CRITICAL BENCHMARKS (REFERENCES AND ADMINISTRATORS' LIABILITY) ACT 2021

EXPLANATORY NOTES

What these notes do

- These Explanatory Notes relate to the Critical Benchmarks (References and Administrators' Liability) Act 2021 which received Royal Assent on 15 December 2021 (c. 33). These Explanatory Notes have been prepared by Her Majesty's Treasury in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

Table of Contents

Overview of the Act

1 The Critical Benchmarks (References and Administrators' Liability) Act 2021 (c. 33) supports the orderly wind-down of critical benchmarks, protecting both users of these benchmarks and the integrity of the UK's financial markets.

2 The Act supports the effective operation of the powers granted to the Financial Conduct Authority (FCA) under the Financial Services Act 2021 to oversee the wind-down of a critical benchmark. In particular, this Act provides legal certainty as to how contractual references to a critical benchmark should be treated where the FCA exercises powers under the Benchmarks Regulation (BMR) to provide for the continuity of an unrepresentative critical benchmark.

3 The Act also grants an immunity to the administrator of a critical benchmark that is designated under Article 23A of the BMR where the administrator acts in accordance with specific requirements imposed upon it by the FCA.

Policy background

LIBOR Transition

4 Benchmarks are indices that are used in a wide range of markets to help set prices, measure performance, or work out amounts payable predominantly under financial contracts. They play a key role in the financial system's core functions of allocating capital and risk. Critical benchmarks, as defined in the BMR, are those benchmarks that are the most systemically important and widely used across the economy (see paragraph 40).

5 Major interest rate benchmarks, such as LIBOR, EURIBOR and TIBOR (generically known as the "IBORs"), are widely used in the global financial system for a large volume and broad range of financial products and contracts.

6 LIBOR is an internationally available and systemically important interest rate benchmark which seeks to measure the average costs at which banks can borrow from the unsecured wholesale lending market. It is used as a reference rate in a wide variety of contracts. The vast majority of these are in the derivatives markets, but it is also used in mortgages, consumer and commercial loans, structured products, money market instruments, and fixed income products. LIBOR is available in five currencies (Sterling, US Dollar, Swiss Franc, Euro and Japanese Yen) and is published over seven time periods (known as tenors), ranging from overnight up to one year. These five currencies and seven tenors are paired to form 35 individual LIBOR "versions", which are published each business day by its administrator, the ICE Benchmark Administration Limited ("IBA").

7 LIBOR is currently the only benchmark that is designated as a critical benchmark under the BMR. As of April 2021, it is estimated that approximately US$300 trillion of financial contracts globally reference LIBOR.

8 To calculate LIBOR, the IBA uses submissions made each business day by a number of major global banks (the "panel banks"). It uses a methodology which requires, to the greatest extent

possible, submissions to be based on, or derived from, actual transactions (the rates at which panel banks have been able to borrow in certain currencies over different periods of time). The IBA provides a 'waterfall methodology'[1] that sets out the basis for calculating these submissions, with panel bank expert judgment only used when sufficient prescribed data are not available.

9 In 2014, in response to cases of attempted manipulation of IBORs, and the decline in liquidity in interbank unsecured funding markets, the Financial Stability Board (FSB) made clear that continued use of major interest rate benchmarks such as LIBOR represented a potentially serious source of systemic risk. This is because the underlying market that these rates intend to measure is no longer sufficiently active and panel banks are increasingly reliant on expert judgment for submissions. The FSB recommended a long-term transition away from IBORs, with regulators signaling that firms should use alternative "Risk-Free Rates".

10 In 2017, the FCA secured voluntary agreement from the LIBOR panel banks to continue making contributions to the rate until the end of 2021. Since then, the Bank of England and FCA have consistently encouraged firms to transition away from LIBOR to alternative reference rates, working with the industry-led Working Group on Sterling Risk-Free Reference Rates (UK RFRWG). Comprehensive lists of announcements and publications are available from the Bank of England[2], the FCA[3], and the UK RFRWG[4]. HM Treasury have reinforced the importance of active transition[5] and worked closely with the regulators to encourage a market-led transition.

11 The FCA has publicly stated that after 2021 it will not use its current regulatory powers to compel panel banks to continue submitting contributions to LIBOR's administrator. In March 2021, LIBOR's administrator confirmed its intention to cease publication[6] of all Sterling, Japanese Yen, Euro and Swiss Franc LIBOR settings, and two US Dollar LIBOR settings, at the

---

[1] LIBOR, Methodology, Intercontinental Exchange Inc., 2021, https://www.theice.com/iba/libor

[2] Transition from LIBOR to risk-free rates, 2021, Bank of England, https://www.bankofengland.co.uk/markets/transition-to-sterling-risk-free-rates-from-libor/

[3] LIBOR resources, Financial Conduct Authority, 2021, https://www.fca.org.uk/markets/transition-libor/resources#publications

[4] Working Group on Sterling Risk-Free Reference Rates, 2021, Bank of England, https://www.bankofengland.co.uk/markets/transition-to-sterling-risk-free-rates-from-libor/working-group-on-sterling-risk-free-reference-rates

[5] Amendments to the Benchmarks Regulation to support LIBOR transition, 2020, HM Treasury, Policy Statement, https://www.gov.uk/government/publications/amendments-to-the-benchmarks-regulation-to-support-libor-transition

[6] ICE Benchmark Administration Limited, 2021, ICE LIBOR® Feedback Statement on Consultation on Potential Cessation, https://www.theice.com/publicdocs/ICE_LIBOR_feedback_statement_on_consultation_on_potential_cessation.pdf

end of 2021. The FCA confirmed that[7], unless it exercises the powers available to it under the BMR, these LIBOR settings will cease to be published at the end of 2021. The remaining five USD LIBOR settings will continue to be published based on panel bank submissions until end-June 2023.

