

# **Feedback Statement: the exercise of the FCA's powers under Article 23A BMR**

March 2021

# 1 Introduction

## Summary

- 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'). These amendments give the FCA enhanced powers, in particular in relation to managing the orderly wind down of critical benchmarks which are no longer representative.
- 1.2 Article 23A of the BMR grants the FCA the ability, in certain circumstances, to designate a critical benchmark as an Article 23A benchmark.
- 1.3 This designation would result in a general prohibition on supervised entities using the benchmark, as well as powers for us to exempt some or all existing use of the benchmark from this general prohibition. It would also enable us to impose requirements on the benchmark administrator with regards to the way in which they determine the benchmark, including by amending the benchmark's methodology. Please see our [Overview document](#) for more information on the BMR and the powers that are available to us. For more detailed information on the power to require amendments to the benchmark's methodology please see our [Statement of Policy](#) in respect of our powers under Article 23D.
- 1.4 Under Article 23F(1)(b) of the BMR, we must publish a Statement of Policy before we may designate any critical benchmark as an Article 23A benchmark and have regard to that policy 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 In November 2020, we published a [consultation](#) on our proposed policy approach in respect of the Article 23A designation of a critical benchmark power.
- 1.6 This Feedback Statement summarises the feedback we received and our response.

## Who this affects

- 1.7 We expect that this Feedback Statement and the final Statement of Policy will be of interest to:
  - administrators of critical benchmarks
  - contributors to critical benchmarks; and
  - both regulated and unregulated users of critical benchmarks

## What we are changing from our proposals

- 1.8 We consulted on the factors that we proposed to take into account when determining whether the benchmark can be restored to representativeness, whether there are good reasons to restore representativeness, and whether the benchmark should be designated as an Article 23A benchmark. This included the following factors: whether the benchmark could be restored by the benchmark administrator and / or us, whether it would advance our consumer protection objective or integrity objective to restore representativeness, the level of market preparedness, the impact on the benchmark administrator, any contributors and benchmark users. It also included consideration of whether our powers, including designation under Article 23A, would

help secure the orderly wind-down of the critical benchmark and whether designation could provide a useful signalling tool to make the market aware of the benchmark's status.

1.9 We are confirming in our Statement of Policy that we will include consideration of the factors that we outlined in our consultation on the designation of benchmarks under Article 23A. Following our review of the responses we received, we have added 2 new factors into our considerations.

1.10 The 2 new factors are:

- international coordination considerations. This reflects the fact that critical benchmarks may be used extensively, including by market participants beyond those specifically within the scope of the Benchmarks Regulation and outside of the UK. Consequently, international coordination and cooperation may help secure the orderly wind-down of a critical benchmark.
- the timing of a designation decision and the time at which the decision becomes effective. Given the potential impact of an Article 23A designation, we will consider the appropriate point at which the decision should be made and become effective.

1.11 We have also expanded some of the considerations that underpin the factors that we originally proposed. This includes clarifying that our consideration of the impact on users extends to the type of benchmark users. We also clarify that we recognise the broader impacts of an Article 23A designation, as we agree with respondents that these are important considerations that may influence our decision on whether to designate a benchmark under Article 23A.

1.12 We have also clarified in our Statement of Policy that:

- The timing of the decision of an Article 23A designation and the date at which the designation becomes effective may be 2 different dates: with the decision date coming first and the decision's effectiveness either being immediate or at a later point.
- Once a benchmark's Article 23A designation becomes effective, we cannot reverse it.

## Summary of the feedback we received

1.13 We received 32 responses from banks, asset managers, trade bodies, a benchmark administrator and a law firm, with respondents from the UK and abroad.

1.14 All respondents agreed with our proposals, with some asking for further details and clarifications to the proposed factors and some suggesting additional factors we should take into consideration.

## Equality and diversity considerations

1.15 We do not consider that our Statement of Policy will adversely affect consumers with protected characteristics under the Equality Act 2010.

