

16 June 2021

ICMA response to FCA consultation (CP 21/15) Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks

The response

This online form provides the format for your response to the CP.

Introduction

The Financial Services Act 2021 (FS Act) introduced a package of amendments to the Benchmarks Regulation (BMR). This package was aimed at ensuring the FCA has the appropriate regulatory powers to help reduce risk in the wind-down period before LIBOR ceases permanently. The FCA is consulting on how it proposes to consider using two new powers relating to the use of critical benchmarks that are being wound down.

Responding to the consultation

You are asked to respond to the consultation by completing this online response process that lists the questions as set out in the consultation paper.

The following is a link back to the consultation paper if you need to refer back to it.

[CP 21/15 Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks](#)

Note, this online form provides a short summary of the CP. For full details please refer to the CP.

Why we are consulting

We are seeking views on how we propose using two new FCA powers, which are described below. 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 critical benchmark that is ending. LIBOR is a critical benchmark to which these powers could be relevant (and the only UK critical benchmark currently), but the consultation sets out factors that could also apply to other critical benchmarks.

The 'legacy use' power: If a critical benchmark becomes permanently unrepresentative of the market it is intended to measure, it may be designated as an 'Article 23A benchmark'. This

results in an automatic prohibition on use of the benchmark by UK supervised entities. However, this 'legacy use' power allows us to permit some or all 'legacy' (i.e. existing) use of the benchmark to continue. The consultation sets out which factors we think are relevant in determining what kind of legacy use we might permit.

The 'new use restriction' power: This power gives us the ability to prohibit some or all new use of a critical benchmark when we have been notified that its administrator intends to stop providing it at a future date. The consultation sets out which factors we think are relevant in determining if and how we might restrict new use of a critical benchmark we know is ending.

Instructions

You can use [this form](#) to upload your completed document. Please complete the 'about you' section first.

FCA privacy notice on how we will use the data you provide in this survey:

<https://www.fca.org.uk/privacy/personal-data-and-surveys-consultations-and-market-research>

Consultation Questions

Introduction to ICMA response

1. ICMA is pleased to respond to this FCA consultation on the FCA's 'legacy use power' and 'new use restriction power' under the UK Benchmarks Regulation.
2. ICMA represents around 600 members active in all segments of the sell-side and buy-side international debt capital markets in over 60 countries. Among its members are private and public sector issuers, banks and securities dealers, asset and fund managers and other investors, insurance companies, capital market infrastructure providers, law firms and others.
3. ICMA has responded to both sections of this consultation i.e. relating to both the 'legacy use power' (which will be relevant for sterling and yen LIBOR) and the 'new use restriction power' (which will be relevant for US dollar LIBOR). The challenges associated with transitioning legacy LIBOR bonds are more acute than those associated with adoption of alternative RFRs in new bonds for the reasons identified in the Sterling Risk Free Rate Working Group's [Paper on the Identification of Tough Legacy Issues](#) in May 2020. This means that the 'legacy use power' is of critical importance to the international bond market.

Key points of ICMA response

1. The challenges associated with transitioning legacy LIBOR bonds are well known. The introduction of synthetic LIBOR is therefore welcome because it will help to avoid the risk of market disruption that could otherwise occur when LIBOR ceases. Several legacy LIBOR bonds have been transitioned to alternative reference rates following successful consent solicitation exercises. However, as recognised in the Sterling Risk Free Rate Working Group's [Paper on the Identification of Tough Legacy Issues](#), the use of consent solicitations to transition the whole of the legacy LIBOR bond market before the end of this year is unlikely to be feasible because some bonds cannot be transitioned and there are too many to transition in the time available.
2. It will be important that the FCA grants UK supervised entities a broad permission to use synthetic LIBOR for legacy LIBOR bonds. Without this, significant legal and practical uncertainty will arise, which could pose a threat to market integrity and consumer protection.
3. There could also be unintended, disruptive or unfair consequences, such as floating rate bonds becoming fixed rate bonds for the remainder of their term, events of default being triggered and/or mandatory redemption of legacy securitisations at par. All of these outcomes could also pose a threat to market integrity and consumer protection.
4. Bonds are distributed and traded internationally and involve different types of entities located in different jurisdictions. International consistency is therefore a very significant factor and relevant to UK market integrity. Broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds would help to ensure international consistency for bond market participants, noting that non-UK supervised entities are unlikely to be subject to a prohibition on use. The interconnected nature of different product types within more complex structures such as securitisations and repackagings is another relevant consideration.

