

Consultation on proposed policy with respect to the designation of benchmarks under new Article 23A

November 2020

1 Introduction

Background

- 1.1 Our [Overview](#) document sets out the background to the Benchmarks Regulation (BMR) and the amendments proposed by the Government under the [Financial Services Bill 2020](#) ("FS Bill") to give the FCA enhanced powers, in particular in relation to managing the orderly wind down of critical benchmarks which are no longer representative. As is widely known, these powers have been introduced to allow the FCA to properly address the issues relating to LIBOR transition.
- 1.2 The FS Bill proposes the insertion of a new Article 23A into the BMR. Its provisions would grant the FCA the ability, in certain circumstances, to designate a critical benchmark as an Article 23A benchmark.
- 1.3 Such designation would result in a general prohibition on use of the benchmark by supervised entities, as well as powers for the FCA to exempt some or all existing use of the benchmark from this general prohibition. It would also empower us to impose requirements on the benchmark administrator relating to the way in which the benchmark is determined, including by amending the benchmark's methodology. For more information on the BMR and the powers that are available to the FCA please see our [Overview](#) document. For more detailed information on the power to require amendments to the benchmark's methodology please see our consultation about our proposed policy in respect of our powers under Article 23D [here](#).
- 1.4 Under the new Article 23F(1)(b) of the BMR proposed in the FS Bill, we are required to publish a Statement of Policy before we may designate any critical benchmark as an Article 23A benchmark and to have regard to it when exercising the power. Under Article 23A(5)(c), when we give notice that we have decided to designate a benchmark, we must explain how we have taken account of the relevant policy statement.
- 1.5 The purpose of this document is to consult on our proposed policy approach. This paper outlines the factors we propose to take into consideration when deciding whether we should designate a critical benchmark, such as a currency-tenor ('setting') of LIBOR, as an Article 23A benchmark.
- 1.6 We have sought to identify all relevant factors. However, any decision would need to be taken in light of the relevant circumstances and market conditions at the time, so we may consider that there is good reason to consider additional factors that are not listed in our Statement of Policy.
- 1.7 We may re-issue a revised version of the Statement of Policy in future if our policy changes.

Who this affects

- 1.8 We expect that this consultation will be of interest to:
 - administrators of critical benchmarks
 - contributors to critical benchmarks; and
 - users of critical benchmarks, both regulated and unregulated.

What we will do next

- 1.9 We are asking for responses to this consultation by 18 January 2021. Please send your feedback using our online response form or by email to benchmark-article23A@fca.org.uk
- 1.10 We will finalise our proposals taking account of responses to the consultation and publish these as a Statement of Policy on our website.
- 1.11 Subject to Parliament approving the proposed changes to the BMR, if we decide to designate a critical benchmark as an Article 23A benchmark, we will publish a Notice in accordance with the requirements at proposed Article 23A(10)(b) of the BMR.

2 Designation of unrepresentative benchmarks

Context

- 2.1 New Article 23A(1) of the BMR requires that, where we have given the administrator of a critical benchmark a notice stating that we consider the benchmark is not representative of the market or economic reality that it is intended to measure, or that its representativeness is at risk, then we must consider whether it would be appropriate to designate the benchmark as an Article 23A benchmark.
- 2.2 New Article 23A(2) of the BMR specifies that the FCA may not designate a benchmark as an Article 23A benchmark if it considers that it is, and is likely to continue to be, the case that:
- (1) the representativeness of the benchmark can reasonably be restored and maintained by the administrator or by the FCA exercising its powers under Article 23(6), and
 - (2) there are good reasons to restore and maintain its representativeness.
- 2.3 Therefore, we can designate a critical benchmark if its representativeness cannot reasonably be restored **or** if the representativeness can be restored but there are not good reasons to restore it. In these circumstances, we have the option but not the obligation to designate the benchmark. We may decide that there are good reasons to designate, or not to designate.

Can the representativeness of the benchmark be restored?

- 2.4 In order to determine whether we have the option to designate a benchmark as an Article 23A benchmark, we will first decide whether it is, and is likely to continue to be, the case that the relevant benchmark's representativeness cannot be restored and maintained – either by the benchmark administrator or by our exercise of our powers under Article 23(6) BMR.
- 2.5 One key factor to be considered would be whether the market or economic reality that the benchmark was intended to measure still existed and was capable of being measured. Markets can evolve, shrink and disappear. In a situation where the underlying market or economic reality no longer existed, or was no longer capable of being measured, then it would not be possible for the administrator or us to restore representativeness.

