FINANCIAL CONDUCT AUTHORITY

Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks

Consultation Paper
CP21/15*

May 2021

How to respond

We are asking for comments on this Consultation Paper (CP) by **17 June**.

You can send them to us using the form on our website.

Email:
cp21-15@fca.org.uk

Moving around this document
Use your browser's bookmarks and tools to navigate. To **search** on a PC use Ctrl+F or Command+F on MACs.

Contents

1 Summary 3

2 Permitting continued use of the benchmark in legacy contracts 8

3 Restricting new use of a ceasing critical benchmark 13

Annex 1
Questions in this paper 18

Annex 2
Compatibility statement 20

Annex 3
Abbreviations used in this paper 21

1 Summary

Why we are consulting

1.1 We are seeking views on how we propose using two new FCA powers introduced through amendments to the Benchmarks Regulation (BMR) under the Financial Services Act 2021 (FS Act). These relate to the use of critical benchmarks that are being wound down. The powers are part of a wider package of amendments to the BMR in the FS Act. This package is intended to ensure that the FCA has the appropriate regulatory powers to help reduce risk in the wind-down period before LIBOR ceases permanently.

1.2 On our website and in our overview document, we set out the background to the BMR and the amendments to be introduced by the FS Act.

Defining terms

1.3 'Use of a benchmark' is defined at Article 3(1)(7) of the BMR. This use can take place in relation to financial instruments, financial contracts and investment funds. For ease of reference, throughout this consultation we refer to use in 'contracts': by this we mean 'use in financial instruments and financial contracts and by and for investment funds'. Please read 'user' in the same way.

Legacy use power

1.4 The new powers will enable us to designate a critical benchmark as an 'Article 23A benchmark' where it has become permanently unrepresentative of the market it is intended to measure. Designation as an Article 23A benchmark would result in an automatic prohibition on use of the benchmark by UK supervised entities (under Article 23B(1) of the BMR). This designation would also unlock further powers, including the ability for us to impose a change of methodology on the Article 23A benchmark. However, the first power covered in this consultation – under new Article 23C(2) of the BMR – enables us to permit some or all 'legacy' use of the benchmark. For ease of reference, we will call this the 'legacy use power' in this consultation.

1.5 This power could help reduce disruption arising from the prohibition for parties to legacy contracts that have no or inappropriate alternatives to the benchmark in the contract and no realistic ability to renegotiate or amend the contract to remove reliance on the benchmark (we explain this further in Chapter 2).

New use restriction power

1.6 The second power – under new Article 21A of the BMR – gives us the ability to prohibit some or all new use of a critical benchmark when we have been notified by its administrator that it will cease to be provided. We call this the 'new use restriction power' in this consultation. Restricting new use of a ceasing critical benchmark could help reduce the risk of misuse, or unnecessary risk to market integrity from the creation of new exposures, during a wind-down period.

1.7 This consultation sets out factors we propose to consider when making decisions to exercise our legacy use power and new use restriction power. Not every factor would always be relevant. They might not all be considered or applied in every instance. The list of factors is not exhaustive. The prevailing circumstances at the time of the decision may make it desirable or appropriate to take account of some of these factors only, or to take account of additional or alternative factors, or both.

Who this applies to

1.8 This consultation will interest users of critical benchmarks such as LIBOR, whether those users are regulated or unregulated. This includes:

- banks and building societies
- investment managers
- life insurance and pension providers
- mortgage lenders and intermediaries
- corporates of all sizes
- consumers who have mortgages or other consumer loans that use critical benchmarks

1.9 It will also interest administrators of critical benchmarks.

Whether contract provisions are affected by this consultation

1.10 It is important that market participants understand how their contract terms interact with the winding down of a critical benchmark.

1.11 Contracts that only include fallbacks which operate when a benchmark ceases permanently are not likely to be triggered while a benchmark continues to be published as an Article 23A benchmark for a wind-down period (although this will depend on the wording of individual contracts). Rather, these fallbacks are likely to operate only when the Article 23A benchmark ceases to be published in any form. So our power and decisions regarding the legacy use power may be relevant to such contracts.

