EUROPEAN COMMISSION
Directorate-General for Financial Stability, Financial Services and Capital Markets Union

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Argus Media response to the European Commission targeted consultation on the regime applicable to the use of benchmarks administered in a third country

Introduction

Argus is an independent media organisation serving global physical commodity industries. Its main activities comprise publishing market reports - produced by journalists - containing price assessments, market commentary and news; and business intelligence reports which analyse market and industry trends.

The Argus Media group has more than 1,200 staff globally and offices in each of the world's principal commodity centres. It established a subsidiary, Argus Benchmark Administration BV (ABA BV), in the Netherlands in 2019. ABA BV is authorised as an Annex II Benchmark Administrator under the EU BMR.

Argus' price assessments identify prevailing open-market spot prices in a wide range of specific bulk physical commodity markets. All price assessment activity is conducted strictly according to detailed public methodologies (www.argusmedia.com/methodology) and within a rigorous governance, compliance and controls framework (please see https://www.argusmedia.com/en/about-us/governance-compliance for further details).

Argus and its main competitors have become known as commodity 'price reporting agencies' (PRAs) — although the publishers themselves did not invent this term and in fact it is somewhat misleading. In reality, as a publisher Argus reports on physical commodities markets and the wider commodity industries, and the reporting of prices in the markets is just one integrated component of this.

A small number of Argus' published price assessments have been adopted by subscribers for use as independent benchmarks in commodity derivatives contracts.

Argus has fully implemented IOSCO's PRA Principles, the agreed international regulatory technical standards for benchmarks published by commodity price reporting agencies. This includes successfully completing annual external assurance audits since 2013 to verify compliance. The latest annual external audit report of Argus' compliance with the IOSCO PRA Principles is available at https://www.argusmedia.com/en/about-us/governance-compliance/assurance-review.

The BMR acknowledges that the two different sets of IOSCO Principles, for financial and commodities

benchmarks "*serve as global standards for regulatory requirements for benchmarks*" (Recitals 34, 44 and 45). BMR Annex II is a careful restatement of IOSCO's PRA Principles and ESMA accepts that an assurance audit against IOSCO's PRA Principles is sufficient to satisfy the BMR external audit requirements set out in Annex II's article 18.

Whatever the EU finally decides in its approach towards third country benchmarks, we suggest — in order to avoid market disruption — all third-country benchmarks used as a reference for trading a financial instrument on 31st December 2023 should continue to be used thereafter.

QUESTIONS SPECIFIC TO BENCHMARK ADMINISTRATORS

a) Question specific to organisations authorised or registered under Article 34(1)(a) BMR

1.1 To what extent do you, in your provision of benchmarks in the EU, experience competition from benchmarks administered outside the EU?

- **Some competition**

Argus at time of writing has four Annex II benchmarks in scope of the BMR: Eurobob Oxy gasoline, thermal coal cif ARA, and two biofuels benchmarks, namely RME barges fob ARA and FAME 0 barges fob ARA. These are used as a settlement basis for commodity derivatives contracts with a notional value above EUR 100-mil. We are aware of several other PRAs which publish similar market assessments which could be adopted as the settlement basis for derivatives, but the majority are based within the EU.

QUESTIONS TO ALL TYPES OF RESPONDENTS

2.1 Do you believe that the rules applicable to the use of benchmarks administered in a third country, which will fully enter into application as of January 2024, are fit-for-purpose? If not, how would you propose to amend the BMR's third country regime?

- **No opinion**

Argus has no strong opinion on whether rules applicable to third country benchmarks are fit-for-purpose, but is concerned that there should be a level playing field, specifically that there be no potential for regulatory arbitrage between jurisdictions.

2.2 More specifically, would you be in favour of a framework under which only certain third country benchmarks, deemed 'strategic', would remain subject to restrictions of use similar to the current rules? Under this hypothesis, the use by EU supervised entities of all other third country benchmarks than those 'strategic' benchmarks would be in principle free, without any additional requirement attached to the status of the administrator.

- **Somewhat in favour**

As noted, Argus' primary concern is that there should be a level playing field, and no potential for regulatory arbitrage between jurisdictions. We welcome the principle of restricting regulation to "strategic" benchmarks, but without a detailed definition of "strategic" in this context, we cannot comment further.

2.3. Under the hypothesis set out in the question above, there would need to be criteria to determine whether a third country benchmark should be designated as 'strategic'. Which of the following criteria should be used, in your view, to identify 'strategic' third country benchmarks?

A. CRITERION: Notional amount/values of assets referencing the benchmark globally

- **Somewhat against**

This approach would be consistent with the existing criteria for determining whether a benchmark falls into scope of BMR, or is deemed "critical" or "significant". However, we believe that the principle of proportionality has not been applied consistently in the BMR across different types of benchmarks.

Considering that critical benchmarks have to exceed a total value of at least EUR 500 billion and that significant benchmarks a minimum value of at least EUR 50 billion, the current minimum volume threshold in BMR above which commodity benchmarks fall into scope (EUR 100 million), is not proportionate and fails to appreciate the lower risk profile of commodity benchmarks generally. The majority of commodity benchmarks have low values that would qualify them as "non-significant benchmarks" if they were financial benchmarks. Yet, all commodity benchmarks that exceed the €100m threshold are subject to the higher and more demanding authorisation regime.