5. In terms of the 'new use restriction power', we believe the most important factors in deciding whether or not, and how, to exercise this power should be international consistency and market preparedness and confidence in alternative rates.

Question 1

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?

ICMA RESPONSE:

1. We agree with the FCA's assessment in paragraph 2.6 of the consultation paper that a prohibition on legacy use of an Article 23A benchmark could pose a threat to either or both of the FCA's consumer protection and integrity objectives, where contracts either:
 - a. 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
 - b. 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, as outlined in the FCA's consultation paper.
2. A combination of these scenarios is likely to apply in the international bond market in the context of the wind-down of LIBOR.

Uncertainty

3. Without a broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds, significant legal and practical uncertainty will arise. This would pose a clear threat to the FCA's market integrity objective and, in the case of bonds held by retail investors, its consumer protection objective.
4. Typical bond market documentation governed by English law has developed in recent years. This means that the fallbacks contained in legacy vanilla floating rate notes, securitisations and capital securities normally fall into one of three broad categories:
 - Type 1 fallbacks. These are traditional bond fallbacks triggered when the reference rate does not appear on the relevant screen page or the relevant screen page is unavailable. They are expected to result in floating rate notes becoming fixed rate notes in the event of LIBOR cessation.
 - Type 2 fallbacks. These provide for the issuer to appoint an independent agent to select an alternative rate and appropriate credit adjustment spread following certain trigger events, typically the permanent cessation of LIBOR and other events such as a prohibition or restriction on use.

- Type 3 fallbacks. These are the same as Type 2 fallbacks but have an additional trigger event based on an announcement that the reference rate is or will no longer be representative.
5. Bonds with Type 1 fallbacks are likely to account for the large majority of legacy sterling LIBOR bonds with a maturity beyond the end of 2021 – probably in the region of 70%.
 6. In particular, the large majority of legacy LIBOR securitisations are likely to include Type 1 fallbacks. This includes securitisations issued recently with AFME’s model benchmark rate modification language allowing for a streamlined process for modifying the benchmark. Hardwired type 2/3 fallbacks were considered less appropriate for many sections of the securitisation market for ratings and other reasons.
 7. The key reasons for uncertainty arising if there is no broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds are set out below.
 - a. Type 1 fallbacks are typically triggered when the reference rate does not appear on the relevant screen page or the relevant screen page is unavailable. This means that if LIBOR (or a synthetic version of LIBOR) continues to be available on the relevant screen page, but a relevant party is prohibited from using it, it will be unclear what should happen. If Type 1 fallbacks are considered to have been triggered, this would result in floating rate bonds becoming fixed rate bonds, which would clearly be an unintended outcome. See further below.
 - b. It is possible that a prohibition on legacy use for UK supervised entities could trigger Type 2 and Type 3 fallbacks. A bond-by-bond analysis would be needed based on the specific drafting of the fallback trigger and a consideration of whether the prohibition on use has constituted a trigger event for that particular bond.
 - c. The analysis of whether any prohibition on use is applicable in the context of determining interest payments under a particular legacy bond may not be straightforward. It will depend on a number of factors including the identity of the relevant parties and whether there is “use” for the purposes of the UK BMR. There is a longstanding question regarding whether determining interest payments under bonds is “use” under the EU and UK BMR or not.
 - d. Furthermore, the prohibition on use would only apply to UK supervised entities, whilst the international sterling and yen LIBOR bond market involves a wide range of different types of entities (including corporate or SPV issuers) located in different jurisdictions.
 - e. It is also likely to be challenging to set out clear criteria for permitting legacy use in some types of bonds and not others given the lack of standardised language used in bond terms and conditions and the different approaches used to cater for LIBOR cessation in different types of bonds (e.g. securitisations vs FRNs). The categories of bond market fallbacks outlined above are only broad buckets. There is variation in approaches within those categories and similarities between the categories. Without clear criteria, confusion and uncertainty are likely to arise.
 8. We also understand that, as a practical matter, the calculation and paying agency community would find any differentiation between certain types of bonds to be very challenging to apply given the mechanical and administrative nature of their role. We understand that more

detailed information on the practical challenges that agents will face is set out in ICMSA's response to this FCA consultation.