1.12 Some contracts may contain provisions that will move the contract away from a benchmark as a result of permanent unrepresentativeness. This is likely to mean that the contract moves away from the benchmark at the time, or before, its designation as an Article 23A benchmark comes into effect. Therefore, the prohibition on use would not be relevant to these contracts.

1.13 It is up to parties to take their own legal advice on the exact wording of their contracts.

The wider context of this consultation

1.14 Under new Articles 23F(1)(a) and (c) of the BMR, we must publish relevant Statements of Policy before we exercise our legacy use power and new use restriction power. We must have regard to these Statements of Policy when exercising them and are obliged to explain how we have done so.

1.15 In this document we are consulting on our proposed policy approach for each of these powers. We will publish Statements of Policy in due course.

1.16 While these powers will directly affect only entities and contracts within scope of the BMR, non-supervised entities such as non-UK firms, non-financial corporations or retail consumers may be party to existing contracts that are affected by a prohibition on use of an Article 23A benchmark. Such prohibition, if not overridden through the exercise of our legacy use power, may trigger or otherwise interact with contractual terms or fund management measures and/or documents that apply to both parties.

1.17 Regarding the legacy use power, Article 23A benchmarks are permanently unrepresentative of the market they are intended to measure and so by their nature are subject to the process of being wound down. Their continued publication may depend on requirements we impose on the administrator – possibly requirements to make changes to the benchmark, including changes to its methodology. Under Article 21(3) of the BMR we can require continued publication of a critical benchmark; new Article 23D(2) allows us to require the administrator to make changes to an Article 23A benchmark. Any such requirements would be subject to regular review, and in any case time limited: so there can be no certainty as to how long the benchmark will continue to be published.

1.18 We discourage the use of permanently unrepresentative benchmarks where appropriate alternatives are available. Users should seek to move away from using them, wherever practicable. This informs our current supervisory approach to the use of benchmarks by firms, and the policy we are proposing in this consultation reinforces this approach.

1.19 As LIBOR is currently the only critical benchmark in the UK, we have drawn on our engagement with market participants in the context of LIBOR transition to help inform our proposed policy approach. For the legacy use power, this includes the Working Group on Sterling Risk Free Reference Rates' (RFRWG) Paper on the identification of Tough Legacy issues, which sets out why certain legacy contracts are more difficult to amend to remove reliance on LIBOR.

1.20 However, the legacy use power could be used in relation to any critical benchmark designated as an Article 23A benchmark, and the new use restriction power could be applied to any ceasing critical benchmark. So, we have sought to identify all relevant factors that might apply more broadly.

1.21 We encourage all users of critical benchmarks such as LIBOR (both regulated and unregulated users, in the UK and outside the UK), to consider the potential exercise of our powers, and respond to this consultation.

How it links to our objectives

1.22 The new BMR provisions stipulate that we may only exercise our legacy use and new use restriction powers if we consider it desirable to do so in order to advance either or both of our statutory objectives to:

- secure an appropriate degree of protection for consumers, and
- protect and enhance the integrity of the UK financial system

1.23 More information on how these powers support our objectives can be found in our overview document.

1.24 In addition: both the Financial Stability Board (FSB) and the UK's Financial Policy Committee have been monitoring interest rate benchmark reform for several years. The financial stability and integrity implications of critical benchmarks possibly ceasing in a disorderly manner are well understood, and our proposed policies seek to reflect and take account of them.

What we are consulting on

1. Permitting legacy use of an Article 23A benchmark (Article 23C BMR)

1.25 Chapter 2 sets out our proposed policy for how we would consider whether and how to exercise our legacy use power (under new Article 23C(2) of the BMR) to permit legacy use of an Article 23A benchmark. (See paragraph 1.3 for what we mean by 'use' in this consultation.) We may only exercise this power where we consider it would advance either or both of our consumer protection and integrity objectives. Accordingly, we propose that our first consideration should be the scale and nature of legacy contracts that do not have adequate provisions to deal with a prohibition on use.

1.26 This will help us to establish whether it would potentially be desirable for us to exercise this power. This is because the absence of such provisions in contracts could mean that the prohibition potentially creates any or all of market disruption, a threat to consumer protection, and financial instability.

