

Statement of Policy on the designation of benchmarks 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 made by the Financial Services Act 2021 ('FS Act')¹. 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 use of the benchmark by supervised entities. However, it also gives us powers to exempt some or all existing use of the benchmark from this general prohibition. It would also allow us to impose requirements on the benchmark administrator relating 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](#) on 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 Statement of Policy.
- 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. This Statement of Policy sets out our final policy in respect of Article 23A, fulfilling the requirement at Article 23F(1)(b). We have also published a [Feedback Statement](#) which summarises the feedback we received and our response.
- 1.6 We have sought to identify all relevant factors that we would take into account in designating a critical benchmark under Article 23A. 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.

Outcomes we are seeking

- 1.8 We will seek to exercise our Article 23A power in a way that might advance our statutory objectives to secure an appropriate degree of protection for consumers and / or enhance the integrity of the UK financial system.

¹ This document has been updated following the relevant BMR provisions under the FS Act being commenced on 1 July 2021.

Who this affects

- 1.9 We expect that this 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 will do next

- 1.10 If we decide to designate a critical benchmark as an Article 23A benchmark, we will publish a notice in line with the requirements at Article 23A(10)(b) of the BMR. We will have regard to this Statement of Policy when exercising the Article 23A designation power.
- 1.11 We will not consult on individual Article 23A decisions. This is because under Article 23A(1), an Article 23A decision must be made within 21 days of a finding that a benchmark is, or is at risk of becoming, unrepresentative. However, we will have regard to this policy framework upon which consultation responses have been received and taken into account.

2 Statement of Policy - Designation of unrepresentative benchmarks

Context

- 2.1 Article 23A(2) of the BMR specifies that we may not designate a benchmark as an Article 23A benchmark if we consider 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.
- 2.2 This means 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.
- 2.3 Once a benchmark's 23A designation has become effective, there is no mechanism for the FCA to 'un-designate' a benchmark.

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- 2.4 In order to determine whether we have the option to designate a benchmark as an Article 23A benchmark, we will first consider whether it is, and is likely to continue to be, the case that the relevant benchmark's representativeness will not be restored and maintained – either by the benchmark administrator or by using our powers under Article 23(6) BMR.
- 2.5 The key factors we will take into account in relation to the restoration and maintenance of representativeness are:
- Whether the benchmark's representativeness is capable of being restored, either by the benchmark administrator and / or by us.
 - Any representations made by the benchmark administrator and our assessment of the likely success and timely delivery of any restorative actions. We will also consider other relevant factors, including whether our ability to supervise the benchmark effectively would be diminished and whether any change would still comply with the BMR and any other relevant regulatory requirements.
- 2.6 If we identify that the benchmark can be restored to representativeness, we would then consider whether there are good reasons to restore and maintain the benchmark's representativeness.
- 2.7 The key factors we would consider in relation to good reasons for restoring and maintaining representativeness are:

- Whether restoring a benchmark to representativeness or designating a benchmark as an Article 23A benchmark would advance our consumer protection and integrity objectives.
- The impact on users of the benchmark, including users that are outside of the BMR's scope and the UK, as well as impact on the economy. This would include considering the type of users that are referencing the benchmark, market expectations and preparedness for the cessation of the benchmark and the benchmark becoming unrepresentative. It would also include whether alternative benchmarks are available and how easily users could transition to any alternatives.
- Whether any action taken would be likely to preserve or restore representativeness of the benchmark in a sustainable way and, if not, whether action for a limited period would be appropriate and justified.
- The impact on other parties, including the benchmark's administrator and its existing and potential contributors. This would include factoring in the external dependencies, costs, legal, regulatory or reputational risks and feasibility constraints these parties could face.

2.8 If we determine that the benchmark cannot be restored to representativeness, or will not be restored to representativeness because there are not good reasons to do so, we would then need to decide whether we should designate the benchmark under Article 23A.

2.9 The key factors we would consider in relation to designation are:

- Whether the administrator proposed to wind the benchmark down within a reasonable time period and could sustain the benchmark over that time period without the FCA designating the benchmark under Article 23A and accessing our powers, or whether designation, the use prohibition, and our powers to permit legacy use and to make changes to the benchmark offer a better route to winding-down the benchmark in an orderly manner.
- Whether it is desirable, as a part of the orderly wind-down of a critical benchmark, for the benchmark to be designated in order to engage contractual triggers and fallbacks.
- Whether the designation and any subsequent impacts (such as the prohibition on use) and exercise of powers (for example, of Article 23D) would align with action that other authorities are taking. We recognise that a critical benchmark's use may be global and that it is desirable for efforts aimed at facilitating the orderly wind-down of a critical benchmark are coordinated and coherent.
- The timing of the designation decision and when the designation should become effective. The timing of the decision of an Article 23A designation and the date at which the designation becomes effective may be two different dates: with the decision date coming first and the decision's effectiveness either being immediate or at a later point. 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 now, or at a later point. We could also consider whether it would be more appropriate to re-assess this matter at a future point, using the Article 22A(3) representativeness assessment as a potential basis for designation.