9. The potential for legal uncertainty and confusion in practice poses a clear threat to market integrity and, in the case of bonds held by retail investors, consumer protection. A broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds is very important to avoid this.

Unintended outcomes and practical challenges of bond market fallbacks

10. To the extent that Type 1 fallbacks are triggered as a result of a prohibition on legacy use by UK supervised entities, they will result in an outcome that the parties would not have intended when they issued or invested in a floating rate instrument, namely the instrument becoming a fixed rate instrument for the remainder of its term. This could cause market disruption.
11. To the extent that Type 2 fallbacks are triggered as a result of a prohibition on use by UK supervised entities, they will likely result in the bond referencing an alternative RFR. However, the transition to an alternative RFR is not automatic and will require certain steps to be taken and costs to be incurred resulting in practical challenges for bond issuers and other parties. These practical challenges include:
 - a. identifying and appointing an independent adviser in time for relevant interest amounts to be determined;
 - b. preparing, agreeing and serving relevant notices related to the changes that will be needed to documentation to reflect the alternative reference rate and credit adjustment spread (note that it is anticipated that the issuer, paying agent and any trustee would require legal counsel for this purpose which will have timing and cost implications);
 - c. making adjustments to market participants' systems from a basic IBOR-related calculation to the more complex calculation associated with an adjusted RFR-based rate; and
 - d. reflecting the change from LIBOR to an adjusted RFR-based rate in any associated contracts, which might involve unwinding or renegotiating swaps for example.
12. These practical challenges will be exacerbated by the fact that the majority of Type 2 fallbacks would likely be triggered at the same time. In addition, Type 3 fallbacks are likely to be triggered at around the same time as Type 2 fallbacks, assuming that the prohibition on use is accompanied by an official announcement of unrepresentativeness triggering Type 3 fallbacks. Furthermore, there will likely be very little prior market experience or precedent of operating Type 2 or Type 3 fallbacks.
13. The operation of Type 2 (and Type 3) fallbacks for sterling FRNs will be supported in sterling markets by recommendations that have been made by the Sterling RFR Working Group. However, similar recommendations have not so far been made with respect to Japanese yen LIBOR FRNs, and so the operation of those fallbacks could be more challenging.
14. If fallbacks are triggered in bonds, this may result in mismatches of cashflows within securitisation or repackaging structures that involve other products such as derivatives and

underlying assets such as mortgages or loans. This could create quite significant practical challenges.

15. The unintended outcomes or practical challenges associated with triggering bond market fallbacks could pose a threat to market integrity and, in the case of bonds held by retail investors, consumer protection. A broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds is very important to avoid these outcomes.

Other threats to market integrity or consumer protection

16. In addition to the threats outlined above, a prohibition on use could result in events of default or mandatory redemption at par provisions being triggered in some legacy bonds.
 - a. **Events of default:** Some bonds contain “illegality” event of default provisions, meaning there could be an event of default if it becomes unlawful for the issuer to perform or comply with any of its obligations under the bonds. The triggering of an event of default provision would be very disruptive. The proportion of legacy LIBOR bonds where this might be relevant is not clear. Once a potential event of default has occurred, there may be questions for trustees and investors regarding whether the event should be waived, which may not be straightforward. If it is not waived, this could lead to redemption at par. Outside of the securitisation market, triggering an event of default in a legacy sterling LIBOR bond could trigger cross-defaults in an issuer’s other borrowings.
 - b. **Mandatory redemption at par:** Some legacy securitisations contain a mandatory redemption provision that may be triggered if it becomes unlawful for the issuer to perform or comply with any of its obligations under the bonds. This would mean that the issuer would be required to redeem the bonds at par. This would be a disruptive and potentially unfair outcome for parties.
17. A broad permission for UK supervised entities to use synthetic LIBOR for legacy LIBOR bonds would help to avoid these disruptive and unfair outcomes.
18. As a final point, we note that the FCA’s policy for, and exercise of, its legacy use power will need to be consistent with the new legislation that is due to be brought forward following HM Treasury’s consultation on [supporting the wind-down of critical benchmarks](#).

