15 March 2021

ICMA RESPONSE TO HM TREASURY CONSULTATION ON SUPPORTING THE WIND-DOWN OF CRITICAL BENCHMARKS[1]

Summary of key points

1. It is important to include explicit and clear continuity of contract and safe harbour provisions in primary legislation to reduce market uncertainty and the risk of litigation to the greatest extent possible.

2. Both continuity of contract and safe harbour provisions are needed. Continuity of contract provisions need to provide that legacy contracts referencing panel bank LIBOR should be read as – or "deemed to be" – references to "synthetic LIBOR" as determined by the FCA. A "deeming" provision like this is particularly important in cases where LIBOR is specifically described in legacy contracts by reference to its current features.

3. The continuity of contract provision needs to be accompanied by a safe harbour against the risk of litigation. This should provide that relevant parties would not be able to sue each other as a result of the changes to LIBOR.

4. The continuity of contract and safe harbour provisions need to be drafted as broadly as possible to include not only supervised entities using LIBOR under the UK Benchmarks Regulation (UK BMR), but also non-supervised entities, where the exposure and risk may be greater.

5. The ARRC has already proposed continuity of contract and safe harbour provisions under New York law. The continuity of contract and safe harbour provisions under English law should be designed to align internationally with the ARRC proposal, while being adapted to the provisions of the UK BMR. This is particularly important given the large volume of legacy US dollar LIBOR contracts governed by English law.

General remarks

6. The issues surrounding LIBOR cessation in the context of legacy bonds that reference LIBOR are well known and recognised by various official sector working groups, including the Working Group on Sterling Risk-Free Reference Rates.[2] The provisions set out in the Financial Services Bill relating to an orderly wind-down of LIBOR are therefore welcome. ICMA has been contributing to the development of these provisions and monitoring related developments in the US and EU.

7. Given the importance of LIBOR for the international bond market, this response refers to "synthetic LIBOR". By this we mean the rate that is expected to be published after one or more

[1] HMT_Safe_harbour_Consultation.pdf (publishing.service.gov.uk)
[2] See *Paper on the Identification of Tough Legacy Issues*, May 2020.

LIBOR settings are designated as Article 23A benchmarks and the FCA has exercised its powers in relation to those benchmarks under Article 23D(2)(a).

8. ICMA welcomes HM Treasury's consideration of the possible implications of the exercise by the FCA of its powers under the UK BMR. ICMA considers it to be very important that contract continuity and safe harbour provisions of the type outlined in Chapter 1 of the consultation are developed and included in the UK BMR – or other appropriate primary UK legislation – in order to reduce to the greatest extent possible the risk of market uncertainty, and possible associated litigation, that could arise in the bond market following the exercise by the FCA of its powers with respect to LIBOR.

9. These provisions could be included either in the UK BMR or other primary legislation. Either way, it is important that the scope of the provisions extends beyond the current scope of the UK BMR given the broad usage of LIBOR by non-supervised entities in a variety of different contexts that may not all constitute "use" under the UK BMR. See further our response to Q5.

10. Bonds present particular complexities and litigation risks resulting from the multiple impacted counterparties. Changes impacting interest rate provisions are particularly sensitive. A significant volume of legacy LIBOR bonds has been publicly issued and bonds are held by a broad range of investors in the international capital markets, including retail investors. Bonds are often hedged with derivatives, involving a swap counterparty. Some structured bonds, such as securitisations, also involve associated swaps and liquidity or other facilities provided by third parties. Taken together, there is a wide range of parties impacted by the introduction of synthetic LIBOR and therefore potential litigants. In addition, the intermediated nature and structure of bond holdings could add significant complexity to any bond market litigation. Contractual uncertainty and the unpredictable nature of complex financial litigation could cause market disruption. The introduction of contract continuity and safe harbour provisions would be a proportionate step to support the introduction of synthetic LIBOR and the intention of HMT to achieve a smooth transition away from LIBOR.

