

# Critical Benchmarks (References and Administrators' Liability) Bill [HL]

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## EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by HM Treasury, have been ordered to be published as HL Bill 49 – EN.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord Agnew of Oulton has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Critical Benchmarks (References and Administrators' Liability) Bill [HL] are compatible with the Convention rights.



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**B I L L**

TO

Make provision about the meaning of references to Article 23A benchmarks in contracts and other arrangements; and to make provision about the liability of administrators of Article 23A benchmarks.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 References to Article 23A benchmarks**

In Chapter 4 of Title 3 of the Benchmarks Regulation (critical benchmarks), after Article 23F insert—

*“Article 23FA*

**References to Article 23A benchmarks**

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1. A reference to a benchmark in a contract or other arrangement is, at any time when the benchmark is an Article 23A benchmark, to be treated for all purposes as including the benchmark as it exists—

- (a) when it is an Article 23A benchmark,
- (b) when the FCA has exercised a power under Article 23D(2) in respect of the benchmark, and 10
- (c) when the benchmark administrator has exercised a discretion or permission conferred on it by the FCA under Article 23D in respect of the benchmark,

whether or not the benchmark is representative of the Article 27 market or economic reality at those times. 15

2. If a contract or other arrangement describes a benchmark or other figure (rather than naming a benchmark), paragraph 1 applies as if the description

were a reference to –

- (a) each benchmark that falls within the description, and
  - (b) each Article 23A benchmark that fell, or was being treated by the parties to the contract or arrangement as falling, within the description immediately before it became an Article 23A benchmark. 5
3. For the purposes of paragraph 2(b), where the description is of a benchmark or other figure that measures, or is intended to measure, a market or economic reality, a benchmark fell within the description immediately before it became an Article 23A benchmark if its Article 27 market or economic reality fell within the description. 10
4. Paragraphs 1 and 2 apply –

  - (a) to any contract or other arrangement, whenever it was formed, and
  - (b) to any reference to a benchmark or other figure, however expressed.
5. Where paragraph 1 applies in a case in which the reference formed part of the contract or other arrangement – 15

  - (a) immediately before this Article came into force, or
  - (b) immediately before the benchmark became an Article 23A benchmark,

the contract or arrangement is to be treated for all purposes as having always provided for the reference to have the meaning provided for by paragraph 1 (and, where relevant, paragraph 2) when the benchmark is an Article 23A benchmark. 20
6. Nothing in this Article is to be taken to create any right, obligation or liability of a party to a contract or other arrangement or of another person –

  - (a) in relation to an act or omission that is relevant to the formation or variation of the contract or arrangement (such as, among other things, an act or omission in connection with the making of a representation or the giving of advice), where the formation or variation took place before the benchmark in question became an Article 23A benchmark, or 25
  - (b) in relation to the operation of the contract or arrangement before the benchmark in question became an Article 23A benchmark. 30
7. Nothing in this Article is to be taken to extinguish, or otherwise affect, any cause of action that arose in relation to a contract or arrangement before the benchmark in question became an Article 23A benchmark, except that the effect of this Article is to be taken into account when determining any loss or damage incurred. 35
8. This Article has effect subject to Article 23FB and any regulations made

under that Article.

9. For the purposes of this Article and Article 23FB, a contract or other arrangement refers to a benchmark if it refers to an index, whether or not the index is used as a benchmark for the purposes of the contract or arrangement (and references to a benchmark are to be interpreted accordingly). 5
10. In this Article and Article 23FB—
- (a) “arrangement” means a legally binding arrangement between two or more parties;
  - (b) references to a contract or an arrangement—
    - (i) are to a contract or arrangement entered into by or on behalf of any person (including the Crown), and 10
    - (ii) include any document referred to in, or otherwise forming part of, a contract or arrangement;
  - (c) “Article 27 market or economic reality”, in relation to an Article 23A benchmark, means the market or economic reality that was intended to be measured by the benchmark immediately before it became an Article 23A benchmark (as defined in the benchmark statement referred to in Article 27). 15

