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'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)
Subject:	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 - Confirmation of the final compromise text with a view to agreement

Delegations will find below the consolidated version of the text agreed between the Council and the Parliament on the above-mentioned legislative proposal.

2020/0154(COD)

REGULATION (EU) 2020/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of …

amending Regulation (EU) 2016/1011 as regards the exemption of certain third- country foreign exchange benchmarks and the designation of a replacement for a benchmark for certain benchmarks in cessation and amending Regulation (EU) No 648/2012

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,

Having regard to the opinion of the European Economic and Social Committee[1],

Acting in accordance with the ordinary legislative procedure[2],

Whereas:

[1] OJ C , , p. .

[2] Position of the European Parliament of ... (not yet published in the Official Journal) and decision of the Council of ....

(1) In order to hedge against adverse foreign exchange rate movements in currencies that are not readily convertible or subject to exchange controls, companies in the Union enter into non-deliverable currency derivatives, such as forwards and swaps. Those instruments enable their users to protect against adverse movements of foreign currencies that are not readily convertible into a base currency. The unavailability of spot foreign exchange benchmarks to calculate the payouts due under currency derivatives would have a negative effect on companies in the Union that export to emerging markets or hold assets or liabilities in those markets, with consequent exposure to fluctuations of emerging market currencies. Following the expiration of the transitional period set out in Regulation (EU) 2016/1011 of the European Parliament and of the Council[3], the use of spot foreign exchange benchmarks provided by a third-country administrator other than a central bank will no longer be possible.

(2) In order to enable companies in the Union to continue their business activities while mitigating foreign exchange risk, certain spot foreign exchange benchmarks used in financial instruments to calculate contractual payouts that are designated by the Commission in accordance with certain criteria should be excluded from the scope of Regulation (EU) 2016/1011.

[3] 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).

(3) In order to designate certain third country spot foreign exchange benchmarks as being excluded from the scope of Regulation (EU) 2016/1011, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the exemption of spot foreign exchange benchmarks for non-convertible currencies when such spot foreign exchange benchmarks are used for calculating the payouts that arise under non-deliverable foreign exchange derivative contracts. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[4]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(4) At the time of adoption of Regulation (EU) 2016/1011, the expectation was that by the end of 2021 third countries would adopt similar legislative regimes for financial benchmarks and that the use in the Union by supervised entities of benchmarks administered in third countries would be ensured by equivalence decisions taken by the Commission or by recognition or endorsement granted by competent authorities. However, limited progress was made in that regard. Considering the disparity in scope between the regulatory regime for financial benchmarks in the Union and in third countries, and to ensure the smooth functioning of the market and the availability of third-country benchmarks for use in the Union after the end of the transitional period on 31 December 2021, the Commission should present a report on the review, by 15 June 2023, of the current provisions on the scope, with particular regard to its effect on the use in the Union of third-country benchmarks. In particular, the Commission should analyse the consequences of the far-reaching scope of such regulation for Union administrators and users of benchmarks also with respect to the continued use of benchmarks administered in third countries. The Commission should assess in particular whether there is a need to amend Regulation (EU) 2016/1011 in order to reduce its scope to administrators of only certain categories of benchmarks or to administrators whose benchmarks are widely used in the Union.

[4] OJ L 123, 12.5.2016, p. 1.

(5) Considering the need to undertake a thorough review of the scope and the provisions concerning third-country benchmarks, the current transitional period for third-country benchmarks should be extended. The Commission should have the power to further extend the transitional period by means of a delegated act, for the maximum of two years, if the assessment demonstrates that the foreseen expiration of the transitional period would be detrimental for the continued use of third-country benchmarks in the Union or poses a serious threat to financial stability.

(6) Extending the transitional period for third-country benchmarks could create an incentive for Union benchmark administrators to relocate their activities to a third country in order not to be subject to the requirements of Regulation (EU) 2016/1011. To prevent such circumvention, administrators who relocate from the Union to a third country during the transitional period should not benefit from access to the Union market under the transitional provision..

