

WIBOR replacement

What about WIBOR?

In June 2022, the Polish Government submitted to the Sejm (the Lower Chamber of the Parliament) the draft Act on Crowdfunding for Business Projects and Assistance to Borrowers (the **Act**). The Act provides, among others, for the introduction of a replacement for WIBOR.

The provisions of the Act regarding the WIBOR replacement are very general and are set out in Article 82 of the Act and in the provisions of the amended Act on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System dated 5 August 2015. The new benchmark will be determined by way of a regulation of the Minister of Finance on the basis of the recommendation of the Financial Stability Committee (the **FSC**). The FSC will prepare a recommendation based on the solution proposed by the Polish Financial Supervision Authority (the **PFSA**). In practice, the new benchmark should be developed by the WIBOR administrator, ie GPW Benchmark S.A. (**GPW Benchmark**) together with financial market participants. The PFSA has been supervising these works. On 18 May 2022 GPW Benchmark launched a public consultation on three benchmarks – WIRF, WIRD and WRR. The consultation will last until mid-June and concerns a selection of optimal benchmarks, as well as a selection of the parameters for the method of its development. In the second half of June, GPW Benchmark will publish the results of the consultations on its website together with a proposal for a new benchmark.

The Act also provides for the possibility of designating a replacement for WIBOR on the basis of the POLONIA rate, while the contents of the Act and the statements of the Polish politicians show that this is an emergency solution if GPW Benchmark fails to develop another replacement benchmark. However, it seems unlikely that the new benchmark will be based on the POLONIA rate because:

- the POLONIA rate **is not** a benchmark within the meaning of the Benchmark Regulation, but only an index determined by the National Bank of Poland (the **NBP**). If the POLONIA index was to replace WIBOR, it would have to satisfy a number of additional conditions set out in the Benchmark Regulation, in particular the NBP would have to receive authorisation as its administrator;
- in its opinion on the Act, the NBP emphasised that replacing WIBOR 3M and WIBOR 6M benchmarks with the POLONIA rate, which is currently at a lower level, would undermine the NBP's efforts to curb the inflation. According to the NBP, it is advisable to use the rate calculated in accordance with international standards as the compounded overnight rates. Given the above, the NBP suggests removing any references to the POLONIA rate from the Act.

Based on information disclosed by Polish politicians, the replacement for WIBOR is scheduled for launching as early as on 1 January 2023. However, under the Act, the Minister of Finance will specify the date when the new benchmark enters into force in the relevant regulation.

What will the new benchmark look like?

Under the [Consultation Paper](#) prepared by GPW Benchmark the new benchmark will be selected on the basis of one of the following three indices:

WIRF Warsaw Index for Financial Market	WIRD Warsaw Index for Deposit Market	WRR Warsaw Repo Rate
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The new benchmark will be:

- a risk-free rate (RFR);
- calculated on the basis of data of O/N transactions concluded in specific market segments on a given day; and
- a purely transaction-based index.

The final index calculation is preceded by adequate data processing. The processing includes, among others, the elimination of transactions not exceeding a certain volume threshold, the identification of potential duplicate transactions (known as matching – where a transaction is reported by two data contributors which are counterparties to the transaction), as well as an asymmetric or symmetric adjustment of the daily interest rate distribution.

The RFR index calculation process may include a fallback procedure which is triggered where transaction data is insufficient to calculate the index in accordance with the standard index determination method; as a result, the value obtained in accordance with a specific non-standard rule (eg use of the last determined and published value) is used as the index value for a given day.

The proposed benchmark calculation methodologies – basic data:

	WIRF	WIRD	WRR
Transaction type	Unsecured	Unsecured	Secured
Scope of the reference market	Deposit transactions concluded by data contributors with other data contributors as well as with other credit and financial institutions	Deposit transactions concluded by data contributors with other data contributors as well as with other credit and financial institutions and with large enterprises	Repo and buy/sell-back transactions concluded by the data contributors with credit and financial institutions
Minimum transaction volume	PLN 1 million	PLN 1 million	PLN 1 million

Detailed information on the methodology for calculating each of the proposed indices may be found in Chapter 4 and Chapter 5 of the Consultation Paper.



Will the new benchmark automatically replace WIBOR in the existing finance documents or hedging documents?

