Brussels, 20 December 2019

EACB Answer

to European Commission's public consultation on

'Review of the EU Benchmark Regulation'

December 2019

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

For further details, please visit www.eacb.coop

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Introduction

The EACB welcomes the opportunity to participate in this consultation, as it allows for the review of the Benchmarks Regulation (BMR) particularly with respect to the "functioning and effectiveness of the rules applicable to critical benchmarks".

Furthermore, we have been following the reforms of EONIA and Euribor with participation in the roundtables of the ECB working group on euro risk-free rates (RFR WG), as well as, direct involvement by some of our members who form part of one of the subgroups within the working group.

We appreciate the good work carried out by the RFR WG, the European Money Markets Institute (EMMI) that is the critical benchmark administrator of Euribor and EONIA, as well as, the college of supervisors, in ensuring that the reformed critical benchmarks are BMR-compliant. This is important to ensure accuracy and reliability of indices used as benchmarks in financial instruments and contracts, thus contributing to an adequate level of consumer and investor protection.

However, we are mindful of certain transition risks to banks in the process of updating financial contracts to be based on the new Euribor with a hybrid methodology developed by EMMI ("hybrid Euribor"), as well as, the reformed EONIA based on the €STR benchmark created by the RFR WG.

Our main comment would thus be that the BMR should provide as much legal certainty for banks and their clients as possible in that the use of the reformed critical benchmarks do not constitute the cessation or a material change of the original benchmark. This is particularly important for co-operative banks in the context of the hybrid Euribor. This is because Euribor directly touches the real economy as it is a key element for corporate and SME loans and a corner stone for the mortgage markets of many member states such as Spain, Italy, Portugal, Finland, and Austria. In this context, the European Credit Sector Associations expressly wished to acknowledge in a press release dated 30 September 2019, statements made by the European Commission and ESMA that the new hybrid EURIBOR does not represent the "cessation or material change of a benchmark". That said, our concern remains that clients might still argue otherwise which is a risk to benchmark users with dire potential implications for financial stability and market disruption. We therefore take the opportunity of the consultation to request that BMR goes a step further in providing legal certainty by clarifying that no "cessation or material change of a benchmark" has occurred in the case of the EURIBOR reform.

We delve upon the above and further topics in the following responses to the consultation paper.

Responses to questions on 'Section 2: Critical Benchmarks'

1	**To what extent do you think it could be useful for a competent authority to have broader powers to require the administrator to change the methodology of a critical benchmark?** • **Very useful – not useful at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[1 – Not useful at all]

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	Our members state that it is not necessary to give further additional powers to EU authorities or EMMI.
2	**Do you consider that such corrective powers should apply to critical benchmarks at all stages in their existence or should these powers be confined to (1) situations when a contributor notifies its intention to cease contributions or (2) situations in which mandatory administration and/or contributions of a critical benchmark are triggered? Yes / no? Please explain.**
	Please refer to our answer to Question 1.
4	**To what extent do you think that benchmark cessation plans should be approved by national competent regulators?** • **Agree completely – not agree at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[1 – Not agree at all] The BMR requires supervised entities that use a benchmark to produce and maintain robust written plans setting out the actions that they would take in the event of a material benchmark change or in case a benchmark ceases to be provided. Our members state that they fulfil these requirements, and that adding approval processes by NCAs would require additional resources both for the supervised entities and the authority. This is too costly and also adds an administrative burden. Therefore, we are not in favour of NCAs approving benchmark cessation plans at all.
5	**Do you consider that supervised entities should draw up contingency plans to cover instances where a critical benchmark ceases to be representative of its underlying market?**
	We note the Commission statement that "Article 28(2) BMR aims to ensure that supervised entities other than benchmark administrators are prepared for the cessation or material change of a benchmark". Supervised entities have also been provided high level recommendations on the fallback language in contracts as part of contingency plans, in a report by the working group on euro risk-free rates dated 6 November 2019. However in as concerns the 'underlying market', the EACB does not consider it feasible to expand Article 28(2) BMR to 'supervised entities'. Whilst the verification of a critical benchmark that "materially changes" or "ceases to be provided" could to an extent be carried out by supervised entities, the same entities cannot possibly verify when the critical benchmark "ceases to be representative of its underlying market". Case in point are the contractual changes with respect to the transition from EURIBOR to EURIBOR with the hybrid methodology developed by EMMI. EURIBOR measures the cost of wholesale funding of credit institutions in the unsecured euro money market. A supervised entity cannot reasonably verify if the hybrid EURIBOR represents its underlying market, neither does it have the data nor the capacities to assess the money market of eurozone Member States. On a related note, the European Credit Sector Associations expressly wished to acknowledge in a press release dated 30 September 2019, statements made by the European Commission and ESMA that the new hybrid EURIBOR does not represent the "cessation or material change of a benchmark". That said, our concern remains that clients