11. ICMA has previously highlighted these concerns in its response to the UK FCA's consultation on proposed policy with respect to the exercise of the FCA's powers under new Article 23D. Paul Richards, Head of Market Practice and Regulatory Policy, ICMA, also discussed this in his oral evidence to the Public Bill Committee on the Financial Services Bill on 17 November 2020.

12. Another issue that is important for the bond market is the future of LIBOR-based benchmarks (such as the LIBOR ICE Swap Rate), which are referenced in certain types of bonds. It will be important for issuers and investors in these legacy instruments for clarity to emerge on how the introduction of synthetic LIBOR interacts with such LIBOR-based benchmarks, noting the work that is already being done in this area by the RFRWG (including the RFRWG's letter to ICE Benchmark Administrator of September 2020 and the Non Linear Task Force paper considering a potential methodology for a replacement for GBP LIBOR ICE Swap Rate based on SONIA swap rates).

Q1: If a critical benchmark is designated as an Article 23A benchmark, and subject to a possible change in methodology under Article 23D, how might this create contractual uncertainty?

13. Contractual uncertainty could arise in a bond market context if the parties disagree, or are uncertain as to, whether they should continue to use synthetic LIBOR for the purposes of determining interest amounts due under contracts and securities instruments that reference LIBOR. In the bond market, there are a number of parties that will be involved in, or impacted by, decisions relating to interest determination including the issuer, paying agents, calculation agents, other third party service providers (including swap and liquidity facility providers), trustees and bondholders. This will increase the complexity and potential for disagreement or uncertainty.

14. Contractual uncertainty could arise because the terms of the contract or financial instrument refer to characteristics or features of LIBOR that are no longer present in synthetic LIBOR. Examples from legacy sterling LIBOR securitisations include:

   - "*the London Interbank Offered Rate for three month sterling deposits*";
   - "*the arithmetic mean of offered quotations for three-month sterling deposits in the London interbank market displayed on [screen page]*"; and
   - **"***quotations to leading banks for the relevant Quotation Deposits for same day value in the Quotation Market…*".

15. Uncertainty could also arise if the nature of the amended benchmark is considered to be significantly different from the rate that the parties agreed to reference when they entered into the contract, meaning that one or more of the parties considers that fallbacks are triggered[3].

16. While the LIBOR methodology previously underwent an evolution which, as far as we know, did not result in litigation, the introduction of synthetic LIBOR could be considered to be different in nature to the previous evolution of LIBOR. For example, the introduction of synthetic LIBOR will be preceded by an Article 23A designation and, as we understand it, an official announcement that LIBOR is no longer representative of the market or economic reality it was intending to measure. There will also be a restriction for UK supervised entities on the use of synthetic LIBOR, subject to the FCA's powers to permit use in certain cases. In addition, the dynamic bank credit element of LIBOR will not be a feature of synthetic LIBOR.[4]

[3] The Financial Markets Law Committee's paper *LIBOR Transition: Issues of Legal Uncertainty*, October 2020 notes in paragraph 4.6: "Substituting the data on the [screen] page may, therefore, be an appropriate mitigation if the rate were close enough in spirit to the original LIBOR."

[4] The introduction of synthetic LIBOR can also be contrasted with the situation in which EONIA was transitioned to €STR + 8.5bps, noting that both EONIA and €STR are overnight rates.

Q2: Subject to responses to the previous question, would this contractual uncertainty lead to causes of action, potential liabilities or grounds for litigation, between parties to contracts, or between other parties?

17. Yes, we consider it to be possible that the uncertainty described above could lead to causes of action, potential liability or grounds for litigation between bond market participants.