Question 2

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

	Yes	No	No view
Whether appropriate alternatives are available	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ease of amending the contract (eg number of parties; legal, regulatory or operational procedures)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Whether large volumes of contracts can be amended without making bespoke amendments	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The nature of the parties to the contract	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The effect of prohibition on parties who must consent to, or be involved in, amending the contract	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Evidence of similar contracts having been amended	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
How much notice parties have had of the prohibition	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

ICMA RESPONSE:

1. **Evidence of similar contracts having been amended:** We do not think this is a relevant consideration. For example, several sterling LIBOR bonds have been amended via a consent solicitation process, but there have also been consent solicitations that have failed - including in circumstances where the proposed adjustment methodology was successful in other transactions. The Sterling Risk Free Rate Working Group’s [Paper on the Identification of Tough Legacy Issues](#) recognised that the use of consent solicitations to transition the whole of the legacy LIBOR bond market is unlikely to be feasible because it may not always be possible to obtain the requisite consent from bondholders. In addition, it is very unlikely to be possible to transition all affected legacy bonds in the time available, recognising that consent solicitation can be a long and costly process. Furthermore, within more complex arrangements (such as securitisations or repackagings), there are additional difficulties where the originator or sponsoring entity no longer exists or is insolvent, or where the economic interest in the transaction has been sold to a third party. This means active transition becomes more difficult as there is no longer a decision maker, nor a party willing to

assume the costs of amendment. Other options, such as buy-backs or exchange offers may be commercially unfeasible. See further below.

2. **How much notice parties have had of the prohibition:** We think this is a lower level consideration. As noted above, it may simply not be possible to achieve a successful consent solicitation in order to amend the terms of certain legacy bonds, regardless of the length of the notice period that parties have had of a prohibition taking effect. This said, imposing a prohibition at very short notice would mean parties have limited opportunity to prepare themselves and understand the practical and legal implications; and this could pose a threat to market integrity.

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

ICMA RESPONSE:

1. We would emphasise the importance of the second factor listed by the FCA (i.e. ease of amending the contract) in terms of whether or not it is feasible to amend bond contracts, and build upon the points outlined in the consultation paper in relation to this factor.
2. For bonds governed by English law, the most likely method of transitioning legacy LIBOR bonds is consent solicitation. There are a number of important factors to be taken into account when considering whether there is potential for more consent solicitations to take place at the rate required to convert all legacy sterling LIBOR bonds by the end of 2021, or whether they will be successful. These factors include:
 - a. **Consent solicitation requirements:** Under English law, amendments to interest rate provisions in bond terms and conditions typically require a quorum of two-thirds or 75% of holders of the outstanding principal amount of bonds, of which 75% of votes cast have to be in favour of the extraordinary resolution to amend the relevant terms and conditions. For an adjourned meeting, a quorum of one-third or 25% of the outstanding principal amount of bonds is typically required (if the first meeting was adjourned for want of quorum), of which 75% of votes cast have to be in favour of the extraordinary resolution to amend the relevant terms and conditions. The thresholds can be difficult to achieve, in particular if the legacy sterling LIBOR bond being transitioned is widely held by a large number of investors, not all of whom can be located, or are prepared to engage with the process. If large volumes of consent solicitations are taking place at the same time, the quorum and threshold requirements may pose a significant logistical challenge.
 - b. **Time required:** A consent solicitation normally takes around 2 months from start to finish. The timings of certain requirements with respect to, for instance, meetings (such as notices of meetings and the delay between first meetings and adjourned meetings), are enshrined in bond documentation and cannot be circumvented. A great deal of discovery and diligence is required in advance of launch of a consent solicitation, involving a considerable amount of management time and effort on discussions between the parties on the rationale for the transition, and respective expectations with respect to pricing methodologies to ensure no value transfer. Additionally, whilst not a significant factor for recent consent solicitations involving capital securities, more time may need to be factored in for capital securities where additional prudential regulation procedural

steps need to be undertaken, particularly for issuers seeking to undertake this process with multiple issuances in the little time left available.

