority or the administrator.
7	Material change is made to EURIBOR methodology.*

Note that this event would not be understood as an automatic trigger event and so could cover either (i) an acknowledgement that EURIBOR may materially change and references to EURIBOR will continue to be references to EURIBOR as changed, or ii) an option for parties to discuss whether to continue the contract with the materially changed EURIBOR or to fall back to the EURIBOR fallbacks included in the contract. See Section 3.2.7.

Finally, **the date from which the fallback rate would apply after one or more of the trigger events has occurred should also be specified clearly in fallback provisions.** In general, the date should be that of the discontinuation of EURIBOR publication or that of any other (factual or legal) barrier to the use of EURIBOR for the relevant cash product and not the date of the publication of the relevant public statement. Fallback provisions should apply to the determination of the interest rate to be applied on or after such a date. Interest periods for which the interest rate was determined before such a date should not be disrupted.

3.2 Potential permanent EURIBOR fallback trigger events

3.2.1 Event 1 – A public statement or publication of information by or on behalf of the regulatory supervisor of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely

This trigger event is intended to cover the announcement of the discontinuation of EURIBOR by the regulatory supervisor of the EURIBOR administrator. As a general principle, **trigger events should be precise, objective and publicly available.** In this sense, a mere speech by a public authority stating that EURIBOR could be discontinued in the future should not constitute a trigger event. To this end, only an official public statement by the regulatory supervisor of the EURIBOR administrator, currently the Belgian FSMA and, from 2022, the ESMA, could be considered a potential trigger event.

This trigger event is in line with those included in the definition of index cessation events in the ISDA IBOR fallbacks¹⁶ and the *ISDA Benchmarks Supplement*; it is also in line with the trigger events

¹⁵ Such parties should be defined in the relevant governing documentation for the relevant asset class. For instance, in relation to floating rate notes, these parties would be the issuer, the paying agent or the calculation agent in respect of which becomes unlawful to determine EURIBOR or calculate any amount payable under the notes using EURIBOR as a reference rate.

recommended by other private risk-free rate working groups in foreign currencies such as the Alternative Reference Rates Committee (ARRC) in the United States.¹⁷

In addition, attention should be paid to the possibility of the competent authority imposing, in accordance with Article 21 of the BMR, mandatory administration on the EURIBOR administrator, which can last up to five years and therefore delay the cessation of EURIBOR for that same period. The working group is of the opinion that the enforcement of mandatory administration by EURIBOR's current or any potential new administrator should not be considered a cessation event as a supervisor will likely apply this measure to provide for a future benchmark cessation in an orderly fashion or until the benchmark is no longer critical, to avoid market disruption. As a result, permanent cessation trigger event 1 should only apply if the supervisory authority has stated that either no mandatory administration will be imposed or, at the latest, when the maximum period of mandatory administration is to end. If the competent authorities decide to make a public statement about the announcement of the imposition of mandatory administration on the EURIBOR administrator (note that competent authorities are not required by the BMR to publicly announce the use of the mandatory administration power), it should not constitute a trigger event.

On 24 July 2020 the European Commission published its proposal to amend the BMR for the designation of replacement benchmarks for certain benchmarks in cessation (the "EC Proposal").¹⁸ The EC Proposal includes, among other provisions, that the Commission may designate a replacement benchmark provided that some events may occur. In particular, the EC Proposal includes the following trigger event: *"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."* It is expected that the EC Proposal will be the subject of interinstitutional negotiations between the European Parliament, the Council and the Commission during November/December 2020. In case parties to a contract have not included this trigger event in their agreement, the contract may be subject to the relevant designation power of the Commission to the extent to which the contract falls under the scope of the EC Proposal. It should be noted that there is no guarantee that the Commission will use its designation power and the working group recommends that fallbacks be agreed between parties rather than relying on legislative solutions

In view of the above, the working group wishes to seek the views of market participants on the inclusion of this trigger in EURIBOR fallback provisions.

¹⁶ Note that the equivalent trigger in the ISDA IBOR fallbacks and in the *ISDA Benchmarks Supplement* also contemplates such an announcement being made by other authorities, including an insolvency official with jurisdiction over the administrator, a resolution authority with jurisdiction over the administrator, or a court or entity with similar insolvency or resolution authority over the administrator.