18. The bond market poses unique risks in that many bonds have been publicly issued and are held by a wide range of legal and natural persons (from Japanese retail investors to US hedge funds). This means that the risk of litigation may be higher than in other contexts where, for example, at least some of the parties are more likely to be UK supervised entities and/or located outside the US. It is worth noting that Randal Quarles, Vice Chair for Supervision of the Federal Reserve System commented during the Senate Banking Hearing on Financial Regulators Oversight on 10 November 2020 that, in relation to synthetic LIBOR: "… in the US, because of our different litigation framework, I would like to find other ways to address that issue before we move in that direction". This is important because it seems likely that synthetic LIBOR will be needed not only for sterling "tough legacy" contracts, but also US dollar "tough legacy" contracts governed by English law. The volume of legacy US dollar LIBOR contracts and financial instruments governed by English law is understood to be significantly greater than legacy sterling LIBOR contracts and financial instruments.

19. In addition to the potentially diverse nature of bond investors, the intermediated nature and structure of bond holdings adds a significant level of complexity to any bond market litigation.

If yes, please specify:

- the nature of the causes of action, liabilities or grounds for litigation that could arise
- how likely they would be, the circumstances and the likely timing in which these could arise
- possible impacts (quantitative and qualitive) on contractual parties and the wider market

20. We understand there could be multiple potential causes of action resulting from the introduction of synthetic LIBOR and any uncertainty related to whether it is the appropriate rate to be used as a reference benchmark for a legacy LIBOR contract or financial instrument. Such claims could include breach of contract, event of default or ineffective use of powers by an issuer or a bond trustee. Claims could be genuine or vexatious. Any litigation in the financial markets is likely to be complex and the outcome highly unpredictable. In addition, any event of default or potential event of default in relation to a bond issue could result in a potential cross default, impacting other financing. The potential disruption caused by such litigation and uncertainty for financial markets should not be underestimated.

21. We set out below one example for the bond market in order to illustrate some of the issues that could arise. Note that this is only one example and the types of issues identified could also arise in other types of bonds.

22. The terms and conditions of certain tranches of English law-governed, sterling denominated, mortgage-backed floating rate notes state:

"*for the purpose of determining the London Interbank Offered Rate (''LIBOR'') for three month sterling deposits … (''Note LIBOR''), on each Payment Date… (each an ''Interest Determination Date''), the Agent Bank will determine the offered quotation to leading banks in the London interbank market for three month sterling deposits … by reference to the display designated as the British Bankers Association's Interest Settlement Rate as quoted on the Telerate Screen Page No. 3750 (or [a replacement screen page]) as at or about 11.00 am (London time) on that date (the ''Sterling Screen Rate'').*".

23. Those terms and conditions also provide certain fallback provisions which apply:

"*if the Sterling Screen Rate is unavailable*".

24. On an Interest Determination Date following the change in LIBOR's methodology, the Agent Bank will need to decide:

    a. whether using synthetic LIBOR would fulfil its contractual obligation to determine the Sterling Screen Rate described as "the offered quotation to leading banks in the London interbank market for three month sterling deposits…"; or

    b. whether the Sterling Screen Rate so described is "unavailable" and so the fallback provisions have been triggered.

25. Regardless of which option the Agent Bank selects, its decision could potentially be open to challenge from one or more investors who might seek to argue that the Agent Bank should have selected the other option. These challenges could be genuine or vexatious. In either case, they would cause significant market uncertainty and disrupt an orderly transition away from LIBOR.

26. Investors might also seek to claim against the bond issuer (ie the borrower), for example on the basis that the Agent Bank (or other relevant paying agent) is the agent of the issuer. Indeed, it is highly likely that the Agent Bank would look to the issuer (as its principal) for instructions on how the provisions should be operated when LIBOR is no longer available.

27. It is also worth noting that, depending on the nature of the transaction, there may be other transaction parties who could be open to potential litigation given their direct or indirect involvement in making interest rate determinations. These parties could include trustees as well as paying agent banks. Bond trustees will be particularly vulnerable to litigation risks resulting from their fiduciary duties to bondholders.