Restoration of representativeness by the administrator

- 2.6 The benchmark administrator may make representations as to whether it thinks it can or cannot restore and maintain the benchmark's representativeness (or that the FCA should – see below). The FCA would take these representations into account.
- 2.7 Where the benchmark administrator has indicated that it can and intends to restore and maintain the benchmark's representativeness, we may ask the benchmark administrator to submit details of how it plans to do so. Any plan would need to include key

assumptions, dependencies on external parties (including the FCA) and a delivery timeline. We might specify additional information that we think should be provided.

- 2.8 Upon receipt of any plan from the administrator, we would assess it, including the likelihood of its successful and timely delivery, any diminution of our ability to supervise the benchmark effectively were the plan to be implemented, whether the plan would in fact restore or maintain the representativeness of the benchmark, or be likely to do so, whether the plan secures the representativeness on a long-term basis or would only provide a short-term fix and whether it is compliant with the BMR and any other relevant regulatory requirements.

Restoration of representativeness by the FCA

- 2.9 Article 23(6) of the BMR empowers us to: require supervised contributors, or other supervised entities (including, if amended as proposed, supervised third country entities) to contribute input data to the benchmark; determine the form and timing of any input data that is to be contributed; and require the administrator to change the methodology, the code of conduct, or other rules of the benchmark. Proposed new Article 23(6A) makes clear that these powers may only be used for the purpose of maintaining, restoring or improving representativeness, where we consider it appropriate to do so.
- 2.10 We would need to assess whether the benchmark's representativeness could be restored or maintained by use of any of these powers, or any combination of them. For example, we would need to be confident that robust input data (whether submitted by contributors or from other sources) were available to the benchmark administrator.

Where representativeness could be restored and maintained - are there good reasons to do so?

- 2.11 There is no obligation on the administrator or the FCA to restore and maintain the representativeness of a benchmark (including under Article 23(6)). This allows for a scenario where it may be possible for the administrator or for us to restore and maintain the representativeness of a benchmark, but we opt not to do so. Further, the statutory language of Article 23A(2)(b) refers to "good reasons to restore and maintain its representativeness", rather than the absence of good reasons not to restore and maintain its representativeness. Our proposed policy approach will be to take the following factors into account when considering whether there are such good reasons.

Preventing consumer harm and promoting market integrity

- 2.12 We would consider whether enabling the continued publication of the benchmark by restoring or maintaining its representativeness might advance our consumer protection objective or integrity objective. These two objectives are set out in s.1C and 1D, respectively, of Financial Services and Markets Act 2000, and are referred to in new Article 23C(4) and new Article 23D(3) of the BMR. This consideration would extend to whether these objectives would be advanced more effectively by designating the benchmark and using our new powers, namely Article 23C and 23D in combination with Article 21(3) to facilitate the benchmark's orderly wind down, rather than trying to restore and maintain its representativeness.
- 2.13 The FCA would consider the impact on users of the benchmark – including benchmark users that are outside of the scope of the BMR – and on the economy. This could include

taking account of: whether and / or to what degree it is likely that users would value continuing to have exposures to the underlying market or economic reality that the benchmark seeks to measure; the degree to which action to prolong the life of the benchmark would succeed in resulting in production of a robust benchmark that had the properties its users had expected, the availability of other benchmarks that measure this market or economic reality; and the ease with which users could transition to any alternatives.

Market preparedness

- 2.14 Where a benchmark is not representative, and is not restored to representativeness, it will ultimately cease to be provided. In particular:
- Article 11(4) of the BMR requires that its administrator must either restore representativeness (using any of a prescribed range of methods) or cease publication within a reasonable time period.
 - Where a critical benchmark is concerned (as will always be the case where Article 23A is being considered), we can use our powers under Article 21(3) to require continued publication for the purpose of an orderly wind down, which can extend for up to 10 years, but ultimately it will cease to be provided.
- 2.15 Accordingly, we would also take into account market preparedness for cessation. We would consider market participants' likely and reasonable expectations with regard to the future of the benchmark, taking account of information already provided to the market by relevant parties – including the administrator in its cessation and material change procedure (as required by Article 28(1)), and the FCA.
- 2.16 We would also have regard to the possibility of using the proposed new powers to require changes to the benchmark if it is designated (see our [consultation](#) about our proposed policy in respect of our powers under Article 23D for further details). We might conclude that where the market is not yet adequately prepared for cessation, designation and change to the benchmark's methodology or rules might provide a better solution.