(7) As of the end of the transitional period for the withdrawal of the United Kingdom from the Union on 31 December 2020 under the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union[5], the interest rate benchmark London Interbank Offered Rate (LIBOR) no longer qualifies as a critical benchmark under Regulation (EU) 2016/1011. The Financial Conduct Authority of the United Kingdom has announced that it will not persuade or compel panel banks to submit to LIBOR beyond the end of 2021, which increases the risk that one of the most important interest rate benchmarks will most likely be wound down by the end of 2021. The wind-down of LIBOR may result in negative consequences that produce significant disruption in the functioning of financial markets in the Union. There is a stock of contracts in the Union in the areas of debt, loans, term deposits, securities and derivatives that all reference LIBOR, that mature beyond 31 December 2021 and that do not have robust contractual fallback provisions to cover for the cessation of publication or for the wind-down of LIBOR in the relevant calculated currency respectively in some of its tenors. Some of those contracts and some financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council[6] cannot be renegotiated to incorporate a contractual fallback provision prior to 31 December 2021. The cessation or wind-down of LIBOR may therefore result in significant disruption in the functioning of financial markets in the Union.

(8) To be able to provide for the orderly wind-down of contracts that reference a widely used benchmark the cessation of which may result in negative consequences that cause significant disruption in the functioning of financial markets in the Union and where such contracts or financial instruments as defined in Directive 2014/65/EU cannot be renegotiated to include a contractual fallback provision by the time of that benchmark ceases to be published, a framework accompanying the cessation or the orderly wind-down of such benchmarks should be laid down. That framework should comprise a mechanism aimed at transitioning such contracts or financial instruments as defined in Directive 2014/65/EU to designated replacement for a benchmark. A replacement for a benchmark should ensure avoiding contract frustration which may result in negative consequences that cause significant disruption in the functioning of financial markets in the Union.

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5 OJ L 29, 31.1.2020, p. 7.

6 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

(9) Article 28(2) of Regulation (EU) 2016/1011 requires supervised entities other than benchmark administrators to have contingency plans in place in case a benchmark changes materially or ceases to be provided. If possible, those contingency plans should identify one or more potential replacements for benchmarks. As shown by the experience with LIBOR, it is important that contingency plans are prepared for the case when a benchmark materially changes or ceases to be provided. Competent authorities should monitor whether this obligation is complied with and may check on a random sample basis. Therefore, supervised entities should keep their contingency plans, and any updates to them, readily available so that they can forward them to the competent authorities without delay upon request.

(10) The absence of a mechanism at Union level to organise the orderly wind-down of a benchmark would likely result in diverging legislative solutions by Member States. Union stakeholders would in such a situation be exposed to risks from the diverging implementation of national laws. Along with the outstanding exposure and stock of contracts and financial instruments as defined in Directive 2014/65/EU, the increased likelihood of contractual frustration and the increased risk of litigation could lead to significant disruptions in the functioning of financial markets. Due to the extraordinary circumstances and systemic risks, it is necessary to establish a harmonised approach to deal with the cessation or wind-down of certain benchmarks with systemic relevance for the Union.

(11) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission to designate a replacement for a benchmark to replace all references to that benchmark in contracts or financial instruments as defined in Directive 2014/65/EU that have not been renegotiated by the date of the entry into force of the implementing act. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[7]. Legal certainty requires that the Commission exercises those implementing powers only upon precisely defined trigger events clearly demonstrating that administration and publication of the benchmark to be replaced will cease permanently.

(12) Similar negative consequences may arise from contracts or financial instruments which are by definition outside the scope of Regulation (EU) 2016/1011, but which reference benchmarks that are under cessation or are being wound down. In the same way, many entities use such benchmarks but do not qualify as supervised entities. Consequently, those contracts and contractual parties would not benefit from a replacement for a benchmark. In order to mitigate the potential impacts on market integrity and financial stability as far as possible and to provide for protection against legal uncertainty, the mandate of the Commission to designate a replacement for a benchmark should apply to any contract and any financial instrument as defined in Directive 2014/65/EU that is subject to the law of a Member State. In addition, the designated replacement for a benchmark should also apply to contracts that are subject to the law of a third country and that have been entered into between contractual parties all of which are established in the Union, in cases where the contract meets the requirements of this Regulation and where the law of that third country does not provide for an orderly wind-down of a benchmark. This extension should not affect the remaining provisions of Regulation (EU) 2016/1011.