28. In the face of these risks, the relevant transaction parties might decide to go to court for a direction as to what to do. Paragraphs 4.4 – 4.6 of the Financial Markets Law Committee's paper *LIBOR Transition: Issues of Legal Uncertainty* indicate that a court would consider whether synthetic LIBOR was close enough to the original LIBOR. It is also possible that UK courts might

take into account that contract continuity and safe harbour provisions had been considered by Government and *not* enacted. This could lead to a decision that the fallbacks had been triggered, on the grounds that LIBOR as defined had ceased.

29. In the bond market, it is widely acknowledged that traditional fallback provisions that will result in a floating rate bond becoming a fixed rate bond for the remainder of its term following LIBOR cessation are commercially unpalatable and therefore “unsuitable”. It is understood that one of the main policy objectives behind the introduction of synthetic LIBOR is to avoid such “unsuitable” fallbacks from being triggered in “tough legacy” contracts. The proposed provision set out in paragraph 1.8(1) of the consultation paper would ensure that synthetic LIBOR fulfils this policy objective by making it clearer that these “unsuitable” fallback provisions should not be triggered when synthetic LIBOR is introduced.

30. In addition to the above, it is possible that parties might need to make conforming changes to their contracts to ensure the contract terms work with synthetic LIBOR or another modified Article 23A benchmark in due course. In the context of bonds, it may not be feasible to obtain the relevant consent required from counterparties to make such changes. This situation could also give rise to potential liability and a scenario in which relevant transaction parties decide to go to court for a direction as to what to do.

31. It is very difficult to predict how likely it is that any such potential challenges would crystallise in practice. Claims could arise from a genuine disagreement as to the correct interpretation of contractual provisions following the introduction of synthetic LIBOR or be opportunistic or vexatious. For example, a bondholder might seek to bring a claim in order to improve its negotiating position in the context of any consent solicitation that is launched by the issuer in order to transition actively a bond away from LIBOR or synthetic LIBOR. Related to this, it is possible that some bondholders could choose not to engage with attempts by an issuer to transition its bonds away from LIBOR in the near-term on the basis that they believe they may be able to bring litigation when synthetic LIBOR is introduced that could place them in a better position. Contract continuity and safe harbour provisions would help to avoid this outcome and thereby support an orderly wind-down of LIBOR.

32. It is also very difficult to quantify the risks identified above. However, they could be substantial, particularly in relation to contracts and securities that describe features associated with panel bank LIBOR and therefore give rise to uncertainty as to whether the parties should in fact apply synthetic LIBOR or whether fallbacks have been triggered as a result of panel bank LIBOR having ceased. In the bond market, we understand this is likely to be the case for a number of securitisations governed by English law and, possibly, older floating rate notes governed by English law.

33. The risk of claims arising should be considered in the context of volume of legacy LIBOR exposure that will remain outstanding after the end of 2021. The General Counsel of the Federal Reserve Bank of New York alluded to this when he stated in 2019 that the risk of a disorderly cessation of LIBOR was a “DEFCON 1 litigation event” in light of the volume of contracts referencing LIBOR.

34. It is very difficult to quantify the overall quantum of relevant legacy LIBOR bonds precisely. Informal estimates suggest that there are around 500 legacy sterling LIBOR bonds with a nominal value of 110 billion sterling due to mature beyond the end of 2021 and that around 70% of these have traditional fallbacks that would result in the instruments becoming fixed rate instruments (which is widely acknowledged to be an "unsuitable" fallback). The figure for US dollar LIBOR bonds is understood to be many times this. A significant volume of legacy US dollar LIBOR bonds is governed by English law.

35. Regardless of the precise figure, the exposure is likely to be significant. It is also worth recalling that bonds will not represent the only relevant legacy LIBOR exposure.

Q3 Do you consider that a legal safe harbour is necessary in order to mitigate the impacts you have identified in response to the questions above?