1.27 However, this effect could be avoided if contracts were amended before the prohibition comes into effect. So, the second consideration we propose is whether and to what degree it is feasible for parties to amend these contracts in a way that delivers fair outcomes. We set out the factors we think are likely to be relevant to determining this in 2.11 below.

1.28 If we conclude that permitting legacy use could be desirable based on the above, we may consider whether permitting only a limited form of use might enable the parties to remove reliance on the Article 23A benchmark – such as permitting legacy use for a time limited period after the prohibition takes effect, or permitting legacy use to calculate a final termination payment.

1.29 We also think there are additional factors we should take into account when reaching a view on whether to exercise our legacy use power to advance our consumer protection and/or integrity objectives. For example, international consistency, or the degree to which we can set out clear and practicable criteria for which contracts we propose to permit continued legacy use. We describe these additional factors at 2.14 below.

2. Restricting new use of a critical benchmark that is ceasing (Article 21A BMR)

1.30 Chapter 3 sets out our proposed policy for considering whether and how to exercise our power to restrict new use of a ceasing critical benchmark under Article 21A of the BMR. New Article 21A(2) of the BMR explains what is meant by 'new use'.

1.31 We may only exercise our new use restriction power if we consider it would advance either or both of our consumer protection and integrity objectives. Our proposed approach is to start by considering the potential risks to consumer protection and integrity if we do not exercise our power. We set out the potential risks from new use of a ceasing critical benchmark at 3.5 below.

1.32 If we decide that intervention is potentially desirable, we may consider a limited form of restriction. For example, we might consider whether restricting new use of a ceasing critical benchmark may only be appropriate for certain types of user or product. We also think there may be reasons why not intervening in respect of certain new use might support our consumer protection and integrity objectives. For example, where the new use is aimed at risk management of legacy exposures, or where suitable replacement benchmarks are not yet available for use.

1.33 We also think there are additional factors we should take into account when reaching a view on whether to exercise our new use restriction power to advance our consumer protection and/or integrity objectives. For example, international consistency, or the degree to which we can set out clear and practicable criteria for which new use we intend to restrict. We describe these at 3.14 below.

1.34 We are seeking feedback on whether we have identified all relevant factors in determining whether and how to exercise our legacy use and new use restriction powers.

Information we will use to inform our decision-making

1.35 Chapters 2 and 3 set out our proposed approach to deciding whether and how to exercise our legacy use and new use restriction powers. When applying the proposed policies, we will use information supplied to us by market participants and their representatives, as well as relevant data we have available. Where necessary we will make assumptions and estimates based on the information available to us.

Next steps

1.36 We want your feedback on our proposed policies as set out in this consultation. Please send your answers to the questions in this consultation by 17 June using one of the methods set out in the 'How to respond' section on page 2.

1.37 Following this consultation, in Q3 we will publish a Statement of Policy and feedback statement.

1.38 If we decide to exercise either or both powers, we will publish a notice in line with the relevant requirements under the BMR.

2 Permitting continued use of the benchmark in legacy contracts

2.1 As set out at 1.17 above, an Article 23A benchmark is permanently unrepresentative of the market it is intended to measure and is in the process of being wound down. New Article 23B(1) of the BMR prohibits its use, except where we permit it by exercising our legacy use power under Article 23C(2).

2.2 New Article 23C(2) empowers us to permit use of the Article 23A benchmark for legacy use only, where doing so would advance one or both of our consumer protection and integrity objectives. This Chapter sets out our proposed policy for considering whether and how to exercise our legacy use power.

Assessing consumer protection and integrity risks

2.3 When referencing a benchmark in a contract, it is always good risk management practice to include a provision setting out what should happen in the event that the benchmark ceases or undergoes a material change.

2.4 Article 28(2) of the BMR reflects this by requiring supervised entities using benchmarks to have robust written plans for the action they would take in these circumstances. These plans should provide for a range of potential situations, including where a critical benchmark is declared to be permanently unrepresentative. The plans should specify an alternative benchmark where this is feasible and appropriate, and should be reflected in contractual relationships with clients.

2.5 We expect that contracts entered into by supervised entities after this BMR provision came into force (on 1 January 2018) should contain contractual provisions that move the contract to use an alternative benchmark in the event of a benchmark becoming permanently unrepresentative.