## Compatibility Statement

1.16 Where the FCA is determining the general policy and principles by reference to which it performs particular functions, we have to comply with certain requirements under section 1B of the Financial Services and Markets Act 2000 ("FSMA"). We confirm that this Statement of Policy is compatible with our strategic objective and it advances our consumer protection and integrity

objectives. We have complied with our competition duty. We have also, where relevant, had regard to the section 3B FSMA regulatory principles, the need to take action to minimise financial crime and the Treasury's recommendations to the FCA about aspects of the government's economic policy.

## Next Steps

- 1.17 We have published our final [Statement of Policy](#), as will be required under Article 23F(1)(b) of the BMR. We will have regard to the Statement of Policy when exercising the Article 23A designation power.
- 1.18 We will not consult on individual Article 23A decisions, because under Article 23A(1), the FCA must make an Article 23A decision within 21 days of a finding that a benchmark is, or is at risk of becoming, unrepresentative. However, we will have regard to our [Statement of Policy](#) upon which consultation responses have been received and taken into account.

## 2 Key Issues and Our Response

### General

2.1 Our consultation outlined the factors we proposed to take into account when determining whether a critical benchmark's representativeness could be restored. This is the first limb of the Article 23A(2) test. The factors that we consulted on included whether it was theoretically possible to restore the benchmark's representativeness, whether the benchmark administrator wished to attempt to restore the benchmark's representativeness and whether we could use our powers to do so.

2.2 We asked in our consultation:

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

2.3 Respondents welcomed our proposed approach and all respondents agreed with the factors we identified.

**Our response:**

2.4 We have retained the factors we identified in our consultation.

2.5 Where we establish that the benchmark's representativeness is capable of being restored, we would then need to determine whether there are good reasons to do this. Our consultation outlined the factors we propose to consider when deciding whether good reasons do or do not exist. These included considering whether restoring representativeness would advance our statutory objectives to secure an appropriate degree of protection for consumers and / or enhance the integrity of the UK financial system, the market's preparedness for the benchmark to become unrepresentative, the sustainability of any restoration plan and the impact on the benchmark administrator, any current and potential contributors and benchmark users.

2.6 We also asked in our consultation:

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

2.7 Respondents welcomed our proposed approach and all broadly agreed with the factors we identified.

**Our response:**

2.8 We have retained the factors we identified in our consultation.

2.9 The consultation also set out the factors we proposed to take into account when determining whether there are good reasons to designate a benchmark under Article 23A. These included the following factors: the signalling effect of an Article 23A designation, whether the use of an Article 23A designation and our powers would secure the orderly wind-down of a critical benchmark and whether new information was likely to come to light at a future point which could influence the outcome of our decision.

2.10 The third and final question we asked in our consultation was:

## **Do you think there are any additional factors that we should take into account?**

- 2.11 Fifteen respondents did not suggest any additional factors, or amendments to existing factors.
- 2.12 Nine respondents (including both buy and sell side participants) said we should consider the international impacts of a designation. In particular, respondents suggested that there should be a specific factor whereby we would consider whether the Article 23A designation would be consistent with actions taken by other key authorities and in other jurisdictions.
- 2.13 Three respondents asked us to consider the possible wider effects that could arise following an Article 23A designation and the level of market preparedness for these. Notably, the impact of the automatic prohibition on use and the potential for the designation notice to trigger contractual fallbacks.
- 2.14 Three respondents asked us to consider the timing of a designation. They suggested that we should consider the impact of a sudden or immediate designation and the impact that an Article 23A designation could have in a period of heightened market volatility.
- 2.15 Our consultation proposed that we would consider our statutory objectives to secure an appropriate degree of protection for consumers and enhance the integrity of the UK financial system, and to consider the market's preparedness. We provided further detail that this would include considering whether the automatic prohibition and access to our powers, including Article 23D, would be more appropriate in securing the orderly wind-down of the benchmark than temporarily restoring representativeness. Several respondents highlighted the importance of these factors and the need for any exercise of our powers to support broader transition efforts and to take into account the market's expectations and preparedness. One banking respondent said that the FCA should not designate a benchmark as an Article 23A benchmark unless there were clear alternatives for all asset classes and counterparty types to transition existed, in order to avoid any potential contract frustration.
- 2.16 Our consultation proposed a factor to consider the impact on users. One respondent asked us to specifically include within that factor, the type of user relying on the benchmark.