36. Yes. A provision of the type described in paragraph 1.8(1) of the consultation paper, if implemented in primary legislation, would assist all parties in understanding that synthetic LIBOR should be used, rather than fallback provisions being triggered. As noted in Q2 above, a majority of fallback provisions in the bond market are considered to be commercially "unsuitable" in the context of the wind-down of LIBOR because they would result in floating rate instruments becoming fixed rate instruments for the remainder of their term.

37. Safe harbour provisions of the type described in paragraph 1.8(2) and 1.9 of the consultation could help to protect relevant transaction parties from potential claims (vexatious or otherwise). Given the potentially significant disruption that could result from litigation due to contractual uncertainty as a result of the publication of LIBOR in a synthetic form, immunity from litigation in the form of a legal safe harbour would be a proportionate step to support the orderly wind down of LIBOR.

38. Depending on the form that synthetic LIBOR takes and precisely how it is published, it might also be important for the provisions to include protection for relevant parties from claims arising as a result of consequential changes made to contracts or securities to reflect the use of synthetic LIBOR. See further our response to Q.7.

Q4 Should any legal safe harbour contain the features highlighted by HM Treasury's stakeholder feedback (as set out in Chapter 1)? Please set out your reasoning, with reference to the Financial Services Bill provisions.

39. Broadly, yes.

40. Importantly, both continuity of contract (per paragraph 1.8(1) in the consultation paper) and safe harbour provisions (per paragraph 1.8(2)) in the consultation paper) are needed in order to support the introduction of synthetic LIBOR fully and minimise the risk of litigation to the greatest extent possible.

41. Continuity of contract provisions need to provide that legacy contracts referencing panel-bank LIBOR should be read as – or "deemed to be" – references to "synthetic LIBOR" as determined by

the FCA. A "deeming" provision like this is particularly important in cases where LIBOR is specifically described in legacy contracts by reference to its current features.

42. The continuity of contract provision needs to be accompanied by a safe harbour against the risk of litigation. This should provide that relevant parties would not be able to sue each other as a result of the changes to LIBOR.

43. Depending on the form that synthetic LIBOR takes and precisely how it is published, a provision protecting relevant parties from claims arising as a result of consequential changes made to contracts or securities to reflect the use of synthetic LIBOR may also be needed. See further our response to Q.7.

44. Including continuity of contract and safe harbour provisions under English law would align with the proposals by the ARRC for continuity of contract and safe harbour provisions under New York law, while adapting them to the UK BMR. Although there are no direct parallels under English law to the orderly wind-down of legacy LIBOR contracts, there are relevant precedents for intervening in private contracts in the public interest: eg relating to the introduction of the euro in place of certain national currencies.[5]

Q5 Are there any circumstances in which we should explicitly exclude the application of a legal safe harbour and, if so, why?

45. As a general matter, the contract continuity and safe harbour provisions should apply as broadly as possible.

46. In particular, their application should not be limited to circumstances in which "use" is permitted under the UK BMR. This is because the risks arising in the bond market outlined above will not just occur in cases where the UK BMR applies.

47. Related to this, it is worth recalling that the application of the contract continuity and safe harbour will be relevant not only for sterling LIBOR (where it is more likely that UK supervised entities might be involved in relevant transactions), but also yen LIBOR and, possibly, US dollar

[5] The Regulation under Article 235 of the Treaty (EC/1103/97) ensured that: "The introduction of the euro will not have the effect of altering any term of a contract, or discharging or excusing performance, or entitling a party unilaterally to alter or terminate the contract, subject to whatever the parties may have agreed."

The Regulation under Article 1091(4) (EC/974/98) provided that: "At the end of the transition period, contracts will be read as if all references to participating national currency units were to euro units at the conversion rates."