¹⁷ See [Fallback Contract Language, ARRC](#).

¹⁸ [Commission's proposal to amend EU rules on financial benchmarks](#), 24 July 2020.

Question 1:

Do you agree with the inclusion of “Event 1” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 1:

A public statement or publication of information by or on behalf of the regulatory supervisor of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide EURIBOR.

3.2.2 Event 2 – A public statement or publication of information by or on behalf of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely

This trigger event is similar to the previous one but the discontinuation announcement is made by the EURIBOR administrator, currently the EMMI. This trigger event is in line with those included in the definition of index cessation events in the ISDA IBOR fallbacks and the *ISDA Benchmarks Supplement*; it is also in line with those trigger events recommended by other private risk-free rate working groups in foreign currencies such as the ARRC in the United States.

In order to also align this trigger with the BMR provision regarding the intended cessation of the benchmark by the administrator and the process to be followed, as stipulated in Article 21 of the BMR, an additional consideration must be taken into account. As per Article 21 of the BMR, the administrator must notify the competent authority, and the benchmark assessment and final decision by the competent authority regarding a possible mandatory administration must be completed (with the final decision having been made to not impose mandatory administration) before the public statement or publication regarding the cessation of EURIBOR by the benchmark administrator can activate the cessation trigger.

The EC Proposal also includes the following trigger event: *“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 that 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.”* It is expected that the EC Proposal will be the subject of interinstitutional negotiations between the European Parliament, the Council and the Commission in November/December 2020. As in the previous events, in case parties to a contract have not included this trigger event in their agreement, their contract may be subject to the relevant designation power of the Commission to the extent to which the contract falls under the scope of the EC Proposals. It should be noted that there is no guarantee that the Commission will use its designation power and the working group recommends that fallbacks be agreed between parties rather than relying on legislative solutions.

In view of the above, **the working group wishes to seek the views of market participants on the inclusion of this trigger in EURIBOR fallback provisions.**

Question 2:

Do you agree with the inclusion of “Event 2” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 2:

A public statement or publication of information by or on behalf of the EURIBOR administrator stating that said administrator has ceased or will cease to provide EURIBOR permanently or indefinitely provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide EURIBOR.

3.2.3 Event 3 – An official public statement by or on behalf of the supervisor of the EURIBOR administrator that, in its view, EURIBOR is no longer representative, or will no longer be representative

This event is known as a “pre-cessation” trigger. This **pre-cessation event is intended to cover a potential deterioration in the representativeness** of EURIBOR that might indicate at an early stage an unannounced stop to EURIBOR or a shift in the regulatory judgement by the benchmark supervisor. The application of this pre-cessation event should consider two elements: (1) the circumstances intended to be covered and (2) the timing when the legal effects occur.

1. The circumstances intended to be covered have actually occurred.¹⁹ It is questionable if the existence of a mere speech would trigger the fallback provisions. Thus, considering that trigger events should be objective, transparent and based on facts – particularly with retail customers – the working group considers that only an **official statement by the supervisor stating that EURIBOR is no longer representative or will no longer be representative would be required to constitute a trigger event**. This official statement should be made with consideration given to the fact that it may engage certain contractual triggers.

In addition, there are several provisions in the current BMR text to address a situation where a benchmark would no longer be representative (e.g. change in input data, mandatory contributions, change in methodology, etc.) pursuant to which the supervisor could require the benchmark administrator to adopt relevant measures to remediate the lack of representativeness. Article 23 of the BMR on mandatory contribution to a critical benchmark, such as EURIBOR, details that the competent authority, in case a supervised entity contributing to a critical benchmark intends to cease contributing input data or on the basis of its own assessment considers that the representativeness of a critical benchmark is put at risk, may take several potentially very powerful specific measures to remediate this risk, such as mandating supervised entities to contribute to the benchmark for a limited period of time, or requiring the administrator to change the methodology or the code of conduct.

Therefore, the event should only occur when these remediation actions have not been or will not be implemented (past experience has shown that changing a methodology takes time for consultation,

¹⁹ Please note that some events might have occurred but might be kept confidential.

testing, etc.). An official public statement made by the supervisor of the EURIBOR administrator, although not specifically foreseen in the BMR, should be desirable in this sense and should clearly and unambiguously state that remediation actions would not be expected or remediation actions already implemented would not be successful.