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7 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(13) The application of the replacement for a benchmark should be restricted to contracts or financial instruments as defined in Directive 2014/65/EU that have not been renegotiated prior to the date of cessation of the benchmark concerned. Where master contracts are used, the replacement for a benchmark will apply only to transactions entered into prior to the relevant date of replacement, even though later transactions might technically be part of the same contract. The use of the replacement for a benchmark designated by the Commission should therefore be restricted to contracts or financial instruments as defined in Directive 2014/65/EU already entered into at the moment of the entry into force of the implementing act designating the replacement for a benchmark. Furthermore, considering that such implementing act is aimed at ensuring contract continuity, the designation of the replacement for a benchmark should not affect contracts or financial instruments as defined in Directive 2014/65/EU that already provide a suitable contractual fallback provision which addresses the permanent cessation of a benchmark.

(14) The adoption by the Commission of a replacement for a benchmark should not prevent parties to a contract from agreeing to apply a different replacement for that benchmark.

(15) The Commission should exercise its implementing powers only in situations where it assesses that the cessation or wind-down of a benchmark may result in negative consequences that cause significant disruption in the functioning of financial markets or the real economy in the Union. The Commission should also exercise its implementing powers only where it has become clear that the representativeness of the benchmark concerned cannot be restored or that the benchmark will no longer be published on a permanent basis.

(16) Contracting parties are responsible for analysing their contractual arrangement to determine which situations a contractual fallback provision intends to cover. If the interpretation of a contract or financial instrument as defined in Directive 2014/65/EU reveals that the parties did not intend to cover the permanent cessation of a chosen benchmark, the statutory replacement for a benchmark that is designated in accordance with the provisions of this Regulation should provide a safe harbour to address the permanent cessation.

(17) Before exercising its implementing powers to designate a replacement for a benchmark, the Commission should conduct a public consultation and should take into account recommendations by relevant stakeholders and in particular by private sector working groups operating under the auspices of public authorities or the central bank. Those recommendations should be based on extensive public consultations and expert knowledge, about the most appropriate replacement rate for the interest rate benchmark in cessation. The Commission should also take into account recommendations of other relevant stakeholders, including the competent authority of the benchmark administrator and ESMA.

(18) Considering that the replacement of a benchmark may require changes or modifications of those contracts necessary for the practical use or application of such replacement for a benchmark, the Commission should be empowered to lay down such corresponding essential conforming changes in the implementing act.

(19) For benchmarks which are designated by the Commission as being critical in one Member State in accordance with Regulation (EU) 2016/1011 and where the cessation or wind-down of such a benchmark may result in significant disruptions of the functioning of financial markets in one Member State, the relevant competent authority should, take necessary actions to avoid such disruptions in accordance with national law.

(20) Where a Member State accedes to the euro area and where a subsequent lack of input data for computing a national benchmark requires the replacement of that benchmark, that Member State may adopt a statutory provision providing for the transition from that national benchmark to a replacement for that benchmark. In such case, that Member State should take into account the status of consumers as contractual parties and ensure their position is not negatively affected by the transition of the national benchmark to a greater extent than necessary.

(21) Benchmarks and their contractually agreed fallback provision may over time significantly and unexpectedly diverge from each other and, as a consequence, may neither represent the same underlying economic reality any longer nor lead to commercially acceptable results. Such cases could include the significant widening of the spread between the benchmark and the contractually agreed fallback provision over time or situations where the contractually agreed fallback provision changes the basis of the benchmark from a variable rate to a fixed rate. Since this issue might arise in a number of Member States, and frequently parties from different Member States would also be affected in such cases, it should be tackled in a harmonised way in order to avoid legal uncertainty, excessive litigation and, as a consequence, possible significant negative effects on the single market or repercussions on the financial stability in individual Member States or the Union. Accordingly, the replacement for a benchmark that is established by the implementing act should under certain preconditions serve as a replacement when relevant national authorities, for example macro-prudential authorities, systemic risk councils or the central banks, have established that the originally agreed fallback provision no longer reflects the economic reality that the ceasing benchmark was intended to measure or could pose a threat to financial stability. The national relevant authorities should undertake this assessment when it is made aware of the potential unsuitability of a commonly used fallback provision by one or more potentially affected parties. Such assessment should not be performed on a contract-by-contract basis. The national relevant authorities involved should be obliged to inform the Commission and ESMA of that assessment.