The Regulation under Article 235 of the Treaty (EC/1103/97) came into force before the introduction of the euro in all Member States, including the UK. The Regulation under Article 1091(4) (EC/974/98), which came into force on 1 January 1999, was not directly applicable to the UK because of its opted-out status. However, the effect of its provisions was recognised by English law under the principles of private international law.

Source: Bank of England, Practical Issues Arising from the Introduction of the Euro, Issue No. 10, 14 December 1998 (pages 100-101).

LIBOR; where the UK BMR prohibition is less likely to apply and where the exposure (and therefore risk of litigation) is higher.

48. Applying the contract continuity and safe harbour provisions broadly would also align with the contract continuity and safe harbour provisions proposed by the ARRC for New York law.

Q6 Should a legal safe harbour only be required for contracts entered into before a benchmark is designated under Article 23A, and therefore any contracts entered in to after an Article 23A designation should not be in scope of safe harbour?

49. For bonds, the most important thing is that the contract continuity and safe harbour provisions apply to legacy bonds issued before the designation of LIBOR under Article 23A.

Q7 Should any legal safe harbour apply to third parties such as facility agents, trustees or parties to contracts ancillary/collateral to the main contract that reference or rely upon an Article 23A benchmark? If so, how?

50. Yes. In the bond market, trustees and agents (including paying agents, calculation agents and other third party service providers) require a legal safe harbour for the following purposes:

    a. determining or calculating amounts by reference to synthetic LIBOR;
    b. not operating or enforcing the operation of whatever fallback cascade may otherwise be contractually provided; and
    c. depending on the form that synthetic LIBOR takes and precisely how it is published, making any consequential or conforming changes to contracts (including associated swaps or liquidity and other facilities), deeds, securities or instruments that are associated with and necessary for the use, adoption or implementation of a modified Article 23A benchmark.

51. It is important to note that bond trustees will be particularly vulnerable to litigation risks resulting from their fiduciary duties to bondholders. The provisions outlined above will be important to ensure that trustees and agents can continue to determine interest amounts and perform related functions under financial instruments and contracts. Absent these types of provisions, trustees and agents may feel they need to seek a court direction as to how to proceed when synthetic LIBOR is introduced, as described in our response to Q.2 above. This outcome could cause market disruption and should be avoided.

52. The safe harbour described in paragraph 50(c) would be designed to allow parties to make consequential changes to contracts that are needed because the modified version of the benchmark requires different underlying operational mechanics for it to operate properly. This might be the case if, for example, the methodology for a forward-looking term rate is changed to become a backward-looking rate (eg a compounded in arrears RFR) or the location or time for publishing synthetic LIBOR is different to LIBOR[6]. This is not expected to be the case for synthetic sterling LIBOR (as set out in the FCA's consultation on proposed powers under Article 23D), but could conceivably be the case for future Article 23A benchmarks, including US dollar synthetic LIBOR where a term RFR is not yet available.

[6] Note that many bonds and related contracts refer to the time and screen page for publication of LIBOR.

53. Consideration would need to be given to the inclusion of parameters around any necessary consequential changes to contracts. The [ARRC's legislative proposal] makes reference to conforming changes that have been recommended by a Relevant Recommending Body or would not result in a disposition of the contract for US federal income tax purposes.

Q8 Do you have any comments on the jurisdictional issues set out above, or the proposed approach? In particular, can respondents provide any evidence of the volumes of LIBOR referencing contracts where the law of Scotland or Northern Ireland is the choice of law, that may benefit from safe harbour provisions?

54. We have no comments on HM Treasury's proposal that any legal safe harbour provisions would "cover contracts where the law of England and Wales is the choice of law, regardless of the jurisdiction of the parties to the contracts". There is significant use of English law as the governing law for securities and contracts in the international bond market.

Q9 Should the scope of any legal safe harbour go beyond supervised entities making 'use' of an Article 23A benchmark in specified 'financial contracts', 'financial instruments', and 'investment funds' as defined in the BMR?