12 The cessation of a critical benchmark, such as LIBOR, could incur financial losses to consumers and impact market stability if not managed appropriately. The cessation of certain LIBOR rates after the end of 2021 would pose a particular problem for those contracts that run beyond the end of 2021, but which cannot transition away from LIBOR, for example due to constraints within their contracts. Some contracts, particularly in cash markets (i.e. loans, securitisations, mortgages and commercial contracts), face significant barriers to moving off LIBOR and as such transition is not a realistic prospect. These contracts are called "tough legacy" contracts. Some LIBOR-referencing non-financial contracts, such as leases, face the same problems.

The Financial Services Act 2021

13 In order to address the risk that LIBOR cessation poses to tough legacy contracts, the Government has passed legislation as part of the Financial Services Act 2021 (the "FS Act 2021"). This legislation amended the BMR to provide the FCA with new and enhanced powers to oversee the orderly wind-down of a critical benchmark.

14 A detailed description of this legal framework is set out in paragraphs 43-51. Importantly, the BMR, as amended by the FS Act 2021, grants the FCA new powers to "designate" a critical benchmark, under Article 23A of the BMR, where it determines that the benchmark no longer accurately represents the underlying market or economic reality it seeks to measure or is at risk of no longer doing so, and the "representativeness" of the benchmark cannot or should not be maintained or restored.

15 Where the FCA "designates" a critical benchmark under Article 23A of the BMR, all use of that benchmark in financial contracts and instruments within the scope of the BMR is prohibited, once the designation comes into force. However, the FCA then have the power to allow certain tough legacy contracts that referenced the benchmark before its use was prohibited to continue to use the benchmark. This means that certain exempted tough legacy contracts will be able to continue using the benchmark after its designation.

16 Where the FCA "designates" a critical benchmark, it is also able to impose certain requirements on the administrator of that benchmark. This includes the power to direct the administrator of the benchmark to change how the benchmark is calculated (including to put in place a methodology that for example does not require panel bank submissions), the rules of the benchmark, or its code of conduct. The FCA also has the power to compel the administrator of a critical benchmark to continue publishing the benchmark for up to 10 years.

17 Taken together, these powers allow the FCA to provide for the continued publication of a critical benchmark for use in permitted contracts for a limited period of time. In the case of

[7] FCA announcement on future cessation and loss of representativeness of the LIBOR benchmarks, 2021, Financial Conduct Authority, https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf

LIBOR, this would allow the FCA to compel continued publication of LIBOR using a revised methodology, known as "synthetic LIBOR", and permit certain legacy contracts to continue to use the benchmark in its synthetic form. The amended BMR also clarifies that the FCA may exercise these powers at the level of each version of a benchmark, meaning the FCA can determine whether or how to use its powers independently for each of the 35 LIBOR versions.

18 On 5 March 2021, the FCA announced[8] the dates on which all 35 LIBOR settings would either cease to be published or no longer be representative. The FCA has been clear that where it designates a benchmark and exercises its powers to require its continued publication under a revised methodology, the benchmark will be unrepresentative of the economic or market reality that it has previously measured. The intended wind-down plan for each LIBOR currency is set out in Table 1.

Table 1: Announced wind-down procedures for all LIBOR currencies.

LIBOR currency-tenor pair	Wind-down plan (as announced on 5 March 2021)
EURO	All settings will cease to be published immediately after end-2021.
Swiss Franc	All settings will cease to be published immediately after end-2021.
Japanese Yen	All settings will become unrepresentative at end-2021. On 24 June 2021, the FCA published a consultation on using its powers to provide for continuation of 1-month, 3-month and 6-month JPY LIBOR settings for 1 additional year, to end-2022.
GBP Sterling	All settings will become unrepresentative at end-2021. On 24 June 2021, the FCA published a consultation on using its powers to provide for the continuation of 1-month, 3-month and 6-month Sterling LIBOR settings.
US Dollar	1-week and 2-month USD LIBOR will cease to be published immediately after end-2021. All other USD settings will continue to be published using ongoing panel bank contributions until end-June 2023. The FCA will continue to consider the case for using its powers to provide for the continuation of certain USD LIBOR settings.

19 Following a public consultation, in March 2021, the FCA issued two statements of policy setting out whether and how it intends to exercise its powers under the BMR to designate a critical benchmark as an Article 23A benchmark and to require an administrator to change how a benchmark is calculated.