(22) Regulation (EU) 2016/1011 should therefore be amended accordingly.

(23) Regulation (EU) No 648/2012 of the European Parliament and of the Council[8] is currently being amended for the purpose of providing clarity to market participants that contracts entered into or novated before the entry into application of the clearing or margin requirements to over-the-counter ('OTC') derivative contracts referencing a benchmark ('legacy contracts') will not be subject to these requirements if those contracts are amended with regard to the benchmark they refer to and those amendments serve the sole purpose of implementing or preparing for the implementation of a replacement for a benchmark or introducing fallback provisions in this regard during the transition to a new benchmark as part of a benchmark reform. Benchmark reforms in this regard result from internationally coordinated work streams and initiatives aimed at reforming benchmark rates to comply with the International Principles for Financial Benchmarks published by the International Organization of Securities Commissions. Regulation (EU) 2016/1011 requires supervised entities to produce and maintain robust written plans setting out the actions they would take in the event that any benchmark materially changes or ceases to be provided and to reflect those plans in the contractual relationship with clients. In order to facilitate compliance by market participants with those obligations and to support action by market participants to enhance the robustness of OTC derivative contracts referencing benchmarks potentially subject to reforms, Regulation (EU) No 648/2012 should be amended to clarify that legacy contracts will not be subject to clearing or margin requirements, if those contracts are amended for the sole purpose of replacing the benchmark they refer to against the background of a benchmark reform. Thus, this exception applies only to contractual amendments necessary to implement or prepare for the implementation of a replacement for a benchmark due to a benchmark reform or necessary to introduce fallback provisions in relation to a benchmark in this regard in order to enhance the robustness of the relevant contracts. Those amendments shall serve to provide clarity to market participants and do not affect the scope of the clearing and margin obligations in relation to amendments of OTC derivative contracts for other purposes or in relation to replacements or novations such as changes of counterparties.

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[8] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

(24) In view of the fact that LIBOR will no longer be a critical benchmark within the meaning of Regulation (EU) 2016/1011 as of 1 January 2021, this Regulation should enter into force as a matter of urgency on the day following that of its publication in the Official Journal of the European Union,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2016/1011

(1) Article 2 is amended as follows:

(a) the following paragraph is inserted:

"1a. Chapter 4a applies to:

(a) any contract or any financial instrument as defined in Directive 2014/65/EU that is governed by the law of one of the Member States and that references a benchmark; and

(b) any contract that is subject to the law of a third country but the parties to which are all established in the Union and where the law of that third country does not provide for an orderly wind-down of a benchmark.";

(b) in paragraph 2, the following point is added:

"(i) a spot foreign exchange benchmark which has been designated by the Commission in accordance with paragraph 3.";

(c) the following paragraphs are added:

"3. The Commission can designate a spot foreign exchange benchmark that is administered by administrators located outside the Union where both of the following criteria are fulfilled:

(a) the foreign exchange benchmark refers to a spot exchange rate of a third-country currency that is not freely convertible; and

(b) the spot foreign exchange benchmark is used on a frequent, systematic and regular basis to hedge against adverse foreign exchange rate movements.

4. By 31 December 2022, the Commission shall conduct a public consultation to identify spot foreign exchange benchmarks that fulfil the criteria laid down in paragraph 3.

5. By 15 June 2023, the Commission shall adopt delegated acts in accordance with Article 49 to create a list of spot foreign exchange benchmarks that fulfil the criteria laid down in paragraph 3 of this Article. The Commission shall update that list as appropriate.";

(2) Article 3 is amended as follows:

(a) in paragraph 1, the following point is inserted:

"(22a) 'spot foreign exchange benchmark' means a benchmark which measures the price, expressed in one currency, of one or a basket of other currencies, for delivery on the earliest possible value date;"

(b) point (i) of point 24(a) is replaced by the following:

