



Law Society
of Scotland

Consultation response

Supporting the wind-down of critical benchmarks

March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company and Insolvency Law Sub-committee welcomes the opportunity to respond to the consultation on Supporting the wind-down of critical benchmarks.¹ We have the following comments to put forward for consideration.

Overall, we welcome the consultation proposals. Our specific comments focus on the jurisdiction issues raised regarding the scope of safe harbour in Chapter 3, addressed under question 8.

Response to questions

Q8. Do you have any comments on the jurisdictional issues set out above, or the proposed approach? In particular, can respondents provide any evidence of the volumes of LIBOR referencing contracts where the law of Scotland or Northern Ireland is the choice of law, that may benefit from safe harbour provisions?

We are concerned at any suggestion (see para 3.2) that contracts written under Scots law might be excluded from the proposed legal safe harbour and that the safe harbours might apply only to financial contracts with an English choice of law clause. We can see no justification for discriminating against Scottish, or indeed Northern Irish, contracts in this way.

We do not have specific evidence as to the volumes of LIBOR referencing contracts where Scots law is the law of choice. However, anecdotal evidence suggests that there are not insignificant numbers. Even if they are not as numerous as financial contracts under English law, there is no reason why contracts under Scots (or Northern Irish) law should be treated differently. This is further reinforced by the possible extension of the safe harbour beyond purely financial contracts (see Q9).

¹ <https://www.gov.uk/government/consultations/supporting-the-wind-down-of-critical-benchmarks>

Q9. Should the scope of any legal safe harbour go beyond supervised entities making ‘use’ of an Article 23A benchmark in specified ‘financial contracts’, ‘financial instruments’, and ‘investment funds’ as defined in the BMR?

We welcome the possibility of extending the safe harbour beyond financial arrangements by supervised entities. Various broader arrangements are likely to incorporate IBOR-related provisions and these may not have been changed by the time the relevant IBOR disappears. As such, the extension of the safe harbour may be helpful to address any issues arising in this wider context.

For further information, please contact:

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