20 On 16 November 2021, the FCA set out which legacy contracts will be permitted to continue using LIBOR after it has been designated, and where the FCA has required the administrator to continue publication of the benchmark with a synthetic methodology.

[8] FCA announcement on future cessation and loss of representativeness of the LIBOR benchmarks, 2021, Financial Conduct Authority, https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf

Contractual uncertainty and dispute

21 Following publication of the Bill for the FS Act 2021, HM Treasury received feedback from market participants that further action is necessary in order to minimise the risk of market disruption and to protect users of a benchmark where the FCA exercises its powers under the BMR to wind-down a critical benchmark. During the passage of the FS Act 2021[9], the Government committed to explore this further.

22 In February 2021, HM Treasury published a consultation[10] seeking views on the case for additional legislation to provide legal certainty for parties that will continue to rely on a critical benchmark after the FCA has exercised its powers to provide for the orderly wind-down of that benchmark.

23 As HM Treasury noted in its response to the consultation[11], after careful consideration of consultation responses, the Government determined that it was appropriate to bring forward further legislation to address issues identified in the consultation. Responses to HM Treasury's consultation focused on the LIBOR benchmark, which is currently the only critical benchmark that is administered in the UK. Responses suggested that, without legislative clarity, parties may be uncertain of, or contest, the continued application of LIBOR to their contract after the FCA has exercised its powers to designate the benchmark under Article 23A of the BMR and require its continued publication using a synthetic methodology. Respondents raised concerns that this could result in parties ceasing to perform their contractual obligations, legally challenging the enforceability of the contract, or bringing claims against contractual counterparties or third parties which continue to apply the synthetic form of LIBOR to the contract.

24 Where there is either uncertainty or dispute over the continued application of LIBOR to tough legacy contracts, this could generate significant financial costs for contractual parties, including consumers. Where such disputes arise, they may also serve to reduce market confidence in the continued use of LIBOR in tough legacy contracts. If parties to tough legacy contracts are reluctant to continue to apply LIBOR as amended to their contracts, this would pose a real risk to the orderly wind-down of the benchmark, and relatedly, the integrity of UK financial markets.

Supporting the orderly wind-down of a critical benchmark under Article 23A of the BMR

25 In order to support the orderly wind-down of a critical benchmark, such as LIBOR, this Act provides legal certainty as to how contractual references to a critical benchmark should be

---

[9] Financial Services Bill (Seventh sitting), 2020, UK Parliament, Hansard, 26th November 2020, https://hansard.parliament.uk/Commons/2020-11-26/debates/6d432ea1-db50-49b0-a6c3-d2994ac5dc36/FinancialServicesBill(SeventhSitting)

[10] Supporting the wind-down of critical benchmarks, 2021, HM Treasury, https://www.gov.uk/government/consultations/supporting-the-wind-down-of-critical-benchmarks

[11] Supporting the wind-down of critical benchmarks, 2021, HM Treasury, https://www.gov.uk/government/consultations/supporting-the-wind-down-of-critical-benchmarks

interpreted where the FCA exercises specific powers under the BMR to oversee the wind-down of the benchmark. The purpose of this legislation is to ensure that the powers provided to the FCA in the FS Act 2021 operate effectively, and in particular that where the FCA exercises its powers to provide for the continuity of certain LIBOR settings, parties to tough legacy contracts are able to continue to apply LIBOR to their contracts with confidence. The provisions, as described below, are also intended to ensure the application of a synthetic methodology to a benchmark does not inadvertently give rise to breach of contract claims or provide a vehicle for one party to claim that the contract has been frustrated. They are designed to enable contracts to continue undisturbed once a benchmark is designated under Article 23A.

26 This Act inserts new Article 23FA into the BMR which clarifies that references to a designated "Article 23A benchmark" should continue to be interpreted as references to that benchmark after the FCA has exercised certain powers under the BMR. For example, in the case of LIBOR, this Act provides certainty that contractual references to LIBOR should continue to be treated as references to that benchmark where the FCA has directed a change in how LIBOR is calculated, i.e. synthetic LIBOR.

27 It also provides that, in respect of an Article 23A benchmark, where parties have referenced a benchmark in a contract before this Act comes into force or before the benchmark is designated as an Article 23A benchmark, the contract will be treated as if it has always provided for the reference to include the benchmark, notwithstanding changes resulting from the exercise of the FCA's powers, such as a change in the methodology of LIBOR.

28 This provides parties with clarity that, unless the contract provides otherwise, an Article 23A designation of the benchmark under the BMR, and any subsequent changes to the benchmark imposed by the FCA, do not in themselves provide grounds for contracting parties to argue that use of the synthetic benchmark is a breach of contract, that there has been a material change to the contract, or that the contract has been frustrated.

29 Article 23FA and Article 23FB apply to any reference to a critical benchmark that is designated under Article 23A of the BMR, however that reference is expressed. This extends beyond the definitions of "use" of a "benchmark" as defined in Article 3 of the BMR to references to the benchmark in all contracts and other arrangements.