"(i) a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU or a trading venue in a third country for which the Commission has adopted an implementing decision that the legal and supervisory framework of that country is considered to have equivalent effect within the meaning of Article 28(4) of Regulation (EU) No 600/2014 of the European Parliament and of the Council* or Article 25(4) of Directive 2014/65/EU of the European Parliament and of the Council, or to have a regulated market considered to be equivalent under Article 2a of Regulation (EU) No 648/2012, but in each case only with reference to transaction data concerning financial instruments;

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* Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).";

(3) the following chapter is inserted:

"CHAPTER 4a

Replacement of a benchmark by legislation

Article 23a

Replacement of a benchmark by EU legislation

1. This Article shall apply to:

(a) benchmarks designated as critical by an implementing act adopted in accordance with point (a) or (c) of Article 20(1);

(b) benchmarks based on the contribution of input data if their cessation would result in a significant disruption in the functioning of financial markets in the Union; and

(c) benchmarks administered in a third country if their cessation would result in a significant disruption in the functioning of financial markets or pose a systemic risk for the financial system in the Union.

2. The Commission may designate one or more replacement benchmarks for a benchmark provided that any of the following events has occurred:

(a) the competent authority for the administrator of that benchmark has issued a public statement, or has published information, in which it is announced that the capability of that benchmark to measure the underlying market or economic reality cannot be restored. In the case of a critical benchmark under points (a) and (c) of Article 20 (1), the above determinations shall be made by the competent authority of that critical benchmark only after the powers set out in Article 23 have been exercised without leading to the restoration of the capability of the benchmark to measure the underlying market or economic reality;

(b) the administrator of a benchmark, or someone acting on behalf of that administrator, has issued a public statement, or has published information, or such public statement has been made or such information has been published, in which it is announced that that administrator will commence the orderly wind-down of that benchmark or will cease to provide that benchmark or certain tenors or certain currencies in which that benchmark is calculated, 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;

(c) 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 will commence the orderly wind-down of that benchmark or will cease to provide that benchmark or certain tenors or certain currencies in which that benchmark is calculated 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;

(d) the competent authority withdraws or suspends the authorisation in accordance with Article 35, withdraws the recognition in accordance with Article 32(8) or ceases the endorsement in accordance with Article 33(6), provided that, at the time of the withdrawal or suspension or cessation, there is no successor administrator that will continue to provide that benchmark and the administrator of that benchmark will commence the orderly wind-down of the benchmark or will permanently cease to provide that benchmark or certain tenors or certain currencies in which the benchmark is calculated.

(2) For the purposes of paragraph 1, the replacement for a benchmark shall replace all references to that benchmark in contracts and financial instruments as referred to in Article 2(1a) where those financial instruments and contracts contain:

(a) no fallback provision; or

(b) no suitable fallback provisions.

3. For the purpose of point (b) of paragraph 2, fallback provisions shall be deemed unsuitable if:

(a) they do not cover the permanent cessation of a reference benchmark; or

(b) their application requires further consent from third parties that has been denied; or

(c) its application no longer, or only with a significant difference, reflects the underlying market or the economic reality that the ceasing benchmark is intended to measure, and could have an adverse impact on financial stability.

4. For the purposes of point (c) of paragraph 3, the following conditions have to be met:

(a) the national relevant authority, based on a horizontal assessment of a specific type of contractual arrangement that has been performed following a motivated request of one or more of the interested parties, has established, after having consulted the relevant stakeholders, that the application of the fallback provision no longer reflects, fully or to a significant extent, the underlying market or the economic reality that the ceasing benchmark is intended to measure, and could have an adverse impact on financial stability;

(b) following the assessment by the relevant national authority in accordance with point (a), one of the parties to the contract has objected to the contractually agreed fallback provision at the latest three months before the permanent cessation of the publication of the benchmark; and

(c) the contracting parties have not agreed on an alternative fallback provision following the objection pursuant to point (b) at the latest one working day before the permanent cessation of the publication of the benchmark.

5. For the purposes of point (c) of paragraph 3, the relevant authority shall inform the Commission and ESMA of its assessment without undue delay. Where entities in more than one Member State could be affected by the assessment, the relevant authorities of all those Member States shall conduct and reach the assessment jointly.

6. Member States shall designate a relevant authority, which is in the position to conduct the assessment in accordance with point (c) of paragraph 3. Member States shall inform the Commission and ESMA of the designation of the relevant authorities pursuant to this paragraph by [six months after the date of entry into force of this amending Regulation].

