ÖSTERREICHISCHE FMA · FINANZMARKTAUFSICHT

OeNB OESTERREICHISCHE NATIONALBANK EUROSYSTEM

Europäische Kommission

Generaldirektion Finanzstabilität,
Finanzdienstleistungen und Kapitalmarktunion

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BEREICH Integrierte Aufsicht
GZ FMA-LE0001.230/0005-INT/2021
(bitte immer anführen!)

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WIEN, AM 06.05.2021

EK-Konsultation: Targeted consultation on the designation of a statutory replacement rate for CHF LIBOR

Sehr geehrte Damen und Herren,

bezugnehmend auf die öffentliche zielgerichtete Konsultation der Europäischen Kommission gemäß Art. 23b Abs. 10 Satz 2 der Verordnung (EU) 2016/1011[1] betreffend die Bestimmung eines Ersatz-Referenzwertes für den CHF LIBOR unter dem Titel

„*Targeted consultation on the designation of a statutory replacement rate for CHF LIBOR*"

erlauben wir uns, Ihnen anbei die offizielle Stellungnahme, die die Österreichischen Finanzmarktaufsichtsbehörde (FMA) gemeinsam mit der Oesterreichischen Nationalbank (OeNB) erstattet, zukommen zu lassen.

Die Stellungnahme wurde zur leichteren Auswertung auch in das ECAS-EU-Survey-Tool unter Verwendung des Links auf der Seite <https://ec.europa.eu/info/consultations/finance-2021-chf-libor-rate_en> eingegeben.

Wir ersuchen höflich um Berücksichtigung unserer Anregungen und stehen für Rückfragen sehr gerne zur Verfügung.

[1] Verordnung (EU) 2016/1011 über Indizes, die bei Finanzinstrumenten und Finanzkontrakten als Referenzwert oder zur Messung der Wertentwicklung eines Investmentfonds verwendet werden, und zur Änderung der Richtlinien 2008/48/EG und 2014/17/EU sowie der Verordnung (EU) Nr. 596/2014, ABl. Nr. L 171 vom 29.06.2016 S. 1, in der Fassung der Verordnung (EU) 2021/168 zur Änderung der Verordnung (EU) 2016/1011 im Hinblick auf die Ausnahme bestimmter Devisenkassakurs-Referenzwerte aus Drittstaaten und die Bestimmung von Ersatz-Referenzwerten für bestimmte eingestellte Referenzwerte und zur Änderung der Verordnung (EU) Nr. 648/2012, ABl. Nr. L 49 vom 12.02.2021 S. 6.

Finanzmarktaufsichtsbehörde
Bereich Integrierte Aufsicht

Für den Vorstand

MMag.a Dr.in Julia Lemonia Raptis, LLM LLM

Dr. Christoph Seggermann

elektronisch gefertigt

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EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Financial markets
Securities markets

CONSULTATION DOCUMENT

Targeted consultation on the designation of a statutory replacement rate for CHF LIBOR

Disclaimer

This document is a working document of the European Commission services for consultation and does not prejudge the final decision that the European Commission may take.

The views reflected on this consultation paper provide an indication on the approach the European Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

The responses to this consultation paper will provide important guidance to the European Commission when preparing, if considered appropriate, a formal European Commission proposal.

Consultation questions

1. On the effective need for a replacement for CHF LIBOR

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

Question 1. Do market participants agree that the situation as described above, requires that the Commission exercises the statutory replacement powers for the CHF LIBOR? Please explain and provide data if available.

a) Yes ☑

b) No

c) No opinion

Explanation: Without a European legislative solution, the discontinuation of the CHF LIBOR will create a significant legal and contract continuity risk for a substantial amount of Austrian retail loans, which could significantly disrupt the functioning of the Austrian financial market. Especially in times of common high uncertainty (Covid-19), legal certainty is essential for financial market participants. A European legislative solution would create legal certainty and mitigate contract continuity risks for all stakeholders and thus pave the way for a smooth benchmark transition fostering financial stability.