2. At what point in time should any legal effects (e.g. replacement of the relevant benchmark) occur. Parties need certainty about whether they wish to replace EURIBOR already at the time of such public statement or determination, or whether they prefer to continue with EURIBOR (which would still be published; otherwise other triggers would apply) for a certain period of time in order to give parties more time for transition from an operational standpoint.

If the official statement of the supervisor does not contain a certain time period after which EURIBOR would be considered non-representative, parties may decide to define themselves when entering the contract to have a short minimum period of time (e.g. one, two or three months) to be applicable after the date of the public statement of the supervisor of the EURIBOR administrator in order to safeguard their transition time. This could, however, pose practical implementation issues: first, it would be difficult to determine upfront what time period may be needed. Second, leaving such minimum time period open to be decided in each contract would pave the way to inconsistencies not only between asset classes but also within a specific asset class. Finally, in the absence of market convention, the determination of such period of time could be difficult to apply with and explain to retail customers. Therefore, although not specifically foreseen in the BMR, to ensure a smooth transition, it would be desirable for the European competent authority to determine such transition period of time when it officially communicates to the market that EURIBOR is no longer representative or will no longer be representative.

This event was recommended as a fallback trigger by the ARRC for floating rate notes, securitisations, business loans and syndicated loans. Additionally, on 19 November 2019, the Financial Stability Board called on the ISDA to insert a pre-cessation trigger alongside the cessation trigger in standard derivatives definition.²⁰ Following two public consultations on this issue, the ISDA introduced a pre-cessation trigger in respect of LIBOR only (but not in respect of EURIBOR or any other rate) in the ISDA IBOR fallbacks, which are due to be launched imminently (and which may have already been launched at the time of this consultation). In this respect, the UK Financial Conduct Authority (FCA), as regulatory supervisor for LIBOR, has published a statement as to how it would announce LIBOR contractual triggers. This clarifies that any announcement relating to the non-representativeness of LIBOR would be made with consideration given to the fact that it may engage certain contractual triggers and, therefore, any announcement would be clear about the LIBOR currencies and tenors to which it related.²¹

Notwithstanding the foregoing, in the Eurozone context it is important to note that the pre-cessation trigger is not recognised in the current BMR text, as of now, and that therefore the supervisor of the EURIBOR administrator is not likely to make such a statement.²² However the EC

²⁰ See the [FSB letter to ISDA on pre-cessation triggers](#), 19 November 2019.

²¹ See the [FCA's statement on LIBOR contractual triggers](#).

²² Note that the *ISDA Benchmarks Supplement*, which was primarily created in response to the BMR, does not contain a pre-cessation trigger of this type in respect of any rates (including LIBOR or EURIBOR) but does include an "administrator/benchmark event" trigger that would result in a fallback rate being selected and applied if an administrator or benchmark did not, for example, appear on the list of authorised administrators or benchmarks maintained by the ESMA under the BMR and this resulted in the parties to a relevant transaction being prohibited from using the benchmark in their transaction.

Proposal includes the following trigger event: *“the competent authority for the administrator of that benchmark (the EMMI in case of EURIBOR) 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.”* It is expected that the EC Proposal will be the subject of interinstitutional negotiations between the European Parliament, the Council and the Commission in November/December 2020.

Although, under the current BMR text, there is no reference to the publication of a statement by authorities upon the occurrence of a scenario in which a benchmark is no longer representative of the underlying market and economic reality that it intends to measure. **The introduction of a pre-cessation event in EURIBOR contracts and financial instruments does not contravene the BMR.** Parties may decide whether they wish to include a pre-cessation event in line with the recommendation of public authorities and other working groups related to LIBOR.

In view of the above and considering the current regulatory framework existing in the European Union and the EC Proposal, **the working group wishes to seek the views of market participants on the inclusion of this event in EURIBOR fallback provisions.**

Question 3:

Do you agree with the inclusion of “Event 3” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 3:

An official public statement by or on behalf of the supervisor of the EURIBOR administrator that, in its view, EURIBOR is no longer representative, or will no longer be representative, of the underlying market it purports to measure and no action to remediate such a situation is taken or expected to be taken as required by the supervisor of the EURIBOR administrator.