30 This Act also makes clear that in respect of an Article 23A benchmark, where a contract or other arrangement includes a fallback clause to operate by reference to something other than the benchmark in question, Article 23FA does not prevent or affect the operation of that fallback clause. The intention of this provision is to not override those contracts which have provided for alternative arrangements to be triggered either before or during LIBOR's wind-down. However, this Act clarifies that where a contract or arrangement has a fallback clause that is triggered by the cessation or unavailability of the benchmark in question, these clauses would not be triggered where the FCA uses its powers under the BMR to provide for the continued publication of the benchmark with a revised methodology i.e. synthetic LIBOR.

Administrator Protections

31 HM Treasury's consultation also explored the case for additional legislative protections for the administrator of a critical benchmark designated by the FCA under Article 23A of the BMR. The administrator is responsible for the calculation of a benchmark and its publication. Stakeholders have identified the risk that parties may look to contest the continued publication of an Article 23A benchmark by its administrator or seek damages against the administrator for doing so.

32 As set out in paragraph 45, under the BMR the FCA has the power to compel the administrator of a critical benchmark to continue to publish that benchmark under specific circumstances.

The FCA also has the power to designate the benchmark under Article 23A of the BMR and to impose requirements on the benchmark administrator under Article 23D(2), relating to the methodology, rules, or code of conduct of the benchmark. The continued publication of the benchmark by an administrator is therefore necessary for the orderly wind-down of a benchmark under Article 23A of the BMR.

33 Responses to HM Treasury's consultation indicated that the administrator could be subject to litigation for action or inaction it takes in accordance with requirements imposed by the FCA to continue publication of an Article 23A benchmark using a revised methodology. Where the administrator of an Article 23A benchmark is subject to legal challenge for complying with statutory requirements imposed by the FCA under the BMR, it could impose a significant and unmerited burden on the administrator of an Article 23A benchmark. Such action could also serve to undermine parties' confidence in using the benchmark, undermining the operation of the FCA's powers to oversee an orderly wind-down of the benchmark.

34 While Annex 4 of the BMR, inserted by the FS Act 2021, allows the FCA to modify the statutory requirements imposed by the BMR in relation to Article 23A benchmarks, including on the administrator of an Article 23A benchmark (see paragraph 52), it does not prevent claims from arising against the administrator on the basis of actions that it is required to take in respect of the benchmark. Consequently, this Act inserts Article 23FC into the BMR, which grants the administrator of an Article 23A benchmark immunity from claims for damages in certain circumstances. Specifically, it provides that the administrator of an Article 23A benchmark is not liable in damages where it takes action or inaction in accordance with requirements imposed by the FCA under paragraph 2 of Article 23D. In the case of LIBOR wind-down, this would protect the administrator from claims of damages where it was acting in accordance with the FCA's direction to calculate LIBOR using a synthetic methodology. It also protects the administrator where it publishes the benchmark as calculated in accordance with those requirements.

35 The protections afforded to the administrator by Article 23FC do not provide the administrator of an Article 23A benchmark with immunity where it does not act in accordance with requirements imposed upon it by the FCA, or where it exercises a discretion conferred upon it by the FCA, or a discretion as to the time or manner of the benchmark's publication.

Legal background

Regulation of benchmarks in the UK

36 In 2009, the Financial Services Authority (FSA), together with regulators and public authorities in a number of different jurisdictions – including the United States, Canada, Japan, Switzerland and the European Union – began investigating a number of institutions for alleged misconduct relating to LIBOR and other benchmarks. Following the announcement of findings against Barclays in late June 2012, the Government asked Martin Wheatley, Managing Director of the FSA and CEO-designate of the FCA, to establish an independent review into a number of aspects of the setting and usage of LIBOR. In 2012, the Government accepted all

recommendations of the Wheatley Review and amended the Financial Services and Markets Act 2000 (FSMA) through the Financial Services Act 2012 (the 2012 Act). Under the 2012 Act, the administration of and contribution to LIBOR became regulated activities. From 1 April 2015, the FCA began applying regulatory requirements to seven additional major UK-based financial benchmarks following the recommendations of the Fair and Effective Markets Review[12].

37 The UK regulatory regime for these eight benchmarks (including LIBOR) was replaced by Regulation (EU) 2016/1011 ("Benchmarks Regulation") on 1 January 2018. The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (S.I. 2018/135) (which implemented aspects of the EU BMR in UK law) provided for the dual operation of the pre-and post-EU BMR regulatory regimes for benchmarks.

38 The EU BMR introduced a regulatory framework to ensure the accuracy, robustness and integrity of benchmarks used in the EU. The EU BMR significantly widened the scope of benchmark regulation in the UK. It places regulatory requirements on administrators of benchmarks, supervised contributors to benchmarks and supervised entities that use benchmarks. These requirements relate to benchmark methodology, governance and transparency.

39 At the end of the EU Exit Transition Period, the EU BMR formed part of retained EU law and continues to apply in the UK. In order to ensure that the regime continued to work effectively, the BMR was amended via the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019 (S.I. 2019/657).

