European Securities and Markets Authority

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PUBLIC STATEMENT

Implementation of the clearing and derivative trading obligations with regard to the benchmark transition

The European Securities and Markets Authority (ESMA) along with several other EU authorities[1] issued a joint statement on 24 June 2021, in which they strongly encouraged market participants to stop using all LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021. This, combined with the cessation of EONIA as well as GBP and JPY LIBOR at the end of the year, means that the bulk of the transition away from EONIA and LIBOR and onto Risk-Free Rates (RFR) such as €STR will be largely completed by the end of this year for OTC interest rate derivatives (IRD) denominated in EUR, GBP, JPY and USD.

In this context, ESMA submitted on 18 November 2021 to the European Commission a set of draft regulatory technical standards (RTS)[2] to reflect this benchmark transition within the scope of classes subject to the clearing obligation (CO) and derivative trading obligation (DTO) for OTC IRD contracts. Similarly, in other jurisdictions the respective COs and DTOs have been amended or are in the process of being amended in view of this same benchmark transition.

The draft RTS are now subject to endorsement by the European Commission and will then be under review by the European Parliament and Council. They would enter into force in the form of Commission Delegated Regulations once their approval process is complete and following their publication in the Official Journal of the European Union[3].

From a legal perspective, neither ESMA nor competent authorities possess any formal power to dis-apply a directly applicable EU legal text. Therefore, any change to the application of the EU rules would need to be implemented through EU legislation.

However, as EONIA, GBP and JPY LIBOR are due to cease by the end of the year, and in view of the communication to stop referencing USD LIBOR as soon as practicable and in any event by 31 December 2021, ESMA does not expect the liquidity criteria for the CO and the DTO to be met for OTC IRD classes referencing EONIA, GBP, JPY and USD LIBOR beyond the end of the year. ESMA is mindful that the approval process for the aforementioned RTSs

[1] The European Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and ESMA issued the following joint statement: [Microsoft Word - 2021-06-18 Joint Public Statement USD LIBOR.docx (europa.eu)]

[2] Link to ESMA Final Report: [ESMA proposes changes to the scope of the clearing and derivative trading obligations for the benchmark transition (europa.eu)]

[3] More specifically, the draft RTS proposes that the amendments would enter into force on the later of the following dates: 3 January 2022 or the twentieth day following that of the publication in the Official Journal of the European Union.

may take some time and thus that most probably the amendments proposed in the RTSs will not have entered into force by the end of the year, when the bulk of the liquidity of the classes referencing EONIA or LIBOR will have pivoted to other benchmarks. Therefore, from 3 January 2022, ESMA expects competent authorities not to prioritise their supervisory actions in relation to the CO for IRD classes referencing EONIA, GBP LIBOR, JPY LIBOR or USD LIBOR and in relation to the DTO for IRD classes referencing GBP LIBOR or USD LIBOR and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

As to the classes being introduced to the scope of the CO, ESMA recommends voluntary clearing of those ahead of the CO start date.

Notes for editors

1. Further details of the work of the standing committees can be found on ESMA's website.
2. ESMA's mission is to enhance investor protection and promote stable and orderly financial markets.

   It achieves these objectives through four activities:

   i. assessing risks to investors, markets and financial stability;
   ii. completing a single rulebook for EU financial markets;
   iii. promoting supervisory convergence; and
   iv. directly supervising specific financial entities.
3. ESMA achieves its mission within the European System of Financial Supervision (ESFS) through active cooperation with the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Systemic Risk Board, and with national authorities with competencies in securities markets (NCAs).