3.2.4 Event 4 – The EURIBOR administrator determines that EURIBOR should be calculated in accordance with its reduced submissions or other contingency or fallback policies or arrangements and either: i) the circumstance(s) or event(s) leading to such determination are not temporary, or ii) EURIBOR is calculated in accordance with any such policy or arrangement for a period of no less than one month.

This trigger event could also be considered a pre-cessation trigger. It is intended to cover a scenario in which the EURIBOR contingency provisions²³ are relied upon for a certain period of time (a period agreed between the parties but of sufficient length to show that such an event is not merely temporary).

²³ [EURIBOR Benchmark Statement](#), EMMI, July 2019.

This event is included in the Revised Replacement of Screen Rate Clause published by the LMA for syndicated loans. It is worth noting that it is not technically a trigger for fallbacks in the LMA document, but rather a suggested trigger for an amendment process.

While such a trigger might be appropriate in the context of an amendment process that provides a mechanism for negotiating certain provisions in contracts, such as the replacement benchmark, it might be less so in the context of hardwired fallbacks for the vast majority of asset classes, which would not allow negotiations and, therefore, provide market participants with more clarity as to a how a potential replacement rate is to be identified and implemented.

This trigger event has also not been included in the ARRC recommendations for floating rate notes, securitisations, business loans and syndicated loans.

In view of the above and seeking the greatest consistency across asset classes as a principle, **the working group wishes to seek the views of market participants on the exclusion of this trigger in EURIBOR fallback provisions.**

Question 4:

Do you agree with the proposal of not including the “Event 4” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 4:

The EURIBOR administrator determines that EURIBOR should be calculated in accordance with its reduced submissions or other contingency or fallback policies.

3.2.5 Event 5 – It has become, for any reason, unlawful under any law or regulation applicable to relevant parties to the agreement to use EURIBOR

This trigger event is intended to cover any circumstance in which EURIBOR cannot be used as a result of a legal or regulatory prohibition. This trigger would not only cover prohibition of use under the BMR (which would be aligned with the definition of a “administrator/benchmark event” as defined in the *ISDA Benchmarks Supplement*) but also any other circumstances in which it would be unlawful to use EURIBOR for any reason for the relevant transaction.

For those parties and asset classes under the scope of the BMR, this trigger would cover circumstances in which use is not permitted as a result of the authorisation of EURIBOR’s administrator being withdrawn or suspended under Article 35 of the BMR. In addition, the parties to the relevant contract might state that such trigger will also occur if such authorisation is suspended or withdrawn even if, at the time of such suspension or withdrawal, the continued provision and use of the benchmark is permitted in respect of the applicable securities or contract pursuant to BMR provisions.

The application of an unlawfulness trigger may pose several challenges. A key aspect to consider is for whom EURIBOR may become unlawful to use. Its application should, as far as possible, be delimited and not left open to all parties to the contract or financial instrument. Generally, using EURIBOR should be construed according to BMR provisions and therefore should refer, at least, to such parties who determine the level of EURIBOR applicable to the transaction according to the conditions of the relevant agreement.

In this regard, it is also important to note that this trigger event should be analysed along with provisions dealing with illegality issues that certain asset classes usually contain, so market participants should make their own independent assessment and decision in relation to the compatibility between this trigger event and existing illegality provisions.

Below are some further considerations by asset class:

- Syndicated loans typically include provisions that apply if it becomes unlawful for a lender to perform any of its obligations under the agreement or fund or maintain its participation in any loan. The lender is given an option to exit the facilities (subject to an obligation to mitigate the effects of any illegality) and the borrower is required to prepay the relevant lender on request and the lender’s commitment is cancelled. In addition, a facility agent has the right to resign, which it may choose to do if unable to carry out its duties for some reason (although it should be noted that this is not a simple process in practice). Syndicated loans typically contain language clarifying that the agent would not be required to take any action that would breach law or regulation. Additionally, in relation to obligors/borrowers, syndicated loans typically include an event of default if it becomes unlawful for an obligor to perform any of its obligations under the finance documents.
- In syndicated loans with parties from different jurisdictions, the application of an illegality trigger event in a particular jurisdiction may pose practical problems when unlawfulness applies to some, but not all parties (for example, it might result in interest being calculated on the basis of different reference rates across the syndicate of banks).
- In bilateral loan transactions, including business and retail ones, if there were an illegality element applying to the lender or the borrower, the unlawfulness trigger could be implemented more easily.