Key definitions and scope

40 Under Article 3(3) of the BMR, a benchmark is defined as an index referenced to determine the amount payable under a financial instrument or a financial contract, the value of a financial instrument, or the performance of an investment fund. A critical benchmark is a benchmark that meets certain qualitative and quantitative criteria stipulated in Article 20 of the BMR. Where certain thresholds are met, the benchmark triggers the criteria to be designated a critical benchmark by HM Treasury. Where certain other listed criteria are met, or where a combination of these criteria are met, a benchmark can also be designated as critical if the FCA has recommended that the benchmark is recognised as critical and HM Treasury considers that the FCA's assessment in this regard complies with Article 20(3).

41 Under Article 23A of the BMR, the FCA has the power to designate a critical benchmark as an "Article 23A benchmark" where the FCA has given notice to the administrator under Article 21 or Article 22B that the benchmark does not accurately represent the market or economic reality it seeks to measure ("unrepresentative"), or its representativeness is at risk.

42 Section 1 of this Act applies to any reference to any index that is designated as an Article 23A benchmark, whether or not the use of the index is within the definition of use of a benchmark, as defined in Article 3(1)(7), or within the definition of a benchmark in Article 3(1)(3). It applies

[12] Fair and Effective Markets Review Final Report, 2015, HM Treasury, Bank of England and the Financial Conduct Authority, https://www.bankofengland.co.uk/report/2015/fair-and-effective-markets-review---final-report

not only to supervised entities that use a benchmark, as defined in Article 3(1)(17) of the BMR, but includes use by non-supervised entities, that fall outside the scope of the BMR, subject to the contract or arrangement being governed by the law of England and Wales and laws of Scotland and Northern Ireland.

43 For the purposes of Section 1, "a contract or other arrangement" is defined as a contract or any legally binding arrangement between two or more parties. Given the wide usage of LIBOR, "other arrangement" is intended to capture legally binding arrangements which may not be contracts, including ancillary or subsidiary documents which reference LIBOR and are integral to the operation of the contract.

44 For the purposes of Section 2, a benchmark administrator is a natural or legal person that has control over the provision of a benchmark, as defined under Article 3(1)(6) of the BMR.

The Financial Services Act 2021

45 The FS Act 2021 introduced amendments to the BMR in order to provide for the orderly wind-down of critical benchmarks. Specifically, the amendments to the BMR grant new and enhanced powers to the FCA, providing an overarching legal framework which it can exercise to cater for a range of scenarios that could occur where a critical benchmark might become unrepresentative or cease.

46 This section of the explanatory notes sets out the key elements introduced in the FS Act 2021 to amend the BMR. A full commentary on those amended provisions is available in the explanatory notes to the FS Act 2021[13] (pp.62-68). The references to articles in this section of the explanatory notes should all be read as referring to articles of the BMR which were amended or introduced in the FS Act 2021.

47 The FS Act 2021 amended Article 21 of the BMR and introduced new provisions relating to the FCA's powers to mandate the administrator of a critical benchmark to continue publishing the benchmark under certain conditions where the administrator gives notice of its intention to cease providing the benchmark. The maximum period for which the FCA may compel the administrator to continue publishing the benchmark was extended from 5 to 10 years. It also introduced provisions to require the FCA to conduct an assessment of the benchmark's capability to represent the underlying market and economic reality it seeks to measure (its "representativeness"), where the FCA decides to mandate administration of a critical benchmark. The market or economic reality that the benchmark seeks to measure is set out in the benchmark statement, which the administrator of the benchmark must publish in accordance with Article 27 of the BMR.

48 The FS Act 2021 introduced Article 21A of the BMR which grants the FCA the power to prohibit some or all "new use" of a critical benchmark where the FCA has completed its assessment of the administrator's plans to cease providing the benchmark under Article 21. Broadly, "new use" consists of creating new financial instruments or contracts that reference the benchmark after the prohibition; or using the benchmark in existing contracts, instruments

[13] Explanatory Notes, Financial Services Act 2021, 2021, The National Archives https://www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpgaen_20210022_en.pdf

or funds after the prohibition date where the contracts, instruments or funds did not reference the benchmark before the date of the prohibition. Article 29(1B) provides expressly that use of a designated benchmark by a supervised entity in breach of this prohibition does not affect either the validity or enforceability of a contract or other arrangement.

49 Articles 22A and 22B relate to the assessments of critical benchmarks conducted by the administrator and the FCA respectively. Article 22A requires the administrator of a critical benchmark based on contributions from supervised entities or supervised third country entities to conduct an assessment of the benchmark's "representativeness" at least biennially, upon written notice from the FCA; and where a supervised contributor or a supervised third country contributor gives notice of its intention to cease contributing input data. Article 22B requires the FCA to conduct its own assessment of representativeness upon receipt of the administrator's assessment under Article 22A and provide a written notice to the administrator setting out the outcome of its assessment.

50 The FS Act 2021 amended Article 23 of the BMR to introduce new requirements clarifying that a contributor who gives notice to cease contributing to a benchmark shall not cease that contribution until the end of its notice period (which is a minimum of 15 weeks), unless the FCA gives it written permission otherwise.