Potential risk to consumer protection and integrity

2.6 A prohibition on legacy use of the Article 23A benchmark could pose a threat to either or both of our consumer protection and integrity objectives, where contracts either:

- do not contain a provision that moves them away from the Article 23A benchmark at or before the point of the prohibition coming into effect, or
- contain a provision that will take effect if the benchmark can no longer be used, but that effect would be inappropriate (eg unintended, unfair, or disruptive) or inoperable

Q1: **What kinds of provisions do you consider would lead to unintended, unfair or disruptive outcomes, or prove inoperable in practice, if a critical benchmark could no longer be used?**

2.7 Either of these situations could potentially create any or all of market disruption, a threat to consumer protection, and financial instability.

2.8 Accordingly, we propose that our first consideration when deciding whether exercising our legacy use power would advance either or both of our consumer protection and integrity objectives, should be the scale and nature of legacy contracts without adequate provisions (as set out at 2.6 above).

- For the consumer protection objective:
  - We consider that we would be able to intervene if any contract(s) without adequate provisions posed any potential risk to an appropriate degree of consumer protection.
  - However, our primary concern is to provide an appropriate degree of consumer protection for retail consumers of benchmarks (ie consumers of benchmarks who are individuals not acting in the course of their trade or business). We will be more likely to intervene on consumer protection grounds for retail consumers of benchmarks than for non-retail consumers.
  - We are likely to intervene where the harm to retail consumers may be widespread and prevalent.
- For the integrity objective, there would need to be enough contracts without adequate provisions potentially to cause disruption to relevant market(s) or risks to financial stability.

Actual risk to consumer protection and integrity

2.9 The potential risk identified could be avoided if these contracts were amended to remove reliance on the Article 23A benchmark before or when the prohibition comes into effect. Where it is feasible, we expect firms to do this. However, there may be legal or structural obstacles, or very significant operational challenges, to making such amendments.

2.10 Therefore, our second consideration will be whether and to what degree it is feasible for parties to amend these contracts, in a way that delivers fair outcomes, before the prohibition on use comes into effect.

2.11 We think the following factors may be relevant to determining this:

- Appropriate alternatives: whether there are appropriate alternative benchmarks to which firms can refer in their contracts, and which would be appropriate and fair replacements. We would also consider how widely these are used and the terms on which parties can secure access to them. For example: alternatives may be available but not used enough for there to be adequate confidence and liquidity for the market to move to them. We may take account of the need to build liquidity and confidence in these rates when deciding whether and how to exercise our legacy use power. If alternatives are available but using them might not lead to appropriate and fair outcomes, we might consider that permitting continued use of the Article 23A benchmark is preferable.
- Ease of amending the contract: the number of parties to the contract and how many of them must consent to change it, the ease of identifying the relevant parties, and the type of legal, regulatory and operational procedure(s) required for the relevant parties to consent. For example: if a contract is held by a very large

number of parties and all of them must consent to the amendment via a defined consent solicitation process, this may not be feasible.
- Available mechanisms for changing large volumes of contracts without making bespoke amendments: industry practice may provide standard documents or mechanisms – or both – to allow multiple contracts to be amended at once. This could be central counterparties' (CCPs') rulebook changes for cleared derivatives, or an industry standard protocol for non-cleared derivatives.
- The nature of the parties to the contract and their likely awareness, knowledge and understanding of Article 23A designation. For example: few retail borrowers will be familiar with Article 23A designation and its consequences. This might mean they are less likely to engage with lenders' efforts to amend the contract, or are reluctant to agree to any amendments.
- The effect of the prohibition on parties who must consent to, or be involved in, amending the contract: whether the prohibition on use affects parties differently such that it creates misaligned incentives to amend the contract on fair terms. For example: only some of the parties may be subject to the prohibition (eg one might be a non-UK firm), and the contract terms may penalise these parties if the prohibition means they are unable to fulfil their obligations under the contract. This would place them at a disadvantage in negotiations to amend the contract terms, because other parties would not face the same penalties. Or, amending the contract might rely on, or require the consent of, a third party not affected by the prohibition.
- Evidence that similar contracts have been amended, indicating that amendments are feasible.
- How much notice the parties have had of the prohibition, or of the likelihood that this type of restriction could take effect.