- In debt securities, an “unlawfulness” trigger event is sometimes included in respect of the agent determining amounts due to the bondholders. These clauses are not, therefore, meant to cover illegality issues affecting bondholders. It is not a market standard for a fallback in debt securities to be triggered when use of the benchmark by one or more bondholders becomes unlawful owing to the fact that bondholders are a numerous and changing group, and some holders may be subject to requirements that do not affect others (for example, bondholders in different jurisdictions).
- In derivatives transactions, any party would be considered a user of a benchmark.²⁴ Thus, if there were an illegality element applying to any of them, the unlawfulness trigger could apply. This approach is already considered in the “administrator/benchmark event” in the *ISDA Benchmarks Supplement*. This approach is not covered by the ISDA IBOR fallbacks, but there may be relevant provisions which would cover this event in a relevant master agreement.

This trigger event has not been included in the ARRC recommendations for floating rate notes, securitisations, business loans and syndicated loans. As a result, this could lead to inconsistency of triggers for multi-currency products.

In view of the above, **the working group wishes to seek the views of market participants on the inclusion of this trigger in EURIBOR fallback provisions, applying only to relevant parties (for example, the borrower and lender in bilateral loans, the agent and the borrower in syndicated loans, the issuer and the agent in debt securities and all parties in derivatives transactions) or whether the existing illegality or resignation provisions in the documentation should be relied on to address this issue and explicitly stated in the relevant agreement to enhance legal certainty and transparency.**

Question 5:

Do you agree with the inclusion of “Event 5” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 5:

It has become, for any reason, unlawful under any law or regulation applicable to relevant parties²⁵ to the agreement to use EURIBOR.

3.2.6 Event 6 – EURIBOR is permanently no longer published without a previous official announcement by the competent authority or the administrator

This trigger event is intended to function as a “catch-all” provision to cover circumstances other than those foreseen in previous events in which EURIBOR could permanently cease to be provided and any other circumstance(s) or event(s) leading to such non-publication that are not temporary. As such, this provision would capture all other scenarios that result in a permanent discontinuation of

²⁴ Particular attention should be paid to the circumstances where a supervised entity may be viewed as using a benchmark under Article 3(1)(7)(b) of the BMR in relation to a derivative and guidance given by the ESMA in the BMR Q&As.

²⁵ Such parties should be defined in the relevant governing documentation for the relevant asset class. For instance, in relation to floating rate notes, these parties would be the issuer, the paying agent or the calculation agent in respect of which becomes unlawful to determine EURIBOR or calculate any amount payable under the notes using EURIBOR as a reference rate.

EURIBOR, but without a public statement being made in advance. Its inclusion would make the fallback language more robust as it could be seen as a trigger event of last resort.

If market participants see the benefit of having this catch-all provision as a trigger event, it is necessary to carefully define the distinction between a temporary blip and a permanent cessation, as unexpected technical issues may occur. This is to avoid the risk of any dispute between counterparties at the moment EURIBOR is discontinued for whatever reason in the absence of any pre-announcement from the EMMI or the FSMA/ESMA. It may therefore require the introduction of a concrete period of time after which parties may consider the discontinuation permanent. For comparison, examples of language included in texts relating to mainstream debt refer to “*the original reference rate ceasing to be published for at least five business days*”.

Even if the permanent discontinuation of EURIBOR without prior communication, either by the EMMI or another competent authority, seems unlikely, **the working group wishes to seek the views of market participants on the inclusion of this trigger in EURIBOR fallback provisions.**

Question 6:

Do you agree with the inclusion of “Event 6” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Event 6:

EURIBOR is permanently no longer published without a previous official announcement by the competent authority or the administrator.

3.2.7 Event 7 – Material change is made to EURIBOR methodology

This event is intended to cover the requirement of Article 28(2) of the BMR, which requires supervised entities to “produce and maintain robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided.” Here it needs to be noted that these plans must (only) nominate one or several fallback rates “that could be referenced to substitute the benchmarks no longer published, indicating why such benchmarks would be suitable alternatives”. Hence, the nomination of fallbacks is only required in the event a benchmark ceases to exist and not to provide for a material change in the benchmark.