55. Yes. As noted in our response to Q.5 above, there are highly likely to be instances in the bond market where contract continuity and safe harbour provisions are needed but there is no nexus with the UK BMR. Where non-UK supervised entities are involved in transactions and where the volume of exposure to LIBOR is higher (as is the case for USD-LIBOR), the risk of litigation could increase. A broad scope extending beyond the UK BMR would also align more closely with the contract continuity and safe harbour provisions proposed by the ARRC for New York law.

Q10 Should a legal safe harbour provide for situations where a contract describes the benchmark alongside, or instead of, the express name of the benchmark in question? If so, how? Please provide examples of contract wording to illustrate your response.

56. Yes. This is a key concern for the bond market, as outlined in our response to Q2 above. We have included example contract wording in our responses to Q1 and Q2.

Q11 How would we best ensure, within any legal safe harbour provisions, that parties to contracts falling in scope of the safe harbour retain the freedom to move away from referencing or relying upon a benchmark that has been designated as an Article 23A benchmark to alternative appropriate arrangements, or to terminate the contract, provided they reach consensual agreement?

57. In the bond market, the parties are able to agree to amend the terms of the contracts pursuant to the mechanisms contained within them (eg bondholder meetings to consider and vote to approve amendments to the terms and conditions of bonds, sometimes referred to as "consent solicitation"). Provided the contract continuity and safe harbour provisions do not operate to override these mechanisms, the parties would still be able to use them to move away from referencing an Article 23A benchmark at any time.

In particular, how should safe harbour provisions interact with contractual fallbacks? Please provide examples of contractual wording where relevant.

58. We understand that the primary policy objective in catering for the introduction of "synthetic LIBOR" under the UK BMR is to allow the FCA to manage an orderly wind-down of LIBOR and preserve market integrity. In meeting these objectives, there is a need to avoid: (a) certain types of "unsuitable" fallbacks being triggered; or (b) contract frustration in cases where there are no fallback provisions, in each case for "tough legacy" contracts.

59. In the bond market, it is widely acknowledged that traditional fallback provisions that will result in a floating rate bond becoming a fixed rate bond for the remainder of its term following LIBOR cessation are commercially unpalatable and therefore "unsuitable". In this context, synthetic LIBOR is seen as a helpful solution because it will mean that bonds with this type of fallback can reference synthetic LIBOR (and therefore remain floating rate instruments as the parties intended) rather than becoming fixed rate instruments. The proposed provision set out in paragraph 1.8(1) of the consultation paper would ensure that synthetic LIBOR fulfils this policy objective by making it clearer that these "unsuitable" fallback provisions have not been triggered when synthetic LIBOR is introduced.

60. Some bonds that have been issued more recently contain updated fallback provisions that were intended to cater for LIBOR cessation. Depending on the precise approach that the FCA takes to exercising its powers under the UK BMR and the precise language used in the fallback provisions, it seems likely that a number of these fallback provisions may be triggered before synthetic LIBOR is introduced. It seems likely that the contract continuity and safe harbour provisions will not be as relevant for contracts where fallbacks have already been triggered.

61. ICMA is looking forward to engaging with the forthcoming FCA consultation on its proposed policy with respect to the exercise of its powers under Article 23C in due course, which is closely related to this question.

In your response please provide any further views on how safe harbour provisions should be designed or scoped in order to address the risks identified in responses to the questions in Chapter 2.

62. The ARRC has already proposed continuity of contract and safe harbour provisions under New York law. The continuity of contract and safe harbour provisions under English law should be designed to align internationally with the ARRC, while being adapted to the provisions of the UK BMR. This is particularly important given the large volume of legacy US dollar LIBOR contracts governed by English law.[7]

63. See also our summary of key points at paragraphs 1 – 5 and our general remarks at paragraphs 6 – 12.

[7] It is also worth noting that the EU has implemented a form of legislative contract continuity in the *Statutory Replacement of a Benchmark* provisions in the EU BMR.