2.12 We will take account of the scale and nature of contracts that cannot feasibly be amended when judging the actual risk to consumer protection and integrity, and whether exercising our legacy use power would advance our objectives.

Q2:
a. Do you think the factors above are relevant to determining whether or not it is feasible to amend contracts?

b. Where you do not think a factor is relevant, please explain why.

c. Are there any other factors not listed that are relevant?

2.13 We may consider whether permitting only a limited form of use might be appropriate in some cases. For example, the barriers to amending some contracts might be overcome if we permit use of the benchmark for a time limited period after the prohibition takes effect. Another example might be where the existing contract provisions allow the contract to be terminated early without disruption if we permit use of the benchmark solely to calculate a final termination payment.

Q3:
a. Do you think there may be situations where we could or should only permit a limited form of continued use of the benchmark?

b. Please explain your answer.

Further considerations

2.14 We think there are additional factors we should take into account when reaching a view on whether to exercise our legacy use power. These factors could inform whether and how we might exercise the power:

- **The effect of permitted legacy use on the robustness and/or the sustainability of any benchmark used as an input to the Article 23A benchmark**
  As set out in the FSB's report 'Reforming Major Interest Rate Benchmarks' (pp.13-14), a high volume of use of a benchmark may create financial stability risks. These risks are particularly acute when combined with low levels of activity in the market(s) underpinning the benchmark. Therefore, where another benchmark is an input to the Article 23A benchmark, we will take account of the following in relation to the benchmark being used as an input:
  - Liquidity in market(s) underpinning it: for instance, in the case of LIBOR, our preliminary view is that a forward-looking term risk-free rate (RFR) would be a likely input to any 'synthetic' methodology that we might require to be used if LIBOR was designated under Article 23A. These term rates are based on prices in the RFR derivatives market, so there needs to be enough liquidity in the RFR derivatives market to support a reliable and representative term rate. Permitting legacy use of the Article 23A benchmark by derivatives would mean these derivatives do not need to move to alternative rates, which would keep liquidity away from the RFR derivatives market.
  - Overall volume of use: Permitting significant use of a benchmark could threaten its robustness and/or sustainability, if its use is disproportionate to the activity in the market underpinning it. This could be the case even if it is indirect use, ie where the benchmark is being used as an input to an Article 23A benchmark (for example a forward-looking term rate used as part of any 'synthetic' LIBOR setting). We might consider whether we should restrict this indirect use by restricting the scale or type of legacy use of an Article 23A benchmark that we permit.
- **International consistency**
  We might consider whether overseas authorities are taking action that would have a similar effect in their jurisdiction. For example, whether other authorities have (or have not) imposed a form of restriction that means our decision to permit use (or leave the prohibition in place) might increase confusion and uncertainty rather than provide clarity. (This could be the case if the contract was potentially affected by both decisions, such as a contract subject to the BMR but governed by the law of another jurisdiction).
- **Whether contracts are required by law or regulation to contain suitable fallback provisions such that they should not be adversely impacted by the prohibition – but there has been non-compliance with the requirement**
  In such cases we might intervene to address the consumer protection and integrity risks identified, but also take action in respect of the non-compliance. For example, we might require appropriate conditions to be complied with in order for the relevant parties to be permitted to continue using the Article 23A benchmark.

- **The degree to which we can set out clear and practicable criteria for the market** Users need clarity and certainty on whether they can continue using the Article 23A benchmark, or not. As set out above, uncertainty for users could lead to market disruption, a threat to consumer protection, and possibly financial instability. We would consider whether and how we could distinguish with clarity and certainty the classes and characteristics of contracts for which we would allow use, from those where a prohibition would remain in place.

Q4: **a. Do you think the considerations above are relevant to determining whether it would be desirable to exercise our legacy use power?**

b. Where you do not think a consideration is relevant, please explain why.

c. Are there any other considerations not listed that are relevant?

Q5: **Are there other relevant factors or considerations we have not reflected in our proposed policy approach to the use of our legacy use power?**

3 Restricting new use of a ceasing critical benchmark

3.1 In circumstances where the administrator of a critical benchmark has notified us that the benchmark will cease to be provided, new Article 21A of the BMR enables us to prohibit some or all new use of the benchmark by supervised entities during any wind-down period before it ceases. As set out at 1.30 above, new Article 21A(2) of the BMR explains what is meant by 'new use'.

