RESPONSE TO FCA'S CONSULTATIONS ON THE PROPOSED POLICIES WITH RESPECT TO (1) THE DESIGNATION OF BENCHMARKS UNDER NEW ARTICLE 23A (THE "ARTICLE 23A CONSULTATION") AND (2) THE EXERCISE OF THE FCA'S POWERS UNDER THE NEW ARTICLE 23D (THE "ARTICLE 23D CONSULTATION")

The Association of Foreign Banks (AFB) is a trade body which represents the interests of the foreign banking sector in the UK to industry stakeholders, including the Government, regulatory bodies, and financial services organisations. Founded in 1947, the AFB today has around 200 international banking group members, representing about 80% of the UK's foreign banking market, providing financial services through branches, subsidiaries, and representative offices in the UK.

The AFB welcomes the opportunity to respond to the Article 23A and 23D Consultations. Our responses to the questions in the consultations are set out below.

ARTICLE 23A CONSULTATION

Q1 & Q2

The AFB supports the objective of securing an orderly transition away from LIBOR and, for this reason, welcomes the proposals to give the FCA new powers to designate benchmarks under new Article 23A of the UK Benchmarks Regulation (UK BMR) and to permit the legacy use of an adjusted LIBOR methodology under the new Article 23D.

Q3

A. ALIGNMENT WITH BANK REGULATORS INTERNATIONALLY

It goes without saying that the impact of the transition away from LIBOR's multicurrency forward-looking term rates will continue to be felt far more widely than in the UK market alone. For the foreign banks doing business in the UK who make up the AFB's membership, the achievement of "orderly transition" requires that, in the exercise of its new powers, the FCA should compensate for the territorial limits of its jurisdiction under the UK Benchmark Regulation by proceeding in the closest possible alignment with bank regulators in the home jurisdictions of AFB members and in the markets

in which they operate internationally. The reality of the need for alignment is alluded to at a number of points in the Article 23A and 23D Consultations.

The AFB would support the inclusion of a clearer legal obligation to consider the alignment of the FCA's decisions on designation under Article 23A, with the policies and initiatives of bank regulators internationally and of the central banking authorities of the currency relating to the relevant benchmark in particular.

B. USD LIBOR EXTENSION TO 30 JUNE 2023

Currently, the most pressing example of the need for alignment is in relation to the IBA's consultation announced on 30 November 2020 regarding the plan to continue publication of the major tenors of USD LIBOR with the support of the Federal Reserve to 30 June 2023 – long after the FCA's support for LIBOR expires in December 2021.

Should this plan proceed with the support of the Federal Reserve, we would request that the FCA make a statement that it will not designate the tenors of USD LIBOR continuing to be published post 2021 as Article 23A benchmarks.

Similarly, if other central banking authorities follow the Federal Reserve's example, the FCA should adopt the same approach with the continuation of LIBOR in the relevant currency.

C. THE ARTICLE 23B PROHIBITION ON USE

We set out below several concerns that we believe require clarification in connection with the automatic application of the prohibition on use under Article 23B upon designation of a benchmark as an Article 23A benchmark.

1. "Supervised entities"

The Article 23B prohibition applies to "supervised entities". We note that it is intended to introduce a definition of "supervised third country entity" meaning an entity that would be a supervised entity by virtue of point (a) of the definition of that term (CRR firm that is a credit institution) but for the fact that it does not have its head office or registered office in the United Kingdom.

On this basis we understand that a foreign bank that does not have its head office or registered office in the United Kingdom should not be in scope of the prohibition in Article 23B and, following designation, would be able to continue, for example, issuing financial instruments and determining rates of interest using the designated Article 23A benchmark, even though UK headquartered banks would be prevented from doing so.

To clarify the position, we request that foreign headquartered banks operating through UK branches are expressly excluded from the definition of "supervised entity" and the Article 23B prohibition on use.

2. Meaning of "use of an Article 23A benchmark**"**

The "use of a benchmark" is a defined term in the UK BMR. Post Brexit, this definition refers only to the "use" of a benchmark in relation to certain products: "financial instruments" admitted to trading on a UK trading venue and "financial contracts" that are consumer credit agreements and mortgages. Corporate loans and derivatives, for example, are notably excluded.

The prohibition in Article 23B states that a supervised entity "must not use an Article 23A benchmark". This drafting creates an ambiguity as it may be taken to imply that the "use" of an Article 23A benchmark is to be applied generally (including to corporate loans and derivatives) and not limited to the products expressly referred to in the definition of "use of a benchmark" above.

We request that the drafting should be clarified so that the phrase "use of an Article 23A benchmark" is to be interpreted to mean the same as "use of a benchmark".

3. Scope of the automatic ban on use

Assuming we are correct in our interpretation of the new Article 23 provisions above, once a benchmark is designated as an Article 23A benchmark, the automatic ban on use would in principle apply only to banks and investment firms headquartered in the UK (and other supervised entities) in relation to financial instruments admitted to trading on a UK venue, UK consumer credit agreements and mortgages and UK investment funds.

In other words, the effect of any ban would be concentrated within the UK among UK banks, funds and consumers. Even then, the complexity of the relevant definitions and the variety of financial structures in use emphasises the risk that effectiveness of the ban may be haphazard: certain participants in the UK market will (perhaps unwittingly) become subject to the ban – at the same time that others are not - and/or participants may continue, for example, to calculate interest for some products using an Article 23A benchmark – but not for other products.

In our view, it would be desirable, at this early stage, for the FCA both to clarify for the markets the use cases that it sees for the applying the ban, and to reshape its communications around its power to designate a benchmark under Article 23A to emphasise the narrower scope and more localised effect of any ban than is suggested by the phrase 'banning the "use" of a benchmark' – the intention of which is easily misunderstood outside the UK.

ARTICLE 23D CONSULTATION

Q1

We confirm that the AFB would be keen to participate fully in any future consultation relating to the exercise of the FCA's powers under Article 23D.

Q2

The main challenge to evaluating the practicality of transition for AFB members is the alignment with non-UK bank regulators and central bank authorities of relevant benchmark currencies. See our response to Q3 of the Article 23A Consultation above.

Q3 & Q4

The interests of protecting consumers and market integrity mean that any exercise the FCA's new powers should take full account of the impact on AFB members' customers and businesses both within the UK and, just as importantly, outside the UK.

Q5

No comment.

Q6

The importance of orderly transition outside the UK and the need for international coordination is, in our view, given insufficient weight.

Q7

We refer to our responses above in relation to the Article 23A Consultation.

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