

EXPLANATORY MEMORANDUM TO
THE BENCHMARKS (PROVISION OF INFORMATION AND DOCUMENTS)
REGULATIONS 2021

2021 No. 812

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations make provision in respect of a notice or permission given by the Financial Conduct Authority (“the FCA”) to the administrator of a critical benchmark¹ under 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 “the BMR”. The provisions in these Regulations concern the giving of a notice or permission under Articles 22A, 22B, 23A and 23D of the BMR where the FCA is considering whether to wind-down a critical benchmark.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments OR the Select Committee on Statutory Instruments OR the Sifting Committees

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of United Kingdom.
4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

¹ A benchmark is deemed critical where it meets certain qualitative and quantitative criteria stipulated in Article 20 of the BMR. Where certain thresholds are met the benchmark triggers the necessary criteria to be designated a critical benchmark by HM Treasury. Critical benchmarks are subject to the most stringent regulatory requirements under the BMR.

6. Legislative Context

- 6.1 These Regulations make provision for a notice or permission given by the FCA to an administrator of a critical benchmark under new Articles 22A, 22B, 23A and 23D of the BMR. These Articles were inserted into the BMR by the Financial Services Act 2021 (“the 2021 Act”) and form part of a suite of amendments to the BMR to provide the FCA with additional powers to manage an orderly wind-down of a critical benchmark.
- 6.2 These Regulations will be used for the wind-down of LIBOR² which the FCA announced³ on 5th March 2021. However, these Regulations apply to any critical benchmark regulated under the BMR. In addition, they may apply where the FCA decide not to wind down a critical benchmark. For example, Articles 22A and 22B of the BMR (to which these Regulations apply) concerns the assessment of the capability of a benchmark to measure the underlying market or economic reality. However, the FCA may determine that it considers that the representativeness of the benchmark is not at risk.
- 6.3 There are two key provisions in these Regulations. Regulation 5 require the administrator of a critical benchmark to provide an email address to which a notice or permission can be sent in accordance with Articles 23A, 22B, 23A and 23D of the BMR. Alternatively, (and with the written agreement of the FCA) the administrator may provide the FCA with an address other than an email address to which a notice or permission can be sent electronically. The administrator must provide the address within five working days beginning with the day that the benchmark is specified as critical under the BMR.
- 6.4 Where the administrator intends to change the address for the receipt of a notice or permission, the administrator must provide a new address at least five working days before changing the address.
- 6.5 Regulation 6 of these Regulations makes provision about when the notice or permission is deemed received. Notices and permissions given by the FCA under Articles 22A, 22B and 23A of the BMR are deemed received on the same working day they are sent, provided that they are sent before 5pm on that day. Otherwise they are deemed received on the following working day.
- 6.6 A notice or permission sent by the FCA under Article 23D of the BMR is deemed received on the same day (including a weekend or bank holiday) that it is sent, provided that it is sent before 5pm on that day. Otherwise the notice or permission is deemed received the following day.
- 6.7 It is necessary that the FCA can immediately provide clarity to the market and to the benchmark administrator as to the status of a critical benchmark under Articles 22A, 22B, 23A and 23D. That is the reason that the notices and permissions under Articles 22A, 22B, 23A and 23D are deemed received at relatively short notice. The FCA has

² LIBOR is a benchmark that seeks to measure the average costs at which banks can borrow from the unsecured wholesale lending market. It produced by ICE Benchmark Administration Limited (IBA) and is calculated based on submissions made to IBA each day by a number of major global banks (“panel banks”). LIBOR is regulated as a critical benchmark under the BMR because it is use in a significant volume of transactions.

³ FCA press release dated 5th March 2021 announcing the end of LIBOR: <https://www.fca.org.uk/news/press-releases/announcements-end-libor>

been involved in extensive consultations with ICE Benchmark Administration Limited (“IBA”), the administrator of LIBOR, about the wind down of this benchmark.