51 Article 23A introduced a power for the FCA to designate a critical benchmark under this Article where the FCA has given notice to the administrator under Article 21 or Article 22B that the benchmark is not able to accurately represent the market or economic reality it seeks to measure ("unrepresentative"), or that such representativeness is at risk. Under Article 23B, all use by supervised entities of an Article 23A benchmark is prohibited, except where the FCA makes exemptions under paragraph 2 of Article 23B or under Article 23C. Paragraph 2 of Article 23B allows the FCA to delay the date on which the prohibition under Article 23B comes into force by up to four months, beginning on the day on which the Article 23A designation takes effect. Article 23C grants the FCA the power to specify and permit certain "legacy use" by supervised entities of an Article 23A benchmark. Broadly, "legacy use" is where reference to the benchmark was included in a contract and instrument before the date the prohibition on new use of that benchmark comes into effect. "Legacy use" by supervised entities is prohibited except where the FCA has permitted use under Article 23C.

52 Article 23D of the BMR granted the FCA further specific new powers to provide for the orderly wind-down of a critical benchmark. Where the benchmark has been designated under Article 23A, the FCA may, by issuing a notice, require the administrator to change how a critical benchmark is determined, including in relation to the input data applied to the benchmark's methodology and rules of the benchmark. Article 23G clarifies that the FCA will be able to apply the relevant powers to provide for the orderly wind-down of each "version" of a critical benchmark, where a benchmark is provided in different currencies, maturities and tenors.

Territorial extent and application

53 Section 4 sets out the extent of the Act (see paragraphs 82-85). This covers both the jurisdictions for which the Act forms part of the law and where it has application. Financial services is a reserved matter in the UK, and this Act extends to England and Wales, Scotland and Northern Ireland.

Commentary on provisions of Act

Part 1: Critical Benchmarks

Section 1: References to Article 23A benchmarks

54 Section 1 inserts Article 23FA and Article 23FB into the BMR. Article 23FA sets out how references to a benchmark that is designated as an Article 23A benchmark are to be treated in a contract or arrangement. Article 23FB makes further provision about references to Article 23A benchmarks.

55 Paragraph 1 of Article 23FA clarifies that where the FCA designates a benchmark under Article 23A of the BMR, references to that benchmark in contracts and other arrangements should be treated as continuing to refer to that benchmark in the form it exists at any given time on or after it is an Article 23A designated benchmark. This also applies where the FCA has exercised a power under Article 23D(2) in respect of the Article 23A benchmark, and where the benchmark administrator has exercised a discretion or permission conferred upon it by the FCA under Article 23D of the BMR. This paragraph has the effect of ensuring that references to benchmarks in contracts or other arrangements include the benchmark once it has been designated under Article 23A, and the FCA has imposed changes to the methodology under Article 23D(2). For example, references to LIBOR in a contract will include synthetic LIBOR, following its designation under Article 23A.

56 Paragraphs 2 and 3 of Article 23FA clarify how descriptions of a benchmark (as opposed to a reference that names a benchmark) are to be treated for the purpose of paragraph 1. Paragraph 2 provides that paragraph 1 applies to all references that include a description of the benchmark, including where the reference is treated as falling within the description of the benchmark immediately before its Article 23A designation, or was treated by the parties to the contract or arrangement as doing so. Paragraph 3 makes clear paragraph 1 also applies where the benchmark is described by reference to the market or economic reality which the benchmark sought to measure before its Article 23A designation.

57 Paragraph 4 sets out that the provisions in paragraph 1 and 2 of this Article apply regardless of the date when the contract or arrangement that references the benchmark was formed, including those contracts formed before this Act becomes law. It also provides that the provisions apply to any reference to a benchmark, however expressed.

58 Paragraph 5 provides that where a contract or arrangement references a benchmark before this Article comes into force, or before the benchmark is designated under Article 23A, the contract or arrangement is to be treated as having always provided that the reference to the benchmark would, once the benchmark became an Article 23A benchmark, have the meaning provided for in paragraph 1 (and where relevant paragraph 2 to ensure that the provision applies to a contractual definition of a benchmark that is wider than an express definition (such as LIBOR), to include a description of the benchmark). The parties are treated as having always agreed that the contract or arrangement should reference the benchmark, once designated, as it exists as an Article 23A benchmark, including changes to the benchmark imposed under Article 23D.

59 Paragraph 6 provides that Article 23FA does not create any right, obligation or liability (i) in relation to any action, or inaction, of a person that was relevant to the creation of the contract or arrangement before the Article 23A designation, or (ii) to the operation of the contract before the Article 23A designation. Paragraph 7 provides that Article 23FA does not extinguish or affect any cause of action that existed before the Article 23A designation. These paragraphs

make it clear that the effect of Article 23FA is not to create any new cause of action that did not exist prior to the Article 23A designation, and would not have existed had this legislation not been made, nor is it to extinguish any pre-existing cause of action.

60 Paragraph 6 prevents the deeming provision in Article 23FA from creating new claims between the parties in relation to the formation or variation of a contract or arrangement prior to the designation of the benchmark, or its operation prior to the benchmark's designation under Article 23A. For example, a party is prevented from arguing that the deemed effect of Article 23FA on a contract means that a new liability has been created in relation to representations made prior to a contract's formation, which did not reflect the effect that Article 23FA would subsequently have on references to the benchmark. Instead, in such a case, those representations are to be considered according to the actual reality at the relevant time.