3.2 The legacy use power covered in Chapter 2 is only relevant to Article 23A benchmarks (ie permanently unrepresentative benchmarks). In contrast, the new use restriction power could apply to any ceasing critical benchmark, except where the benchmark has already been found to be permanently unrepresentative and designated as an Article 23A benchmark – in which case all new use will be prohibited by Article 23B(1). Therefore, this restriction could be applied to a critical benchmark while it remains representative. For example: several US dollar LIBOR panels will cease at the end of June 2023, and we expect that these rates will continue to be representative until then. This Chapter sets out our proposed policy for considering whether and how to exercise our new use restriction power.

3.3 The proposed policy is limited to situations in which the administrator intends that the benchmark will no longer be published. It does not address situations in which the administrator intends to transition the administration of the benchmark to a new administrator.

3.4 We can only exercise our new use restriction power where we consider that doing so would advance either or both of our consumer protection and integrity objectives. Therefore, we will first need to consider the potential risks to consumer protection and integrity if we do not exercise our power.

Assessing consumer protection and integrity risks

3.5 Supervised entities are required by Article 28(2) of the BMR to have robust fallbacks that operate when a benchmark ceases (as well as in the event of a material change to the benchmark). However, we still think that any of the following factors (or a combination of them) could mean that new use of a ceasing critical benchmark could pose potential risks to consumer protection and/or integrity:

- **Resilience: system-wide operational risk**
  Given the scale of use of critical benchmarks, if new use does not move to alternatives ahead of the critical benchmark ceasing, there could be a more risky cliff-edge when the benchmark ceases. This is because both new and legacy use would be moving to alternative benchmarks at the same time. The consequences of this could be, for example:
  - greater difficulty in building liquidity in markets based on alternative benchmarks ahead of cessation, with less confidence in price formation or greater transition costs as a result

- less readiness for and experience of operating with alternative benchmarks, with changes in firms' internal operations being implemented at a single point rather than phased in, leading to increased risks to market integrity

A 'big bang' transition of this sort could therefore introduce operational risk into the financial system. This could potentially prevent market infrastructure from functioning effectively or in an orderly way, and prevent firms from serving their customers in an efficient and effective way. We may consider that a staged transition, where new use of the benchmark stops before the benchmark ceases, better supports an orderly transition away from the benchmark as it can help ensure readiness for cessation.

- **Financial stability: the nature and/or degree of activity in the market(s) underpinning the ceasing critical benchmark**
  Critical benchmarks are widely used, and financial stability risks are particularly acute where high volumes of use of a benchmark are combined with low levels of activity in the market(s) underpinning it (as set out at 2.14). We might limit increases in the overall volume of contracts relying on the ceasing benchmark, by restricting new use.

- **Orderliness: whether the benchmark is expected to remain representative for the entirety of the wind-down period**
  If we do not expect the benchmark to remain representative for the entire wind-down period, we might consider how likely it is that its representativeness would be restored. A benchmark that is permanently unrepresentative is not suitable for use in new contracts, and we could potentially designate it as an Article 23A benchmark – in which case, as set out at 2.1 above, all use would be prohibited. Therefore, where representativeness is or could be at risk, we might prevent new use of the ceasing benchmark, to reduce any cliff-edge if we were to make an Article 23A designation subsequently.

- **Orderliness and consumer protection: risk that consumers or the market face unexpected changes such as volatility or liquidity impacts in either the ceasing benchmark itself, or the market(s) using it**
  Unexpected changes such as volatility or liquidity impacts could arise from a variety of factors. This is more likely where the benchmark is ceasing. For example:
  - the benchmark could become volatile due to deteriorating quality of input data or other market circumstances, or
  - liquidity in markets using the benchmark could decline

  Users may not foresee this, and so may not be prepared. This could create possible market disruption or consumer harm.

- **Orderliness and resilience: adequate confidence and liquidity in alternative benchmarks and market preparedness to use them**
  Where alternative benchmarks are available but are not widely used, new use of the ceasing benchmark may prevent the necessary market infrastructure and liquidity from building up in these alternatives before the critical benchmark ceases. This could affect market functioning.