- c. **Cost:** It can be costly to undertake a consent solicitation, and the cost is usually borne by the issuer. Additional costs may arise in older bonds, where there is a contractual requirement for issuers to publish notices in, for instance, the Financial Times, or other recognised newspapers in jurisdictions where the bonds are listed. Therefore, issuers will want to ensure that, before incurring such costs, the consent solicitation will be successful. But there is no guarantee of this, as evidenced by several recent consent solicitations that were not successful.
- d. **Process:** Although the consent solicitation process takes time, it is tried and tested – it has long been enshrined and is generally understood. But while the process is largely mechanical in terms of documentation and operations, some inefficiencies have been highlighted recently; in particular, difficulties in the location of bondholders and the requisite cascade of information and communications between the parties, which can be compounded if there are different ownership structures in place. This may be partly due to the number of parties in the chain, and partly due to the fact that much of the operations process is conducted manually, which not only takes up a considerable amount of time in an already compressed time frame, but can also lead to significant extra work for the parties involved. This would all become exacerbated if large volumes of consent solicitations were to be undertaken within a relatively short time frame. Technical innovation and automation would be helpful, but this is unlikely to be achieved in any meaningful way in the time available this year.
- e. **Transaction-specific challenges:** The success of a consent solicitation can largely depend on transaction-specific challenges, such as: (i) investor desire to allow certain fallbacks to operate in accordance with their terms in the hope of a more favourable outcome; (ii) the migration of holdings in transactions to different jurisdictions, which renders their holders ineligible to vote in a consent solicitation; (iii) the unwillingness of investors to vote in a certain way in the hope of a more favourable outcome; and (iv) investors in jurisdictions outside of the UK not engaging with the process.
- f. **Securitisation-specific issues:** Potential blockers to the securitisation market not transitioning as fast as it could include: (i) the uncertainty surrounding whether the underlying LIBOR assets (such as loans and mortgages) will transition away from LIBOR to SONIA (or other currency RFRs) in line with the bond itself; (ii) the need to ensure that the various different instruments which together make up the securitisation (swaps, liquidity facilities and other credit enhancement arrangements) all transition at the same time in order to preserve the integrity of the structure/cashflows; (iii) the likely need to involve rating agencies in the process to ensure that there is no impact on the rating of the notes issued as part of the securitisation; and (iv) in the case of orphan transactions, the lack of funds and resources to fund and lead a consent solicitation process.
- g. **RFR market conditions:** Further operational efficiency and clarity on the use of market conventions for the relevant RFR bond market could be helpful to reassure issuers that the conventions to which they would be transitioning are, and are likely to remain, the market standard.

3. **Bond exchanges and buybacks** have also been considered as a means of reducing legacy sterling LIBOR bond contracts to an irreducible core through active conversion to SONIA before the end of 2021.
4. These exercises can be costly and time consuming, requiring significant legal, financial and structuring advice, and can be subject to market tensions. For example, for an exchange offer to exchange legacy sterling LIBOR bond for new bonds which do not reference LIBOR, market conditions existing at the time of the exchange may be favourable – or unfavourable – to either party. On a buyback of legacy sterling LIBOR bonds, the issuer must ensure that it is in a position to buy back the legacy sterling LIBOR bond at a price which takes account of future interest payments which would be payable were the bond to remain outstanding and compensate the investor for any future loss of yield. Issuers may not be able to exchange or buy back the entire outstanding amount of the legacy sterling LIBOR bond, which could result in an illiquid rump being left outstanding, requiring the issuer to do a consent solicitation in any event. Exchanging or buying back legacy sterling LIBOR bonds may also result in breaking hedging contracts early, which can be very expensive, or may require renegotiation of hedging agreements to transfer them to new financing arrangements.
5. Bond exchanges and buybacks could reduce the *value* of LIBOR bonds outstanding, though not necessarily the *number* of bond issues outstanding, if there is still a rump of the issue that is not part of the bond exchange or buyback.

Question 3

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

- Yes
- No
- No view

b. Please explain your answer.