### **Our response:**

#### International coordination considerations

- 2.17 We recognise that critical benchmarks may be used by market participants beyond those specifically within the scope of the Benchmarks Regulation. This includes users outside of the UK. We also accept that international coordination and cooperation may be required to facilitate the orderly wind-down of a critical benchmark.
- 2.18 We have reflected these responses in our final Statement of Policy by adding a new factor that confirms we will consider whether our decision would align with actions by international authorities.

#### Subsequent impacts of an Article 23A designation

- 2.19 We know that an Article 23A designation may be one step in a series of decisions to facilitate the orderly wind-down of a benchmark and that these steps may have broader impacts on the

market, for example the designation may trigger contractual fallbacks. We have reflected these considerations in the final Statement of Policy.

#### Timing of an Article 23A designation

- 2.20 Under Article 23A(1), the FCA must make an Article 23A designation decision within 21 days of a decision that the relevant benchmark has become unrepresentative or is at risk of becoming unrepresentative. While this time constraint applies to when we must make a decision to designate, it does not extend to the time the designation decision becomes effective. The ability to split the timing of when the decision is made and when the decision becomes effective was designed to enable us to take into account matters such as the market impact of an immediately effective designation and wider market events. This means we could consider delaying the effective date of an Article 23A designation to provide the market with more time to prepare.
- 2.21 The final Statement of Policy outlines that we will consider the appropriate timing of an Article 23A designation decision and when the designation should become effective. For example, if we were assessing whether to designate a benchmark during a period of heightened market volatility, we could consider whether the designation decision should become effective immediately, or at a later point.

#### Supporting a benchmark's orderly wind-down and market preparedness

- 2.22 We agree with respondents that we should use Article 23A in a way that advances our statutory objectives to secure an appropriate degree of protection for consumers and / or enhance the integrity of the UK financial system. We also agree that where we exercise Article 23A, this should seek to support the orderly wind-down of the relevant benchmark. When considering these factors, we will take into account whether additional powers, including the legacy use power at Article 23C and the changes to an Article 23A benchmark power at Article 23D, will support an orderly wind-down of the benchmark. If we think that the exercise of these powers would not achieve this, then we will not exercise them. These factors are contained in the final Statement of Policy.
- 2.23 Our consideration of market preparedness will include examining whether alternative benchmarks are available and the ease with which users could transition to any alternatives. However, the existence or not, at the time we determine whether a benchmark should be designated, of a readily-available alternative for every use of the benchmark should not, in our view, be determinative. We have reflected this position in the final Statement of Policy.

#### Type of users

- 2.24 We agree that the impact on users is a key factor to consider when determining whether there are good reasons (or not) to restore a benchmark's representativeness. This factor was included in our consultation on our proposed policy on Article 23A designations and is included in our final Statement of Policy. For clarity, we have also drawn out that this factor includes considering a benchmark's user type, ie we would consider whether wholesale market participants and / or retail consumers used the benchmark.

Feedback outside of the scope of our consultation on Article 23A

- 2.25 We also received responses that were not relevant to the exercise of Article 23A. We did not consider these responses in this Feedback Statement or the final Statement of Policy on Article 23A designations but we will consider them as part of our wider policy work.
- 2.26 We continue to encourage firms to engage with us as and when we consult on use of other aspects of the powers that the Government has proposed to confer on us through amendments to the BMR, and as we look to put in place Statements of Policy and decisions in relation to those powers.