  Where adequate alternatives are not available then it may, however, be important to allow some or all new use of the ceasing benchmark for a period while alternatives develop.

Q6: **a. Do you think the factors above are relevant to determining whether new use of a ceasing critical benchmark could be a risk to consumer protection and/or market integrity?**

b. Where you do not think a factor is relevant, please explain why.

c. Are there any other factors not listed that are relevant?

3.6 When reaching a view on whether exercising our new use restriction power would potentially advance our objectives:

- For the consumer protection objective:
  - We consider that we would be able to intervene if the above factors affected any consumer such that it posed a potential risk to an appropriate degree of consumer protection.
  - However, our primary concern will be to provide an appropriate degree of consumer protection for retail consumers of benchmarks (ie consumers of benchmarks who are individuals not acting in the course of their trade or business). We will be more likely to intervene on consumer protection grounds in respect of retail consumers of benchmarks than for non-retail consumers.
  - We are likely to intervene where the harm to retail consumers may be widespread and prevalent.
- For the integrity objective, there would need to be enough potential new use for the above factors to cause possible disruption to relevant market(s) or risks to financial stability. As this power only applies to ceasing critical benchmarks, which are those used extensively in the financial system, we expect that in most cases there would be enough potential new use to justify our intervening where any of the above factors are met. However, we would assess this case-by-case based on information available to us on the current scale of new use of the benchmark.

3.7 If we determine that intervention may be desirable, we may consider a limited form of restriction. For example, we might consider whether restricting new use of a ceasing critical benchmark may only be appropriate:

- for certain contract maturities, such as those that mature after the benchmark will cease
- for certain types of product or user, such as market participants or products which could help build liquidity in alternative benchmarks or are not needed to manage risk related to outstanding positions (see 3.9 below), or
- after a defined time period, such that new use restrictions would come into effect after a certain amount of time

Q7: **a. Do you think there may be situations where we could or should impose a limited form of restriction (eg for certain contract maturities; certain types of product or user, or after a defined time period)?**

b. Please explain your answer.

Further considerations

3.8 In deciding whether and how to exercise the power we propose also to consider whether not intervening for some new use (ie not restricting new use of the ceasing benchmark) might support our objectives. We propose two considerations:

Orderliness and resilience: reducing exposure to the ceasing benchmark

3.9 Some new use of the ceasing benchmark may support our integrity objective, where the use is aimed at:

- managing down legacy exposures to the benchmark (for example, where new use is needed to unwind an existing legacy exposure)
- mitigating other risks arising from legacy exposures to the benchmark (for example, new use that maintains market participants' ability to risk manage a legacy exposure effectively), or
- other purposes which are aligned with our objectives for the market to be operationally prepared and resilient to the benchmark ceasing

3.10 By way of example, US authorities have published guidance on their supervisory approach to restricting new use of US dollar LIBOR after end-2021, which takes account of users' potential risk management needs.

Orderliness and consumer protection: ensuring users have access to suitable replacement benchmarks

3.11 Where adequate alternatives are not available: the risks to consumer protection and integrity from shutting down access to the relevant markets by restricting new use of the ceasing benchmark might outweigh the risks set out at 3.5.

3.12 Where there are alternative(s) available but these are not widely used: we might balance the need to develop liquidity in markets referencing alternative benchmarks with the impact on supervised entities and other parties of having to operate in markets with lower liquidity due to a restriction on new use.

3.13 Where there are widely used alternative(s) available: operational changes may still be required in order to use the alternative benchmark(s) in some markets.

Q8:

a. Do you think the considerations above are relevant to determining whether us not intervening in respect of certain new use of the ceasing critical benchmark might support consumer protection or market integrity?

b. Where you do not think a consideration is relevant, please explain why.

c. Are there any other considerations not listed that are relevant?

3.14 We think there are some additional factors we should take into account when reaching a view on whether to exercise our new use restriction power. These factors could inform whether and how we might exercise the power:

- **International consistency**
  We propose to consider whether, and if so how, overseas authorities are taking action that would have similar effects in their jurisdiction. In particular, we might consider any impact of our intervention on UK markets and market participants if other authorities are not planning to act; for example, whether it could materially affect UK market participants' access to liquidity and ability to hedge.