As the EURIBOR administrator, the EMMI is responsible for carrying out market consultation and drafting definitions regarding what constitutes a material change in the EURIBOR methodology and the circumstances in which the administrator is to notify users of any such changes in accordance with Article 13 of the BMR and the *EURIBOR Governance Code of Conduct*²⁶, and more specifically in accordance with the EMMI’s *Benchmarks Consultation Policy and Procedure*²⁷. An administrator of a benchmark will only make a (material) change to the benchmark’s methodology to prolong its life by ensuring that it remains adequate and representative; a move to the benchmark’s fallback would not benefit its users.

²⁶ EURIBOR Governance Code of Conduct, EMMI, 31 January 2019.

²⁷ Benchmarks Consultation Policy and Procedure, EMMI, 29 March 2019.

Any potential future change of the EURIBOR methodology could be handled by market participants in two different ways.

- Market participants could consider including an acknowledgement that any material change to EURIBOR methodology (as published and defined by the administrator) does not, per se, constitute a trigger event and that references in contracts to EURIBOR should be understood to be references to EURIBOR as changed, unless otherwise agreed by the parties. This could provide transparency in the light of future changes in EURIBOR methodology by the administrator. Changes to EURIBOR methodology may happen in the future given that Article 5(3)(a) of the BMR requires benchmark administrators to review the definition and methodology of benchmarks at least annually. This approach of including an acknowledgement has already been taken by market participants – see, for example Article 7.8 of the *2006 ISDA Definitions*, which has been added as part of the ISDA IBOR fallbacks, and Article 5 of the *2006 ISDA Definitions Benchmarks Annex* to the *ISDA Benchmarks Supplement* and the recommendation by the working group on euro risk-free rates in the EONIA transition (the working group notes in its recommendation that such acknowledgement is not strictly necessary to ensure a smooth transition, but it could enhance transparency). This approach is also being followed in the ISDA IBOR fallbacks.²⁸
- Market participants could also consider that any material change of EURIBOR methodology (as published and defined by the administrator) constitutes an event with an option for parties to discuss whether to continue the contract with the materially changed EURIBOR or to fall back to EURIBOR fallback rates included in the contract. This approach has been adopted by the LMA in their Revised Replacement of Screen Rate Clause. One of the possible triggers for the application of this clause is the case where the methodology, formula or other means of determining a relevant screen rate has materially changed in the opinion of the majority lenders (or other specified majority) and the borrower. One of the purposes of this option is to protect the borrower and lenders should the screen rate under the revised methodology differ significantly from the rate under the previous methodology. It should be noted, however, that the Revised Replacement of Screen Rate Clause provides for events leading to a process to amend provisions relating to the benchmark rate in syndicated loan agreements rather than providing automatic triggers to a fallback rate and any such amendments would need to be agreed with the consent of the majority lenders (or other specified majority) and the borrower. While this approach may be appropriate in the context of an amendment process that provides a mechanism for negotiating certain provisions in the contracts such as the replacement benchmark, it might be less appropriate in the context of automatic triggers leading to the application of EURIBOR fallbacks or in other asset classes, particularly those with less sophisticated consumers. It should be noted that if fallbacks to the EURIBOR fallback rates are triggered in a contract, but not in all contracts, particularly in derivatives transactions, this could lead to hedging mismatches, among other issues. Additionally, it should be noted that the LMA's exposure draft multi-currency rate switch facility agreement, which contains an inbuilt switch mechanism from LIBOR and EURIBOR to risk-free rates, does not contain a material change trigger event to that automatic switch.

²⁸ [Recommendations of the working group on euro risk-free rates on the EONIA to €STR legal action plan](#), 16 July 2019.

As a general principle mentioned above, fallback trigger events included in contracts should be precise, objective and publicly available. The BMR requires supervised entities to have robust written plans setting out the actions that they would take in the event that a benchmark materially changes and the EMMI is responsible for determining what would amount to a material change and for consulting on any proposed material change in EURIBOR methodology.