7. The Commission shall adopt implementing acts to designate one or more replacements for a benchmark in accordance with the examination procedure referred to in Article 50(2) where one of the conditions laid down in paragraph 1 is fulfilled.

8. An implementing act referred to in paragraph 7 shall include the following:

(a) the replacement for a benchmark or benchmarks;

(b) the spread adjustment, including the method for determining such spread adjustment, that is to be applied to the replacement for a benchmark in cessation on the date of the replacement for each particular term to account for the effects of the transition or change from the benchmark to be wound down to the replacement for a benchmark;

(c) the corresponding essential conforming changes that are associated with and reasonably necessary for the use or application of a replacement for a benchmark; and

(d) the relevant date from which the replacement or replacements for a benchmark shall apply.

When adopting an implementing act, the Commission shall take into account, where available, the recommendations on the replacement for a benchmark, the spread adjustment and the replacement for a benchmark conforming changes made by the central bank responsible for the currency area in which the relevant benchmark is to be wound down, or by the alternative reference rate working group in particular operating under the auspices of public authorities or the central bank. Before adopting the implementing act the Commission shall conduct a public consultation and shall take into account the recommendations of other relevant stakeholders, including the competent authority of the benchmark administrator and ESMA.

9. Notwithstanding point (c) of paragraph (4) of this Article, the replacement for a benchmark designated by the Commission in accordance with paragraph 1 of this Article shall not apply where all parties or the required majority of a contract or financial instrument that is subject to Article 2(1a) have agreed to apply a different replacement for a benchmark before or after the entry into force of the implementing act.

Article 23b

Replacement of a benchmark by national legislation

1. The national competent authority of a Member State, where the majority of contributors is located, may designate one or more replacements for a benchmark under point (b) of Article 20(1), provided that any of the following events has occurred:

(a) the competent authority for the administrator of that benchmark has issued a public statement, or has published information, in which it is announced that the capability of that benchmark to measure the underlying market or economic reality cannot be restored. This determination shall be made by the competent authority only after the powers set out in Article 23 have been exercised without leading to the restoration of the capability of that benchmark to measure the underlying market or economic reality;

(b) the administrator of a benchmark, or someone acting on behalf of the administrator has issued a public statement, or has published information, or such public statement has been made or such information has been published, in which it is announced that that administrator will commence the orderly wind-down of that benchmark or will cease to provide that benchmark or certain tenors of that benchmark or certain currencies in which that benchmark is calculated, 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;

(c) 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 will commence the orderly wind-down of that benchmark or will cease to provide that benchmark or certain tenors or certain currencies in which that benchmark is calculated 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; or

(d) the competent authority withdraws or suspends the authorisation of the benchmark administrator in accordance with Article 35, provided that, at the time of the withdrawal or suspension there is no successor administrator that will continue to provide that benchmark.

2. Where a Member State designates one or more replacements for a benchmark in accordance with paragraph 1, the competent authority of that Member State shall immediately notify the Commission and ESMA.

3. The replacement for a benchmark shall replace all references to that benchmark in contracts and financial instruments that are referred to in Article 2 (1a) where both of the following conditions are fulfilled:

(a) the contracts or financial instruments reference the benchmark that will cease or has ceased to be published on the date when the national legislation designating the replacement for a benchmark enters into force; and

(b) those contracts or financial instruments contain no fallback provision or contain a fallback provision which does not cover the permanent cessation of a reference benchmark.

4. The replacement for a benchmark designated by the Member State or competent authority in accordance with paragraph 1 shall not apply where all parties or the required majority of a contract or financial instrument that is subject to Article 2(1a) have agreed to apply a different replacement for a benchmark before or after the entry into force of the national provision.";

(4) in Article 28, paragraph 2 is replaced by the following:

"2. Supervised entities other than an administrator as referred to in paragraph 1 that use a benchmark shall 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. Where feasible and appropriate, such plans shall nominate one or several alternative benchmarks that could be referenced to substitute the benchmarks that would no longer be provided, indicating why such benchmarks would be suitable alternatives. The supervised entities shall, upon request and without undue delay, provide the relevant competent authority with those plans and any updates and shall reflect them in the contractual relationship with clients.";

(5) in Article 29, the following paragraph is inserted:

"1a. A supervised entity may also use the replacement for a benchmark designated in accordance with the procedure in the Article 23a or Article 23b in those contracts and financial instruments where references to the replacement originate from such statutory replacement."