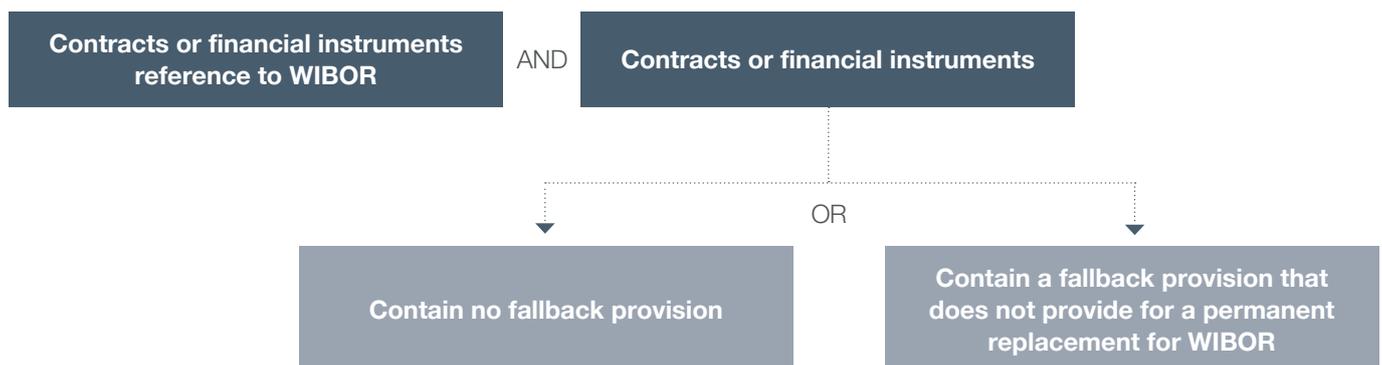
Under Chapter 4a of the Benchmark Regulation updated in 2021 a benchmark may be replaced by national or European Union law if certain conditions set out in the Benchmark Regulation are satisfied. The scope of the Benchmark Regulation in this respect has been significantly extended in relation to the scope of the Benchmark Regulation in its original version. In particular, Chapter 4A applies not only to consumer loan agreements or mortgage loan agreements, but also to all corporate credit agreements and derivative transactions.

The Benchmark Regulation also introduces a number of restrictions and exemptions for the European or national legislator regarding the possibility of freely replacing the existing benchmarks with their replacements.

Firstly, under Article 23a and Article 23c of the Benchmark Regulation, a replacement (eg WIBOR) cannot automatically replace all the references to a given benchmark in contracts and financial instruments within the meaning of MIFID II,

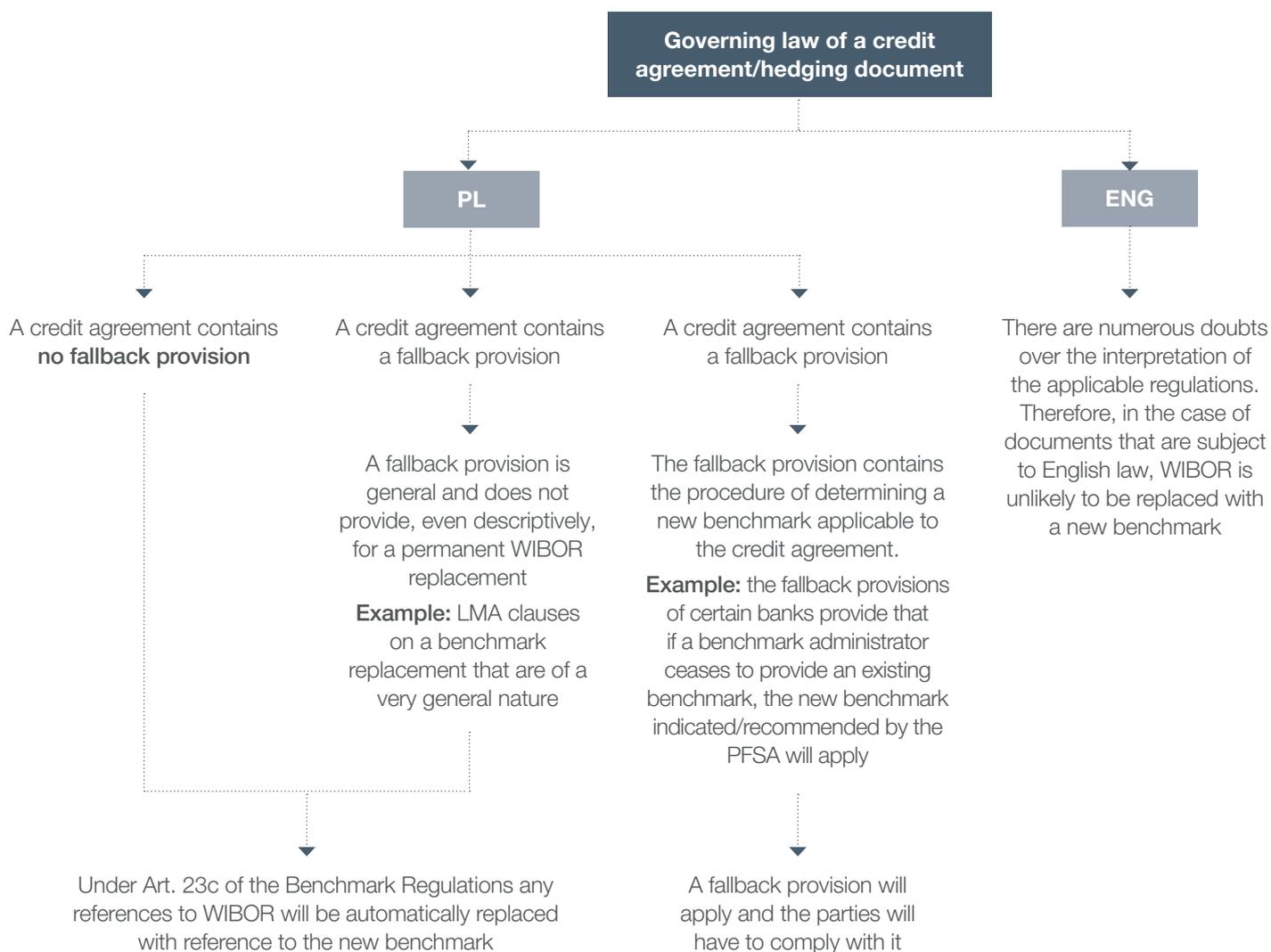
but only in those subject to the law of one of the Member States. A replacement may also be used to automatically replace the benchmarks in contracts and financial instruments subject to the law of a third country, but only if the law of that third country does not provide for the orderly wind-down of the benchmark. The use, if any, of a replacement for a benchmark in contracts and financial instruments subject to English law (including LMA credit agreements or ISDA documentation for derivative transactions) raises reasonable doubts regarding the compliance of such use with the Benchmark Regulation.