ICMA RESPONSE:

1. From the perspective of the international bond market, we believe legacy use should be permitted without limitations given the risks to market integrity outlined in our response to Q1 and the challenges associated with active transition of the whole bond market outlined in our response to Q2.
2. Imposing a time limit on permission for use of synthetic LIBOR for legacy LIBOR bonds would not solve the “tough legacy” problem in the sterling LIBOR bond market, because some bonds have long maturities and it is not feasible to transition them. A time limit for permitted use of synthetic LIBOR would also be inconsistent with the US and EU legislative solutions for “tough legacy”, which involve a legislative override of LIBOR references in contracts and securities (and therefore have no time limit).
3. The final termination payment example outlined in the consultation paper would not be applicable to bonds.
4. See also our response to Q4b in relation to setting clear and practicable criteria.
5. We are not able to comment on whether there may be situations outside of the bond market where it would be appropriate for there to be a limited form of continued use of the benchmark.

Question 4

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

	Yes	No	No view
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.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
International consistency.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Whether contracts are required by law or regulation to contain suitable fallbacks but there has been non-compliance with the requirement.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The degree to which we can set out clear and practicable criteria for the market.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

ICMA RESPONSE:

1. We do not consider non-compliance with a requirement to contain robust fallbacks to be a relevant factor for the FCA in determining whether or not to exercise its power to permit use of an Article 23A benchmark in the context of LIBOR cessation.
2. International bond market participants have taken steps in recent years to use updated fallback provisions catering for the permanent cessation of the relevant reference rate; or otherwise provided for cessation of the relevant reference rate (e.g. by including new provisions to make it easier for the reference rate to be changed). Many of these contractual arrangements will not provide for the contract to be moved to an RFR automatically. For example, where a provision similar to AFME’s model benchmark rate modification language has been included, this would typically require a process to be actioned by the issuer and the process to be successful for the contract to transition. There was not enough market consensus around adjustment methodology in 2018 for this to be hardwired into documentation. Therefore, even where there has been appropriate provision in a contract, this does not necessarily mean synthetic LIBOR would not be required. In addition, to the extent any individual bonds have been issued without provisions catering for permanent cessation of the relevant reference rate, they are highly likely to be isolated cases and should not impact upon the FCA’s policy with respect to the bond market as a whole.

3. It is also worth noting that only a relatively small subset of legacy LIBOR bonds would have been subject to a regulatory requirement to include robust fallbacks at the time they were issued because: (a) not all bond issuers are subject to the EU or UK Benchmarks Regulation (in particular non-financial institution/non-regulated corporate issuers); and (b) the sterling LIBOR bond market adopted alternative reference rates in new issues relatively quickly after the end of LIBOR was announced in July 2017 (and so, particularly in the case of sterling LIBOR, there were only a limited number of new bonds referencing LIBOR issued after the time that the requirement for robust fallbacks was introduced in January 2018).
 4. The variety of approaches taken in bond market documentation noted above relates to the FCA's final factor i.e. the degree to which it could set out clear and practicable criteria for the market.
 - a. **Clear criteria:** As noted in our response to Q1, we think it would be very challenging to set out clear criteria for permitting legacy use in some types of bonds and not others given the lack of standardised language used in bond terms and conditions and the different approaches used to cater for LIBOR cessation in different types of bonds (e.g. securitisations vs FRNs). The categories of bond market fallbacks outlined in our response to Q1 are only broad buckets. There is variation in approaches within those categories and similarities between the categories. Without clear criteria, confusion and uncertainty are likely to arise, which would undermine the overall objective of an achieving an orderly wind-down of LIBOR.
 - b. **Practicable criteria:** Also as noted in our response to Q1, we understand that the calculation and paying agency community would find any differentiation between certain types of bonds to be challenging to apply in practice given the mechanical and administrative nature of their role. We understand that further information on this is set out in ICMSA's response to this FCA consultation.
 5. These considerations, as well as the other legal and practical considerations outlined in our response to Q1, would further support a broad permission to use synthetic LIBOR for legacy LIBOR bonds.
- c. Are there any other considerations not listed that are relevant?