61 However, paragraph 7 ensures that if a party has a valid cause of action that arose prior to the benchmark's designation under Article 23A, it can be pursued – the deeming provision in Article 23FA does not extinguish or otherwise affect it. For example, a misrepresentation claim that could have been brought notwithstanding Article 23FA would not be extinguished. Again, this means that in such a case the relevant representations are to be considered according to the actual reality at the relevant time.

62 The exception to this is that paragraph 7 also provides that the effect of Article 23FA on the contract or arrangement should be taken into account when determining the extent of a person's loss or damage in respect of a cause of action which arose prior to the Article 23A designation. This means, for example, that where, as a result of Article 23FA(1), payments due under a contract have fallen to be calculated by reference to the benchmark in its Article 23A form, the calculation of loss or damages should take this into account.

63 Paragraph 8 provides that the effect of Article 23FA is subject to Article 23FB (see paragraphs 69-74).

64 Paragraph 9 makes clear that the provisions of Article 23FA and Article 23FB apply, even where the benchmark is not used in a contract or arrangement in line with the definition of "use" of a "benchmark" set out in Article 3 of the BMR (see paragraph 42). This means that these provisions apply to any contract or arrangement made under the laws of England and Wales, Scotland or Northern Ireland, regardless of whether it falls within the definitions set out in Article 3 of the BMR.

65 Paragraph 10 sets out key definitions regarding the operation of Article 23FA and Article 23FB. An "arrangement" is any legally binding agreement between two or more parties, including where relevant financial instruments and securities. Paragraph 10(b)(ii) also makes clear that reference to "contract or other arrangement" includes any ancillary or subsidiary documents referred to in, or that form part of, the contract or arrangement in question.

66 Paragraph 10(c) defines the term "Article 27 market or economic reality", for the purposes of paragraphs 1 and 3. It makes clear that this refers to the market or economic reality the benchmark represented before it was designated under Article 23A of the BMR by the FCA.

67 Section 1 also inserts Article 23FB into the BMR. This clarifies how Article 23FA applies where a contract or arrangement includes fallback provisions, or other specific provision to operate in a different manner in response to a particular event or situation, and separately it provides a power for the Treasury to make limited provision in secondary legislation regarding the operation of Article 23FA.

68 Paragraph 1 of Article 23FB sets out that paragraphs 1 and 2 of Article 23FA do not apply where a contract or arrangement makes express provision that those paragraphs do not apply.

69 Paragraph 2 provides that paragraph 1 of Article 23FA does not apply where a contract or arrangement specifies that the reference to the benchmark does not include the benchmark as it exists when it is an Article 23A benchmark and/or when the FCA has exercised a power under Article 23D, imposing a synthetic methodology on the benchmark. This includes where paragraph 1 of Article 23FA would otherwise apply to the contract or arrangement by virtue of paragraph 2 of Article 23FA.

70 Paragraphs 3 and 4 provide that the contractual continuity provisions in Article 23FA do not override the operation of contractual fallback provisions. "Fallback provision" is defined as an express provision that provides for a contract or arrangement to operate by reference to something other than the benchmark, to be varied so as to operate by reference to something other than the benchmark, or to terminate on a particular date or a particular circumstance. These paragraphs ensure that this legislation does not impede the operation of contractual fallback provisions on the date or in the circumstances specified in the contract or arrangement. Paragraph 4 provides three examples of circumstances which might be specified as "triggers" in fallback provisions – these examples, which are not exhaustive, are circumstances relating to the benchmark's representativeness, its designation under Article 23A or the way in which it is determined.

71 Paragraph 5 clarifies that, as a result of Article 23FA, a trigger in a contractual fallback provision that is activated by the cessation or unavailability of a benchmark, is not activated when a benchmark is designated under Article 23A or when its methodology is changed under Article 23D. This is consistent with the approach taken in the BMR (as amended by the FS Act 2021), which provides the FCA with the powers to ensure continued publication of an Article 23A benchmark, such that the benchmark does not cease to exist or to be available when it is designated under Article 23A or when its methodology is changed under Article 23D.

72 Paragraph 6 provides that the Treasury can by regulations provide that Article 23FA does not apply to specified benchmarks or benchmarks of a specified description, or to specified contracts or other arrangements. It also provides that the Treasury can make provision by regulations specifying where express provision in a contract or arrangement would apply within the definition of "fallback provision" in paragraph 4 of Article 23FB, and for further cases, in addition to those described in paragraph 5, in which fallback provisions are not triggered.

73 Paragraph 7 provides that the regulations can apply generally, or in specific cases, such as in relation to specific benchmarks, particular descriptions of contracts or arrangements, or particular types of fallback provision.

Section 2: Liability of administrator of an Article 23A benchmark

74 Section 2 inserts Article 23FC into the BMR, which specifies actions or inactions for which the administrator of an Article 23A benchmark is not liable in damages.

75 Paragraph 1(a) of Article 23FC provides that neither the administrator of an Article 23A benchmark, nor its officers or employees are liable in damages where it takes action or inaction that is required by the FCA under paragraph 2 or paragraph 8 of Article 23D of the BMR. Specifically, paragraph 2 of Article 23D provides that the FCA can impose requirements on the administrator of an Article 23A benchmark relating to how a critical benchmark is determined, including the use of input data, the rules of the benchmark or its code of conduct. Paragraph 8 of Article 23D clarifies that the benchmark administrator may not change any of these elements of the benchmark unless it is either required or permitted to do so by the FCA.