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	might still argue otherwise which is a risk to benchmark users with dire potential implications for financial stability and market disruption. We therefore take this opportunity to request that BMR provides as much legal certainty as possible by clarifying that no "cessation or material change of a benchmark" has occurred in the case of the EURIBOR reform.
6	**To what extent do you consider the system of supervision by colleges as currently existing appropriate for the supervision of critical benchmarks?** • **Very appropriate – not appropriate at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **If not, what changes would you suggest?**
	[Don't know/ No Opinion/ Not relevant] The supervision carried out by colleges is difficult to assess due to the lack of transparency. For instance, there is no public available list of members of the EURIBOR and EONIA college. We propose exploring possibilities to increase transparency regarding the work done by the benchmark supervision colleges.

Responses to questions on 'Section 3: Authorisation and Registration'

7	**Do you consider that it is currently unclear whether a competent authority has the powers to withdraw or suspend the authorisation or registration of an administrator in respect of one or more benchmarks only?** • **Very unclear – very clear (5 categories)** • **Don't know/ No opinion/ Not relevant**
	[5 – Very unclear] The EACB would prefer a clarification as we believe that competent authorities should have the option to suspend or withdraw authorisation or registration of one or more benchmarks in cases where the same administrator also provides BMR compliant benchmarks.
8	**Do you consider that the current powers of NCAs to allow the continued provision and use in existing contracts for a benchmark for which the authorisation has been suspended are sufficient?** • **Totally sufficient – totally insufficient (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[2 – Insufficient] In order to ensure financial stability, we are in favour to extend the power of the competent authority to allow the continued provision and use of a non-compliant benchmark when it is suspended also to cases where the authorisation is withdrawn.
9	**Do you consider that the powers of competent authorities to permit continued use of a benchmark when cessation of that benchmark would result in contract frustration are appropriate?** • **Very appropriate – not appropriate at all (5 categories)**

	• **Don't know/ No opinion/ Not relevant** **Please explain.**
	[Don't know/ No opinion/ Not relevant] There should be a European definition of the term "contract frustration". Its meaning differs across member states, particularly in English law in which its definition is considered to be rather narrow. EU law, however, i.e. the BMR, relates broadly to contractual disruption and its resulting problems. This should be clarified.

Responses to questions on 'Section 4: Scope of the BMR'

10	**Do you consider that the regulatory framework applying to non-significant benchmarks is adequately calibrated? Which adjustments would you recommend?** • **Completely adequately calibrated – not well calibrated at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[1 – Not well calibrated at all] Since third country jurisdictions have mostly opted to regulate only the most critical benchmarks, it is our view that the regulation of non-significant benchmarks in the BMR is not well calibrated at all. As a result, EU customers and market participants are disadvantaged because non-EEA benchmarks (in the categories; non-significant and significant) are not accessible to EU FIs as they do not fulfil the requirements. We, therefore, argue that the regulation should be recalibrated so that the EU legislation is equivalent to comparable third country jurisdictions.
11	**Do you consider quantitative thresholds to be appropriate tools for the establishment of categories of benchmarks (non-significant, significant, critical benchmarks). If applicable, which alternative methodology or combination of methodologies would you favour?** • **Completely appropriate – not appropriate at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[3] As outlined in question 10 we think that the BMR should be recalibrated so that it is equivalent to comparable third country jurisdictions, i.e. only the most critical benchmarks (Euribor, EONIA, LIBOR and €STR) are within the scope of the regulation. In any case, waivers for benchmarks below a certain threshold should be established.

Responses to questions on 'Section 5: ESMA register of administrators and benchmarks'

14	**To what extent are you satisfied with your overall experience with the ESMA register for benchmarks and administrators? If not, how could the register be improved?** • **Completely satisfied – not satisfied at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[2 – not satisfied] The EACB would like to point out that the use of the register could be simplified by requiring the administrator to enter the actual benchmark(s) into the register, as required from third country administrators. In general, aligning the requirements for third country administrators and EU-administrators would reduce complexity and the administrative effort for users considerably. In addition, the ESMA Register could be upgraded by a "newsletter function". Market participants could register themselves in the ESMA Register with an e-mail address. As soon as an administrator or a benchmark is added to or deleted from the register, a corresponding message would be sent to the registered e-mail address. This would ensure timely information to the market.
15	**Do you consider that, for administrators authorised or registered in the EU, the register should list benchmarks instead of/in addition to administrators?** • **Agree completely - do not agree at all (5 categories)** • **Don't know/ No opinion/ Not relevant**
	[5 – Agree completely] The EACB strongly believes that the register should list benchmarks in addition to administrators. In our opinion, users who are not yet familiar with the ESMA benchmark register tend to search for the benchmark first as they want to check on details of the benchmark itself. Additional searching tools could contribute to increased transparency and facilitate the use of the register. As the register currently allows to search third-country benchmarks, additional implementations regarding EU benchmarks should be not too burdensome.