ICMA RESPONSE:

1. We think another factor to consider is the interconnected nature of different product types, in particular within more complex structures such as securitisations and repackagings. For example, if permission to use synthetic LIBOR is not extended to all instruments within a securitisation structure, this could give rise to cashflow mismatches that will be difficult to manage (in particular where the relevant parties are no longer "active").
2. We agree that international consistency is a relevant factor. However, we think this should be considered not only from the perspective of whether overseas authorities are taking action that would have a similar effect in their jurisdiction, as outlined in the consultation paper, but also from the perspective of whether overseas authorities are *not* taking action that would have a similar effect. From the perspective of the international bond market, which includes different types of entities located in different jurisdictions, the effect of one party being

restricted from using the reference rate and others not being so restricted could also be problematic, given the confusion and uncertainty that could arise and the practical challenges that agents would have in applying different approaches to different legacy bonds depending on the identity of the parties.

Question 5

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

ICMA RESPONSE:

We do not consider there to be other relevant factors or considerations, but draw attention to the summary of key points contained at the top of our response.

Question 6

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

	Yes	No	No view
System-wide operational risk of a cliff-edge when the benchmark ceases.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The nature and/or degree of activity in the market(s) underpinning the ceasing critical benchmark.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Whether the benchmark is expected to remain representative for the entirety of the wind-down period.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The risk that consumers or the market face unexpected changes (eg volatility or liquidity impacts) in the ceasing benchmark or market(s) using it.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Whether there is adequate confidence and liquidity in alternative benchmarks and market preparedness to use them.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

ICMA RESPONSE:

1. In relation to restricting new use (which is anticipated to be relevant for US dollar LIBOR, as recently emphasised by the [FSB](#) and [IOSCO](#), but not sterling or Japanese yen LIBOR where all use is expected to be prohibited subject to the FCA’s power to permit some or all legacy use), we do not consider that a high volume of use of the benchmark but a low level of activity in the market(s) underpinning it would be a sensible justification unless there are viable and liquid alternatives for market participants to use.
2. We also do not consider that limited confidence and liquidity in alternative benchmarks and/or market preparedness to use them to be reasons to restrict new use of a critical benchmark. If anything, these should be reasons not to restrict new use of a critical benchmark as there could be risks to market integrity if UK supervised entities are restricted from using a critical benchmark in circumstances where there is no viable alternative. The FCA acknowledges this in paragraphs 3.11 – 3.13 of the consultation paper.

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

ICMA RESPONSE:

The FCA lists international consistency as an additional factor that it proposes to take into account. Given the interconnectedness of global financial markets, we consider international consistency to be an important factor that would be relevant in the context of the FCA's market integrity and consumer protection objectives, and not just an "additional" factor.

Question 7

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)?

- Yes
- No
- No view

b. Please explain your answer.

ICMA RESPONSE:

We agree that there may be situations in which a limited form of restriction would be more appropriate and proportionate than a blanket ban on new use. We anticipate that the limitations are likely to be more straightforward to formulate and apply if they are temporal in nature e.g. only applying a restriction in cases where a contract will mature after the benchmark will cease (which might be relevant for the ECP market). We suspect that it could be challenging to formulate clear and practicable limitations based on features of certain types of products, in the same way that this could be challenging in the context of the FCA's exercise of its 'legacy use power'.

Question 8

a. Do you think the considerations below 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?

	Yes	No	No view
Whether new use reduces exposure to the ceasing benchmark	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Whether users have access to suitable replacement benchmarks	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Not applicable.

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

ICMA RESPONSE:

We believe that the FCA has identified the most relevant considerations.

Question 9

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

	Yes	No	No view
International consistency	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The degree to which we can set out clear and practicable criteria for the market.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Not applicable.

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

ICMA RESPONSE:

As noted above, we agree that international consistency is a very important consideration. Given the interconnectedness of global financial markets, we consider international consistency to be an important factor that would be relevant in the context of the FCA’s market integrity and consumer protection objectives, and not just an “additional” factor.

Question 10

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

ICMA RESPONSE:

The FCA might also wish to note that any restriction on new use of US dollar LIBOR could potentially trigger Type 2 and Type 3 fallbacks in some legacy LIBOR bonds, depending on the precise drafting of the fallback.

Question 11

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

ICMA RESPONSE:

We would draw attention to the summary of key points set out at the top of this response.

We are asking for comments on this Consultation Paper (CP) by 17 June 2021.

You can submit this Word document using the online form here:

[Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks](#)

If you have any questions when completing the survey, please contact cp21-15@fca.org.uk.