76 Paragraph 1(b) also provides that the administrator of an Article 23A benchmark is not liable in damages where it then publishes the benchmark as amended as a result of the action or

inaction required under paragraph 2 or by paragraph 8 of Article 23D. Paragraph (1)(b) applies regardless of whether the administrator has been compelled to publish the benchmark by the FCA under Article 21(3) of the BMR, and therefore includes a case where the administrator exercises discretion in continuing to publish the benchmark.

77 Paragraph 2 sets out that to the extent that the administrator exercises a discretion conferred upon it by the FCA under paragraph 2 or paragraph 8(b) of Article 23D, the protections afforded to the administrator in paragraph 1 of Article 23FC will not remove liability. The administrator of an Article 23A benchmark remains liable for action it takes within the scope of its discretionary powers.

78 Paragraph 3 also makes clear that paragraph 1(b) does not remove liability where the administrator exercises any other discretion relating to the time or manner of publication of the Article 23A benchmark.

Section 3: Consequential Provision

79 Section 3 inserts a new paragraph 3 into Article 2 of the BMR which provides that neither paragraph 1 nor 2 of Article 2 limits the application of Articles 23FA to 23FC.

80 It also amends Article 23G(3) of the BMR to include the new provisions inserted by this Act so that each version of an umbrella benchmark (a critical benchmark that is provided for different currencies, maturities or tenors, or a combination of these factors) is treated as a separate benchmark for the purpose of these provisions.

Section 4: Interpretation, extent and short title

81 Section 4(1) defines "the Benchmarks Regulation" as 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. This is a reference to the BMR as it has effect in the UK following the UK's exit from the EU and pursuant to the European Union (Withdrawal) Act 2018 (see section 20(3) of the Interpretation Act 1978).

82 Section 4(2) provides that the Act extends to England and Wales, Scotland and Northern Ireland.

83 Section 4(3) provides that the provisions of the Act come into force on the day on which it is passed.

84 Section 4(4) provides that the Act may be cited as the Critical Benchmarks (References and Administrators' Liability) Act 2021.

Commencement

85 The provisions of this Act commence on the day on which it is passed.

Related documents

86 The following documents are relevant to the Act and can be read at the stated locations:

- Andrew Bailey, 2017, The future of LIBOR, https://www.fca.org.uk/news/speeches/the-future-of-libor.
- UK Parliament Hansard, Commons: 26 November 2020, Financial Services Bill (Seventh Sitting), https://hansard.parliament.uk/Commons/2020-11-26/debates/6d432ea1-db50-49b0-a6c3-d2994ac5dc36/FinancialServicesBill(SeventhSitting).
- UK Parliament Hansard, Lords: 24 March 2021, Financial Services Bill, https://hansard.parliament.uk/Lords/2021-03-24/debates/13FBDABA-525C-48CA-92B6-A21B017E1DC3/FinancialServicesBill.
- HM Treasury, 2021, Consultation: Supporting the wind-down of critical benchmarks, https://www.gov.uk/government/consultations/supporting-the-wind-down-of-critical-benchmarks.
- Working Group on Sterling Risk-Free Reference Rates, 2021, Letter to the Economic Secretary to the Treasury: safe harbour to support the wind-down of critical benchmarks, https://www.bankofengland.co.uk/-/media/boe/files/markets/benchmarks/rfr/rfr-letter-to-hmt-safe-harbour-provisions.pdf?la=en&hash=15CDFDEBEFAAF9C802E5228C1990AFC540147964.
- FCA, 2021, Announcement on future cessation and loss of representativeness of the LIBOR benchmarks, https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.
- Financial Services Bill 2021, Explanatory Notes, https://publications.parliament.uk/pa/bills/cbill/58-01/0200/en/200200en.pdf.

Annex A - Hansard References

87 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
House of Commons		
Introduction	3 November 2021	
Second Reading	18 November 2021	Vol. 703 Col. 776
Public Bill Committee	18 November 2021	Vol. 703 Col. 788
Third Reading	18 November 2021	Vol. 703 Col. 794
House of Lords		
Introduction	8 September 2021	Vol. 814 Col. 839
Second Reading	13 October 2021	Vol. 814 Col. 1889
Order of Commitment Discharged	27 October 2021	Vol. 815 Col. 796
Third Reading	2 November 2021	Vol. 815 Col. 1120
Royal Assent	15 December 2021	House of Lords Vol. 817 Col. 255

Printed and published in the UK by The Stationery Office Limited under the authority and superintendence of Jeff James, Controller of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.

tso
a Williams Lea company

Published by TSO (The Stationery Office), a Williams Lea company, and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0333 202 5070
Fax orders: 0333 202 5080
E-mail: customer.services@tso.co.uk
Textphone: 0333 202 5077

TSO@Blackwell and other Accredited Agents

£6.90

ISBN 978-0-10-560262-0

9 780105 602620