Sustainability of restored representativeness

- 2.17 A key consideration we would take into account when determining whether there are good reasons to restore or maintain a benchmark's representativeness would be whether any action we took using our Article 23(6) powers (or which the administrator took) would be likely to preserve or restore representativeness of the benchmark in a sustainable way, or whether it would at best be a short-term support. If the latter, we would have to consider whether preserving the benchmark's representativeness for a limited period would be appropriate and justified given other considerations.

Impact on other parties

- 2.18 Any decision to restore and maintain representativeness could have wide-ranging implications for other parties. This is particularly the case for the exercise of our Article 23(6) powers, which would have implications not only for the benchmark's users as noted above, but also for the benchmark's administrator and its contributors (existing and potential). This might involve our having to weigh the impacts on the various parties.

2.19 We would take into account external dependencies, costs, legal or reputational risks and feasibility constraints faced by other parties as a result of any proposed exercise of our Article 23(6) powers. For example, we have previously noted that requiring a new contributor to contribute input data may involve it in material costs and it could also take time for a new contributor to put in place the systems and controls to allow it to contribute with confidence. We would consider the feasibility of contributing input data, for example whether a contributor was an active participant in the underlying market the benchmark sought to measure.

Decision to designate a critical benchmark

2.20 Where the benchmark's representativeness cannot reasonably be restored or where it could be restored but we consider that there are not good reasons to do so, we have the option but not the obligation to designate the benchmark.

2.21 There are a number of good reasons why we might consider it appropriate to designate a benchmark under Article 23A. Some of the considerations might overlap with factors that are also relevant to a decision on whether or not there are good reasons to restore and maintain representativeness, and in particular whether it would help advance our operational objectives referred to above.

2.22 We might consider that it would usefully signal to benchmark users that a benchmark is unrepresentative and will not be restored to representativeness and therefore must be wound down in a reasonable period of time in accordance with the BMR.

2.23 Following a designation there is an automatic prohibition on usage of the benchmark by supervised entities. There may be scenarios where we have such significant concerns about a benchmark's unrepresentativeness that we thought it appropriate to stop all usage of the benchmark and we could use an Article 23A designation to help achieve this aim.

2.24 There may be other scenarios where a designation would be appropriate as it could enable us to support the orderly wind down of a benchmark: following a designation, the FCA also has access to powers, such as the ability to modify a benchmark's methodology, that could be used to sustain a benchmark for permitted legacy use, thereby preventing market disruption that may otherwise be caused by the collapse of a critical benchmark.

2.25 We would consider whether the automatic prohibition on use and powers that are available to us upon designation, namely new Article 23D in combination with new Article 23B and 23C, would provide a solution that would prevent consumer harm and promote market integrity more effectively than solely relying upon our power to require continued publication until the benchmark can be ceased in an orderly fashion in line with 21(3).

2.26 We envisage that there could be situations in which we might consider that it is not appropriate to designate, even though the qualifying conditions are met. For example, where the administrator of the benchmark made clear its intention to cease publication of the benchmark within a reasonable time period, we might consider that the cessation of the benchmark over the time period planned would not have a disorderly impact on the market and therefore, that designation was not required. Alternatively, were we to consider that there was a reasonable likelihood that at a future point it would become possible to restore representativeness, then we might choose not to designate, so that we could wait to see if this possibility crystallised. Similarly, we might consider that even

though there were not good reasons to restore representativeness currently, there was a reasonable likelihood of these emerging in the future.

2.27 Were we to decide not to designate immediately but we considered that we might want to do so in future – the proposed new power at new Article 22A(3) would allow us to re-assess representativeness, and thus potentially to designate, at a later date, where appropriate.

Q1: Do you agree with the factors that we plan to consider when determining whether we can designate a benchmark as an Article 23A benchmark?

Q2: Do you agree with the factors that we plan to consider when determining whether we should designate a benchmark as an Article 23A benchmark?

Q3: Do you think there are any additional factors that we should take into account?