Although shrinking over the years, the total outstanding amount of CHF denominated mortgage loans provided to private households was still approx. EUR 10.8 bn (end of December 2020), which means a total share of loans to private households of 6.54%. Almost all CHF loans are variable rate loans referencing to CHF LIBOR and the CHF LIBOR is after the EURIBOR still the second most important reference rate in loans to private households in Austria (approx. 16% of all the outstanding amount of variable loans to private households). According to our estimates, 50.000-60.000 single contracts, which refer to CHF LIBOR, are still outstanding. More than 400 Austrian banks have CHF loans to private households in their books.

CHF denominated mortgage loans to domestic private households typically have a bullet structure with a vast majority still having a residual maturity between 5 and 15 years (the remaining part has a residual maturity up to 5 years). As these CHF loans were granted more than a decade ago (when the cessation of LIBOR was not foreseeable and the EU Benchmark Regulation did not apply), the contracts do not contain appropriate fallback provisions covering the permanent cessation of CHF LIBOR. A retrospective inclusion of a fallback clause covering the cessation of CHF LIBOR can only be done with the explicit consent of each individual client. Such a change in each individual loan contract would be unrealistic to be reached until the end of the year due to the sheer number of outstanding contracts and unclear incentives on the consumer's side to agree to such a change of the loan contract.

Where no bilateral agreement on a new reference rate is achieved, the contractual gap, which occurs due to the cessation of CHF LIBOR, can only be filled by a supplementary interpretation of the contract. Unless there is a replacement rate designated by the Commission, such interpretation leads to a significant litigation risk and frustration of contract risk for these contracts. So Austrian courts would have to decide on the replacement rate for these loans, including all aspects, such as interest rate, calculation method and further adjustments. The lack of a designated replacement rate may lead to lengthy legal challenges of the CHF interest rate referencing, the outcome of which cannot be predicted (but may go as far as a retroactive questioning of the contracts). This could prove disruptive for the financial market given the size of the exposure and number of contracts affected. Altogether resulting in legal uncertainty for approx. 50.000-60.000 consumers as well as their lending banks.

In our view, a cessation of the CHF LIBOR without a designated statutory replacement rate would undermine legal certainty for a substantial amount of Austrian retail loans as well as trust in the Austrian financial market. Whereas by exercising its statutory replacement powers for the CHF LIBOR the Commission can create legal certainty for all stakeholders thereby supporting the smooth functioning of the financial market.

2. On the fairness and acceptability of the solution recommended by the Swiss National Working Group

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

a) Yes

b) No

c) No opinion ☑

Additional remark: To avoid negative implications on the functioning of the Austrian financial market we highly appreciate a solution, which is fair, acceptable and above all provides legal certainty for all stakeholders.

3. On the Compatibility of the chosen methodology with EU and Member States laws protecting consumers

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

a) Yes ☑

b) No

c) No opinion

Explanation: As there is no “forward looking” CHF interest rate available, we see the ‘last reset method’ for compounded SARON as the only possible method, which is compatible with the requirements of the consumer credit legislation. Article 11 paragraph 1 of the Austrian Consumer Credit Act (“Verbraucherkreditgesetz”) states: “*Before a change in the borrowing rate takes effect, the creditor shall inform the consumer on paper or another durable medium of the adjusted* *borrowing rate, the adjusted amount of the instalments and any changes in the number or due date of the instalments. A change in the borrowing rate to the detriment of the consumer shall not take effect vis-à-vis the consumer until the creditor has provided him with the aforementioned information."* Art. 27 of the Mortgage Credit Directive (MCD) and Art. 11 of the Consumer Credit Directive (CCD) have similar requirements.

Only with the application of the last reset (in advance method) the consumer can be informed ahead of the interest rate period about the interest rate and the amount payable.