Secondly, the automatic replacement of the existing benchmark is possible, so long as the existing documentation satisfies the conditions set out in the Benchmark Regulation regarding the absence of the fallback provisions:



Thirdly, under Article 23c(4) of the Benchmark Regulation, even if the contracts or financial instruments contain no fallback provision (or contain a fallback provision but does not provide for a permanent replacement for WIBOR), the Benchmark Regulation allows the parties to it to agree on another replacement for the benchmark.

In conclusion, the provisions on the automatic replacement of WIBOR may apply to credit agreements and financial instruments (hedging documents) referring to WIBOR, so long as these documents meet the following conditions:



Will replacing a benchmark trigger amending the finance documents?

The greatest concern and doubt in the introduction of the new benchmark is its level, because according to statements Polish politicians have made so far, it would be lower than WIBOR by up to 150 basis points. Such a determination of the level of the new benchmark would be contrary to the Benchmark Regulation, which requires the appropriate spread adjustment be used to account for the effects of the transition or change from the benchmark to be wound down to its replacement.

Credit agreements

Even if a contract (a credit agreement) satisfies the conditions set out in the Benchmark Regulation for automatic benchmark replacement, and all the references to WIBOR are automatically replaced with references to the new benchmark, it will be necessary to amend the credit agreement. The contractual provisions allowing a bank to amend the credit agreement at its discretion by replacing a benchmark also create doubts.

In the case of a loan agreement, the type of benchmark and its calculation methodology (forward-looking rate (WIBOR) or backward-looking rate (new benchmark)) are fundamental not only for determining the interest rate on the loan, but also for many other provisions of the loan agreement, eg:

Break costs	Unavailability of screen rate
Financial covenants, eg Debt Service Cover Ratio (DSCR)	Hedging

Once the new benchmark is introduced, these provisions will have to be adjusted to the structure of the new benchmark. Without these adjustments, their application will not be possible.

Hedging (derivative transactions) documents

In the case of the hedging (derivative transactions) documents, automatic WIBOR replacement seems possible only in the documents subject to Polish law (eg the Polish Bank Association Maser Agreement or the hedging documents developed by the banks on their own). In this case a thorough analysis of the documents will also be necessary to determine whether the existing fallback provisions satisfy the conditions set out in the Benchmark Regulation for the possible exclusion of the automatic benchmark replacement.

The derivative transactions concluded on the basis of the ISDA documents are subject to English law, and therefore the automatic replacement of WIBOR with a new benchmark seems highly questionable. On the other hand, introducing a replacement benchmark may be tantamount to the orderly wind-down of WIBOR by GPW Benchmark. This, in turn, may cause a number of uncertainties in the scope of application of the new benchmark replacing WIBOR, in particular if the intended replacement does not actually include a spread adjustment.



For more information on benchmarks in the finance documents and their replacement, please refer to our online seminar [Benchmarks in Hedging Documents and Banking Transactions](#) available on the A&O seminars website.

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