#### *Article 23FB*

#### **References to Article 23A benchmarks: further provision** 20

1. Article 23FA(1) and (2) do not apply to the extent that the contract or arrangement provides expressly that those paragraphs do not apply.
2. Article 23FA(1) does not apply to a reference to a benchmark to which it would otherwise apply (taking account of Article 23FA(2), where relevant) to the extent that the contract or arrangement provides expressly that the reference does not include the benchmark as it exists at the times described in Article 23FA(1). 25
3. Article 23FA(1) to (5) do not prevent or otherwise affect the operation of fallback provision, either before or after the benchmark in question became an Article 23A benchmark, subject to paragraph 5 and any regulations made under paragraph 6. 30
4. “Fallback provision” means express provision for the contract or arrangement—
- (a) to operate, or to be varied so as to operate, by reference to something other than the benchmark in question (temporarily or permanently), or 35
  - (b) to terminate,

either on a particular date or in particular circumstances (such as, among other things, circumstances relating to the benchmark's representativeness, its designation under Article 23A or the way in which it is determined).

5. To the extent that fallback provision provides that it is triggered when the benchmark in question ceases to exist or to be published or otherwise made available (temporarily or permanently), Article 23FA(1) to (5) prevent it from being triggered by reason of the benchmark's designation under Article 23A or the exercise of a power, discretion or permission under Article 23D. 5

6. The Treasury may by regulations provide –

(a) that Article 23FA(1) and (2) do not apply – 10

(i) to a specified benchmark or to benchmarks of a specified description;

(ii) to contracts or other arrangements of a specified description;

(b) that references in this Article to “fallback provision” include (in addition to the provision described in paragraph 4) express provision of a specified description; 15

(c) that fallback provision is not triggered in cases of a specified description relating to a benchmark's designation under Article 23A (in addition to the cases described in paragraph 5).

In this paragraph “specified” means specified in the regulations. 20

7. Regulations under paragraph 6 may make provision that applies generally or only for specific purposes (for example, provision that only applies in relation to a particular benchmark, a particular description of contracts or other arrangements or a particular type of fallback provision).”

## 2 Liability of administrator of Article 23A benchmark 25

In the Benchmarks Regulation, after Article 23FB (inserted by section 1) insert –

*“Article 23FC*

### **Liability of administrator of Article 23A benchmark**

1. An administrator of an Article 23A benchmark, and its officers and employees, are not liable in damages – 30

(a) for action or inaction required by a notice under Article 23D(2) or by Article 23D(8), or

(b) for publishing the benchmark as it exists as a result of such action or inaction. 35

2. Paragraph 1 does not remove liability in respect of loss or damage arising



from the exercise of a discretion conferred on the administrator under Article 23D(2) or as part of a permission given under Article 23D(8)(b).

3. Paragraph 1(b) does not remove liability in respect of loss or damage arising from the exercise of any other discretion of the administrator as to the time or manner of publication.”

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### **3 Consequential provision**

(1) In Article 2 of the Benchmarks Regulation (scope), at the end insert –

“3. Paragraphs 1 and 2 do not limit the application of Articles 23FA to 23FC.”

(2) In Article 23G(3) of the Benchmarks Regulation (critical benchmarks provided for different currencies etc), for “and 23A to 23E” substitute “, 23A to 23E and 23FA to 23FC”.

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### **4 Interpretation, extent, commencement and short title**

(1) In this Act, “the Benchmarks Regulation” means Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.

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(2) This Act extends to England and Wales, Scotland and Northern Ireland.

(3) This Act comes into force on the day on which it is passed.

(4) This Act may be cited as the Critical Benchmarks (References and Administrators' Liability) Act 2021.

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## B I L L

To make provision about the meaning of references to Article 23A benchmarks in contracts and other arrangements; and to make provision about the liability of administrators of Article 23A benchmarks.

*Lord Agnew of Oulton*

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