Responses to questions on 'Section 6: Benchmark Statement'

16	**In your experience, how useful do you find the benchmark statement?** • **Very useful - not useful at all (5 categories)** • **Don't know/ No opinion/ Not relevant**
	[2 – not useful] There is an overlap of content in the benchmark statement and description of methodology, resulting in little meaning and value in having the benchmark statement. There should be a clearer delineation between both documents, potentially turning the current benchmark statement into a summary for the description of the methodology.

	Further standardization with minimum requirements and structure should be established. Index guidelines should be flexible with a high degree of freedom while benchmark statements should be strict in structure and content.
17	**How could the format and the content of the benchmark statement be further improved?**
	Please refer to our answer to Question 16.
18	**Do you consider that the option to publish the benchmark statement at benchmark level and at family level should be maintained?** • **Should definitely be maintained - should definitely be removed (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[2 – should be removed] The information given at benchmark level is the relevant information. Information given for a family is, therefore, not necessary.

Responses to questions on 'Section 7: Supervision of climate-related benchmarks'

19	**Do you consider that competent authorities should have explicit powers to verify:** **a) whether the chosen climate-related benchmark complies with the requirement of the Regulation?** **b) whether the investment strategy referencing this index aligns with the chosen benchmark?** • **Agree completely - do not agree at all (5 categories)** • **Don't know/ No opinion/ Not relevant** **Please explain.**
	[2 – Do not agree] An explicit "ex-ante" power for the National Competent Authority (NCA) to verify compliance of the Benchmark might encourage Benchmark Administrators to launch Low Carbon Indices, since this implies a comparable certification of the benchmarks quality. Therefore, we propose handing such "power" to ESMA, in that ESMA would be responsible for both the certification of BMR-compliant and low carbon/Paris aligned certified benchmarks. This solution would harmonize both the certification and prevent differing national standards, while at the same time giving proof to Benchmark users that the Benchmark is compliant with the regulation.
20	**Do you consider that competent authorities should have explicit powers to prevent supervised entities from referencing a climate-related benchmark, if**

	such benchmark does not respect the rules applicable to climate-related benchmarks or of the investment strategy referencing the climate-related benchmark is not aligned with the reference benchmark?
	Please refer to our answers to Question 19.

Responses to questions on 'Section 9: Non-EEA Benchmarks'

24	**What improvements in the above procedures do you recommend?**
	In line with the last paragraph of the consultation on how third-country benchmark administrators might not have the incentive to seek either recognition or endorsement of their benchmarks for use in the Union, we would like to raise our concerns especially regarding administrators located in the United Kingdom and Switzerland. LIBOR successor benchmarks, in particular, are of great importance for the European financial sector. To prevent market disruptions, we urge the Commission not only to create legal incentives for third-country administrators to seek recognition for their benchmarks to be used in the European Union, but to also work at political level. The CHF LIBOR plays a key role in the financial stability and real economy (in particular, but not exclusively for consumer mortgages) in the European Member States bordering Switzerland, as it was quite popular to conclude CHF credits. Regarding the CHF LIBOR, the National Working Group on the Swiss Franc reference rate has recommended SARON as the alternative. Although the SARON administrator SIX has committed to ensure compliance of its relevant benchmarks for continued use internationally by customers and financial service entities and to implement the necessary provisions to ensure the benchmarks are capable of achieving endorsement on the ESMA register, we would like to highlight again the importance for both supervised entities and consumers and therefore the entire European economy to create incentives for third-country administrators like SIX to comply with the BMR and ensure the use of e.g. the SARON. To conclude, we would like to express our positive support of the equivalence decision taken on 29 July 2019 under Article 30 of Regulation (EU) 2016/1011, that the legal and supervisory framework applicable to the administrators of certain financial benchmarks in Australia is seen as equivalent to the corresponding requirements under the BMR. We also note that on 9 October 2019, a memorandum of understanding was signed between the Australian Investment Commission and ESMA regarding cooperation arrangements on critical benchmarks covered in the EU and Australia.

Contact:

The EACB trusts that its comments will be taken into account.

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