7. Policy background

- 7.1 These Regulations make provision in respect of a notice or permission given by the FCA to the administrator of a benchmark in accordance with certain provisions of the BMR. The FCA regulates benchmarks under the BMR. The BMR creates a regulatory framework which places requirements on administrators, supervised contributors and supervised users of benchmarks. These requirements relate to benchmark methodology, governance and transparency. The BMR forms part of retained EU law⁴ with effect from the end of the Transition Period⁵. The 2021 Act inserted new powers into the BMR for the orderly cessation of a critical benchmark. A critical benchmark is a benchmark with widespread use, or one with few market-led substitutes, which may, should the benchmark cease to be provided, lead to adverse impacts on markets and consumers. Therefore the 2021 Act amends the BMR to give the FCA powers to manage the orderly cessation of a critical benchmark: hence avoiding these adverse outcomes.
- 7.2 Where the FCA considers a critical benchmark not to be representative of the market or economic reality, or is at risk of becoming unrepresentative, it can designate that critical benchmark as a “special category” of critical benchmark, otherwise known as an “Article 23A benchmark”. Once a benchmark is designated by the FCA as an Article 23A benchmark, the 2021 Act provides the FCA with further powers, including the power to compel the administrator of the critical benchmark to change the way the benchmark is determined. The 2021 Act inserts Article 48A into the BMR which gives HM Treasury the power to make provision about the service of notices where a provision under the BMR requires information or a document to be given.
- 7.3 It is important to specify when notices are deemed as received, in order to facilitate the operation of specific timeframes set out in legislation, associated with the exercise of the powers. These Regulations set out how notices are deemed to be served in relation to specified provisions in Articles 22A, 22B, 23A and Article 23D of the BMR. The provisions in these Articles concern the assessment of a critical benchmark’s representativeness, designating a ‘special category’ of critical benchmark and impose requirements on the benchmark administrator such as how the critical benchmark is determined. The provisions in these Regulations ensure clarity on when the timeframes set out in the BMR are triggered. These Regulations also provide that, in a few specific circumstances, the FCA is permitted to give a notice to the administrator of a critical benchmark on a non-working day. This is to ensure that, at certain key events in the benchmark’s wind-down, the FCA can immediately provide clarity to a

⁴ Retained EU law is the body of laws converted or preserved by the European Union (Withdrawal) Act 2018 (“EUWA”). The EUWA converted the body of directly applicable EU law (such as the BMR) that was operative immediately before the end of the implementation period into domestic law and preserves the body of laws made in the UK to implement EU obligations as they applied up to the end of the implementation period.

⁵ The Transition Period is the implementation period provided by Part 4 of the Withdrawal Agreement between the UK and EU, beginning with the UK’s departure from the EU on 31 January 2019 and ending on 31 December 2020.

benchmark administrator and the market on the status of the benchmark, even on a non-working day. Whilst these Regulations will apply during the wind down of a critical benchmark, not every application of these Regulations will necessarily occur during the wind down. For example, where the FCA has made an assessment of unrepresentativeness, and has found that the benchmark is not at risk of becoming unrepresentative of the underlying market or economic reality that it seeks to measure.

- 7.4 The regulations require the administrator of a critical benchmark to provide an email address to which notices or permissions from the FCA may be sent under Articles 22A, 22B, 23A and 23D. The administrator may provide an address, other than an email address, to which a notice or permission may be sent electronically. The administrator must provide the address to the FCA within five working days of the benchmark being specified as critical in regulations made by HM Treasury under Articles A20 or 20 of the BMR.
- 7.5 These Regulations also specify when the notice or permission given under Articles 22A, 22B, 23A and 23D are deemed to have been received by the administrator. A notice or permission under Articles 22A, 22B and 23A is deemed to have been received, if sent on a working day before 5pm, on that same day. If sent after 5pm on a working day, it is deemed received on the following working day. A notice or permission under Article 23D, if sent before 5pm on any day, is deemed received on that same day. Otherwise it is deemed received on the following day. The effect of this provision is that notices under Article 23D can be sent on a non-working day such as the weekend or a bank holiday. The reason for this is that the FCA should be able to immediately provide clarity to a benchmark administrator and the market on the status of a benchmark, even on a non-working day, when exercising its powers to change how a benchmark is produced or governed. Before the FCA can send notices or permissions under Article 23D, the FCA must designate the critical benchmark as an Article 23A benchmark (see paragraph 7.2). The BMR prescribes the processes the FCA must go through to designate a benchmark under Article 23A. This will involve substantive engagement between the FCA and the administrator of the benchmark in question prior to an Article 23D notice being sent on a non-working day.
- 7.6 These Regulations give clarity both to the FCA and to the administrator of a critical benchmark about when a notice or permission is deemed received by the administrator. However, it is unlikely to be of any wider interest given that the regulations only apply to the FCA and the administrator of a critical benchmark, and only in a relatively narrow set of circumstances.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 HM Treasury does not intend to consolidate the Benchmark Regulation or regulations made under the Benchmark Regulation.

10. Consultation outcome

- 10.1 No formal public consultation was deemed necessary because the provisions in these Regulations only apply to the FCA and the administrator of a critical benchmark, of

which there is currently only one in the UK. In relation to the wind-down of most of LIBOR at the end of this year, HM Treasury has been involved in extensive discussions with the FCA about these Regulations. The FCA, in turn, has been involved in regular discussions with IBA on the wind down of LIBOR.

11. Guidance

11.1 Guidance is not required for this instrument.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 A de minimis Impact Assessment is submitted alongside this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As the Regulations will not have a net impact on businesses greater than +/- £5 million annualised, it is not appropriate to have a review clause. Furthermore, as these Regulations formalise existing methods of communication, undertaking a review would be disproportionate to the changes being made.

15. Contact

15.1 Alex Ramos Boylan at HM Treasury Telephone: 07866 059713 or email: alex.ramosboylan@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Tom Duggan, Deputy Director for Securities and Markets, at the HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Glen MP, Economic Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.