(6) Article 49 is amended as follows:

(a) the following paragraph is inserted:

“2b. The power to adopt delegated acts referred to in Articles 2(5) and 54(7) shall be conferred on the Commission for an indeterminate period of time from [date of entry into force of this amending Regulation].”;

(b) the following paragraph is inserted:

“3a. The delegation of power referred to in Articles 2(5) and 54(7) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.”;

(c) the following paragraph is added:

“6a. A delegated act adopted pursuant to Article 2(5), or 54(7) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.”;

(7) in Article 51, paragraph 5 is replaced by the following:

"5. Unless the Commission has adopted an equivalence decision as referred to in paragraph (2) or paragraph (3) of Article 30 or unless an administrator has been recognised pursuant to Article 32, or a benchmark has been endorsed pursuant to Article 33, the use in the Union by supervised entities of a benchmark provided by an administrator located in a third country where the benchmark is already used in the Union as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund, shall be permitted only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the Union on, or which add a reference to such benchmark prior to 31 December 2023.

The transition provided for in the first subparagraph shall not apply to benchmarks provided by administrators who relocate from the Union to a third country during the transitional period. The national competent authority shall notify ESMA in accordance to Article 35. ESMA shall draw up a list of third country benchmarks where the transitional provision does not apply.";

(8) Article 54, paragraph 6 is replaced by the following:

"6. By 15 June 2023, the Commission shall submit a report to the European Parliament and to the Council on the scope of this Regulation, in particular with respect to the continued use by supervised entities of benchmarks administered in third countries and on potential shortcomings of the current framework. That report shall assess in particular whether there is a need to amend this Regulation in order to reduce its scope to the provision of certain categories of benchmarks or to the provision of benchmarks that are widely used in the Union. The report shall be accompanied by a legislative proposal, if appropriate.

7. The Commission is empowered to adopt a delegated act in accordance with Article 49 by 15 June 2023 in order to extend the transitional period referred to in Article 51(5) until 31 December 2025 at the latest, if the report referred to in paragraph 6 provides evidence that, otherwise, the use in the Union of certain third country benchmarks by supervised entities would be significantly impaired or this would pose a serious threat to financial stability.".

Article 2

Amendment to Regulation (EU) No 648/2012

Article 13a of Regulation (EU) No 648/2012 is replaced by the following:

"Article 13a

Amendments to legacy contracts for the purpose of the implementation of benchmark reforms

1. Counterparties may continue to apply the risk-management procedures as referred to in Article 11(3) that they have in place at the date of application of this Regulation in respect of OTC derivative contracts not cleared by a CCP entered into or novated before the date on which the obligation to have risk-management procedures pursuant to Article 11(3) takes effect where, after … [the date of entry into force of this amending Regulation], those contracts are subsequently amended or novated for the sole purpose of replacing a reference benchmark or introducing a fallback provision in relation to any benchmark referred to in that contract.

2. Contracts which are entered into or novated before the date on which the clearing obligation takes effect pursuant to Article 4 and which, after … [the date of entry into force of this amending Regulation], are subsequently amended or novated for the sole purpose of replacing a reference benchmark or introducing a fallback provisions in relation to any benchmark referred to in that contract, shall not, for that reason, become subject to the clearing obligation referred to in Article 4.

3. Paragraphs 1 and 2 of this Article apply only to OTC derivative contracts that are amended or novated that:

(a) are necessary to address replacements for benchmarks due to benchmark reforms;

(b) do not change the economic substance or risk factor represented by the benchmark of the contract; and

(c) do not encompass other changes to that contract relating to any legal terms that do not refer to the reference benchmark and thus potentially amend the contract in a way that effectively requires its treatment as a new contract.".

Article 3

This Regulation shall enter into force and apply on the day following that of its publication in the Official Journal of the European Union.

Article 2 shall apply as of 1 March 2021.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at …,

For the European Parliament	For the Council
The President	The President