In view of the above, **the working group wishes to seek the views of market participants on the premise that a material change (as defined by the administrator) would not result in an automatic trigger event and parties are free to agree, when entering into the contract, either (1) to acknowledge that references in contracts to EURIBOR are to be understood to be references to EURIBOR as materially changed, or (2) to provide parties the opportunity to discuss, for certain asset classes, whether (i) to continue the contract with the materially changed EURIBOR or (ii) to fall back to the EURIBOR fallback rates included in the contract.** If parties wish to include wording to this effect in their agreement, (i) the provision must be drafted so that it is sufficiently precise, objective and publicly available when the event has occurred, and (ii) parties should consider the introduction of a stipulation for those cases in which, notwithstanding any potential material changes in the EURIBOR methodology, either the administrator or the supervisor of the administrator states that the underlying interest of the benchmark remains the same. The introduction of such an acknowledgement is not strictly necessary for ensuring a smooth transition, but it would enhance transparency.

Question 7:

Do you agree that the inclusion of a material change in EURIBOR methodology (as defined by the EMMI) should not result in an automatic trigger event and parties are free to agree when entering into the contract that either **(i) references in contracts to EURIBOR shall be understood to be references to EURIBOR as changed, or (ii) discuss between parties to continue the contract with the materially changed EURIBOR or to fall back to the EURIBOR fallback rates included in the contract?** (yes / no / no opinion) Please elaborate.

Event 7:

Material change is made to EURIBOR methodology.

3.3 Consistency between asset classes

Market participants should aim for consistency in relation to fallback provisions across all asset classes and related contracts, including cash products and derivatives, in order to deal with transfer value and basis risks. In October 2019 the working group published a report highlighting the **risk management implications of having timing inconsistencies in fallback triggers** and of incorporating different fallback trigger language for different asset classes.²⁹

²⁹ *Report by the working group on euro risk-free rates. On the risk management implications of the transition from EONIA to the €STR and the introduction of €STR-based fallbacks for EURIBOR*, ECB, 17 October 2019.

Regarding derivatives transactions, on 23 October 2020 the ISDA published the *IBOR Fallbacks Supplement*³⁰ and *IBOR Fallbacks Protocol*³¹, taking effect on 25 January 2021. These documents should be taken into account in the development of proposed fallback provisions for cash products. However, the ISDA has not analysed the appropriateness of its proposed fallbacks for non-derivatives and it may be the view of market participants that cash product fallbacks should differ in some respects from derivatives fallback provisions.

The working group noted the side-effects that could arise from the lack of concordant language for the usual hedging product combinations. Such risks could arise if both products use divergent fallback clauses with respect to the replacement rates and to different timings for the determinations.

To this end, **the working group wishes to seek the views of market participants on the use of the same trigger events for all asset classes. Market participants are encouraged to consider the risks derived from using different fallback trigger events**, noting feasibility and appropriateness of alignment. Differences have always existed between fallbacks in related products. However, with the improvement of fallbacks, market participants should take the opportunity to harmonise fallbacks across products where feasible and appropriate. Even if the precise language used cannot be identical between products, market participants should aim for fallbacks to have harmonised outcomes across related products to minimise basis risk.

As market associations play a relevant role in this context, the working group encourages them and their affiliates to also consider the implications of inconsistencies in fallback provisions and triggers and of incorporating different fallback trigger language for different asset classes and currencies.

Question 8:

Should all asset classes have the same fallback trigger events, to the extent possible? (yes / no / no opinion) Please elaborate.

³⁰ *IBOR Fallbacks Supplement*, 23 October 2020.

³¹ *IBOR Fallbacks Protocol*, 23 October 2020.

4 Summary of the questions

Question 1: Do you agree with the inclusion of “Event 1” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 2: Do you agree with the inclusion of “Event 2” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 3: Do you agree with the inclusion of “Event 3” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 4: Do you agree with the proposal of not including “Event 4” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 5: Do you agree with the inclusion of “Event 5” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 6: Do you agree with the inclusion of “Event 6” as a trigger event in EURIBOR fallback provisions? (yes / no / no opinion) Please elaborate.

Question 7: Do you agree that the inclusion of a material change in EURIBOR methodology (as defined by the EMMI) should not result in an automatic trigger event and parties are free to agree when entering into the contract that either (i) references in contracts to EURIBOR shall be understood to be references to EURIBOR as changed, or (ii) discuss between parties to continue the contract with the materially changed EURIBOR or to fall back to the EURIBOR fallback rates included in the contract? (yes / no / no opinion) Please elaborate.

Question 8: Should all asset classes have the same fallback trigger events, to the extent possible? (yes / no / no opinion) Please elaborate.

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