- **The degree to which we can set out clear and practicable criteria for the market**
  Users need clarity on whether they can continue to use the ceasing benchmark in new contracts. If users are uncertain about this, it could lead to market disruption and a threat to consumer protection. Where we are proposing to restrict some but not all new use of the ceasing critical benchmark, we will consider whether and how we can reflect the classes and characteristics of contract that should fall within the restriction in criteria that are readily understandable by users and can be easily put into practice.

Q9:

a. Do you think the additional factors above are relevant in determining whether and how exercising our new use restriction power would advance consumer protection and/or market integrity?

b. Where you do not think a factor is relevant, please explain why.

c. Are there any other factors not listed that are relevant?

Implementing our decision

3.15 If we decide to exercise our new use restriction power, we would need to decide when the restriction would apply. We may consider the time that market participants have had to plan ahead, alongside other relevant factors set out above. For example, a shorter implementation period might be appropriate if the market was already aware that the benchmark was likely to cease, before the cessation date was confirmed.

Q10: Are there other relevant factors or considerations we have not reflected in our proposed policy approach to use of our new use restriction power?

Q11: Please provide any other comments you may have on this consultation.

Annex 1
Questions in this paper

Q1: What kinds of provisions do you consider would lead to unintended, unfair or disruptive outcomes, or prove inoperable in practice, if a critical benchmark could no longer be used?

Q2:
a. Do you think the factors in 2.11 are relevant to determining whether or not it is feasible to amend contracts?

b. Where you do not think a factor is relevant, please explain why.

c. Are there any other factors not listed that are relevant?

Q3:
a. Do you think there may be situations where we could or should only permit a limited form of continued use of the benchmark?

b. Please explain your answer.

Q4:
a. Do you think the considerations in 2.14 are relevant to determining whether it would be desirable to exercise our legacy use power?

b. Where you do not think a consideration is relevant, please explain why.

c. Are there any other considerations not listed that are relevant?

Q5: Are there other relevant factors or considerations we have not reflected in our proposed policy approach to the use of our legacy use power?

Q6:
a. Do you think the factors in 3.5 are relevant to determining whether new use of a ceasing critical benchmark could be a risk to consumer protection and/or market integrity?

b. Where you do not think a factor is relevant, please explain why.

c. Are there any other factors not listed that are relevant?

Q7: a. **Do you think there may be situations where we could or should impose a limited form of restriction (eg for certain contract maturities; certain types of product or user, or after a defined time period)?**

b. **Please explain your answer.**

Q8: a. **Do you think the considerations in 3.9 – 3.13 are relevant to determining whether us not intervening in respect of certain new use of the ceasing critical benchmark might support consumer protection or market integrity?**

b. **Where you do not think a consideration is relevant, please explain why.**

c. **Are there any other considerations not listed that are relevant?**

Q9: a. **Do you think the additional factors in 3.14 are relevant in determining whether and how exercising our new use restriction power would advance consumer protection and/or market integrity?**

b. **Where you do not think a factor is relevant, please explain why.**

c. **Are there any other factors not listed that are relevant?**

Q10: **Are there other relevant factors or considerations we have not reflected in our proposed policy approach to use of our new use restriction power?**

Q11: **Please provide any other comments you may have on this consultation.**

Annex 2
Compatibility statement

Compliance with legal requirements

1. 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 the policy proposed in this consultation is compatible with our strategic objective and would advance 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.

Equality and diversity considerations

2. We have considered the equality and diversity issues that may arise from the proposals set out in this consultation.

3. Overall, we do not consider that these proposals materially impact any of the groups with protected characteristics under the Equality Act 2010. However, we will continue to consider the equality and diversity implications of the proposals during the consultation period and will revisit them when making the final statements of policy.

Annex 3
Abbreviations used in this paper

Abbreviation	Description
BMR	Benchmarks Regulation
CCP	Central counterparty
CP	Consultation Paper
FS Act	Financial Services Act 2021
FSB	Financial Stability Board
FSMA	Financial Services and Markets Act 2000
RFR	Risk Free Rate
RFRWG	Working Group on Sterling Risk Free Reference Rates

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