

Terms of Reference for the Sub-Group to the Working Group on Euro Risk-Free Rates on contract issues (work stream #3)

1. Background

In September 2017 the European Central Bank (ECB), the European Commission, the European Securities and Markets Authority (ESMA) and the Financial Services and Markets Authority (FSMA) announced the launch of a working group on euro risk-free rates (RFRs) (hereinafter: Working Group) tasked with the identification and adoption of RFRs to serve as a basis for an alternative to the current benchmarks used in a variety of financial instruments and contracts in the euro area.

The working group decided at its first meeting to set up three dedicated work streams:

- work stream #1 - Identify and recommend alternative RFRs
- work stream #2 - Identify and recommend term structure on RFR(s)
- work stream #3 - Contractual robustness for legacy and new contracts

For work streams #2 and #3, dedicated subgroups have been created. These terms of reference define the detailed objects, governance, membership, work, reporting and transparency arrangements applicable to the subgroup on work stream #3 (hereinafter: Subgroup)

2. Objectives and output

The Subgroup shall have the following deliverables:

- Analyse the legal risks and impact of embedding fall-back provisions referencing newly defined RFRs, or, where appropriate, a replacement of references to EONIA and Euribor with references to newly defined RFRs (and term/credit spreads where appropriate) in legacy contracts;
- Define solutions to embed fall-backs, and replacements where appropriate, for EONIA and Euribor. The proposed solutions might include advice to amend bilateral documentation, multilateral protocols as well as national or European legislation to safeguard consumer protection and support contract continuity balancing interests of contract parties when replacement rates are introduced;
- Suggest measures to enhance the legal soundness of references newly defined RFRs (and term/credit spreads where appropriate) in new contracts, taking into account consumer protection interests.

The Subgroup will take into account, among others, the need for coordination between asset classes and jurisdictions to reduce mismatches and value shifts.

3. Chair and membership

The Subgroup shall be chaired by Jose Manuel González-Páramo.

A call for applications to participate in the work of the Subgroup was published on the ECB's website. The selection procedure was led by ESMA in coordination with the other public institutions and the Working Group chair. The selected institutions were chosen on the basis of their motivations and their commitment to provide support to the Subgroup's specific tasks. In addition, the institutions were selected with a view to inboard a variety of interests and perspective beyond the horizon of credit institutions. Geographical representativeness was also considered.

Representatives from the ECB, the European Commission, ESMA, and the FSMA may participate in the work of the Subgroup as observers. ESMA will provide its secretariat.

The Subgroup may consult with a broad cross-section of market participants and organisations where appropriate, through the publication of consultative papers, hosting roundtable events, or other suitable approaches. The Subgroup will consult consumer associations in particular to ensure that retail investors are informed of the work of the Subgroup thoroughly and in a timely fashion. Other third parties who may be invited to attend, or be consulted, include but are not limited to: investment firms, asset managers, trading firms, market infrastructure firms and other actual or potentials users.

The Subgroup may engage external legal counsel or other type of advisers to accomplish its objectives.

4. Governance

The Subgroup shall take decisions by consensus of its members. In case no consensus is achieved, the chair will present the diverging proposals, options or views to the Working Group for consultation.

5. Reporting and transparency

The Subgroup will regularly update to the Working Group on the progress of its work. These updates can take the form of letters, reports, e-mails or presentations to the Working Group. The updates will be part of the minutes or documents published following each Working Group meeting.

6. Competition policy, conflicts of interest and member responsibilities

It is the responsibility of Working Group and Subgroup members to ensure that they understand their responsibilities under all applicable competition laws, including EU competition law. The competition law compliance policy agreed at the Working Group level shall equally apply to the Subgroup.

7. No legal or other advice

Due to the specific objectives of the Subgroup, it is expected that different opinions related to legal issues may be raised by the different members of the Subgroup. Neither the opinions expressed by members during the meetings or elsewhere nor any document or report that the Subgroup may issue should be construed, or relied in any manner, as legal, regulatory or other advice on or about the matters and facts covered therein.