It is worth reiterating that the risk profile associated with physical commodity markets is different to that in financial markets and relates to variations in price over time resulting from the extraction, transportation and the delivery of physical commodities. Commodity derivatives are predominantly used to manage these risks along this supply chain. While we recognise the desire to regulate the derivative market, there is no real risk to financial stability associated with these smaller benchmarks. There is only one commodity benchmark with any potential, arguably, systemic impact on the financial markets that could potentially be designated as "strategic", and that is the benchmark for North Sea crude, commonly referred to as "Brent".

Raising the minimum volume threshold for commodity benchmarks to a higher level to address this would, we respectfully submit, ensure a more proportionate approach and effect of the regulation.

We have been complying with the BMR requirements for a few years now, but we still believe there are a number of negative consequences which arise as a result of the minimum volume threshold being set at an inappropriate level, in particular, uncertainty and cost.

In addition to that, we base our calculation of the notional value on the limited data available from trading venues and we are unable to identify uses of our benchmarks in other contexts, such as by Systematic Internalisers. We strongly believe the calculation of the threshold should be based on publicly available data for example through Trade Repositories. Trade repositories are, however, not obliged to publish data on the aggregate nominal amount reported to them when the index is under EUR 5 billion. Raising the threshold for commodity benchmarks to a much higher level, more proportionate to the critical and significant benchmarks will allow a consistent and verifiable approach to the measurement across all benchmarks.

The on-going costs and complexity associated with measuring volume thresholds for commodity benchmarks are also significant. Add to this the cost of bringing additional benchmarks under BMR scope where the minimum threshold is exceeded, even if that occurs for a short period of time. This includes the cost of compliance for monitoring whether our market sources are supervised or unsupervised entities, which is unlikely to be a meaningful factor in the context of physical commodity benchmarks but which causes an unnecessary cost and burden that could be alleviated by removing this requirement in the context of commodity benchmarks and in the alternative, increasing the minimum volume threshold.

Finally, we would like to raise an additional issue that PRAs are facing here. We would like the Commission to consider deleting the second condition limiting the exemption to when a benchmark is used as a reference on one trading venue only. Imposing different and incremental requirements if a benchmark is traded in two or more trading venues could potentially provide a disincentive for broader benchmark licensing and usage. The limitation is anti-competitive in the market where trading venues compete, without having any apparent benefits. Trading venues should be free to compete against each other without this restriction, and administrators should be free to make their benchmarks available to any potential trading venue customer. Therefore, the limitation could increase licensing costs and ultimately discourage competition.

B. CRITERION: Notional amount/values of assets referencing the benchmark in the EU

- **Somewhat against**

Please refer to our answer to your previous question 2.3.A.

C. CRITERION: Type of use (determination of the amount payable under a financial instrument, providing a borrowing rate, measuring the performance of an investment fund…)

- **Neither against nor in favour**

D. CRITERION: Type of user (investment fund, credit institution, CCP, trade repository, etc.)

- **Somewhat in favour**

Due to inherent challenges in monitoring the use of benchmarks by systematic internalisers as explained above in our answer to question 3 A), Argus believes it would be more pragmatic to limit the scope of the regulatory regime to benchmarks used by exchanges only.

E. CRITERION: Core activity of the administrator (bank, trading venue, asset manager, benchmark administrator, etc.)

- **Totally in favour**

We agree that the EU Commission should take into account the core activity of the benchmark administrator.

F. CRITERION: Regulatory status of administrator in home jurisdiction Type of benchmark (interest rate benchmark, commodity benchmark, equity benchmark, regulated -data benchmark, etc.)

- **Totally against**

This criterion appears to contradict directly the aim of creating a level playing field for EU and non-EU benchmark administrators.

G. CRITERION: Type of benchmark (interest rate benchmark, commodity benchmark, equity benchmark, regulated -data benchmark, etc.)

- **Somewhat in favour**

Argus would welcome a regime that reduce the regulatory burden on Annex II commodity benchmark administrators, as long as a level playing field is maintained between EU and non-EU entities.

H. CRITERION: Substitutability of the benchmark (i.e. existence of a similar benchmark administered in the EU)

- **Neither against nor in favour**

As long as a level playing field is maintained between EU and non-EU entities.

I. CRITERION: EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks)

- **Neither against nor in favour**

J. Other: please specify

2.4. Under the hypothesis where the current third country regime would be reformed or repealed, please indicate the degree to which you agree with each of the following statements:

a) The European Commission should be granted powers to designate certain administrators or benchmarks as 'strategic' on a case-by-case basis.

- **Do not agree**

Argus has concerns about the criteria to be employed and the consistency of their application as these powers seem to be unspecified and based on not measurable criteria.

b) ESMA should be given the task to supervise those third country 'strategic' benchmarks.

- **Somewhat agree**

Argus agrees in principle, since this is the situation under the present "recognition" regime for third country benchmarks but has concerns about the criteria to be employed and the consistency of their application.

c) ESMA should also be tasked with the supervision of EU-based benchmarks that qualify as 'strategic'.

- **Neither agree nor disagree**

Argus has concerns about the criteria to be employed in defining "strategic" and the consistency of their application. Without a clear definition we cannot offer an opinion here.

d) The EU internal scope of regulation of EU benchmarks should also be amended along similar lines, to only comprise certain types of strategic benchmarks, notably with a view to avoid circumvention or unlevel playing field.

- **Somewhat agree**

Argus is definitely in favour of a level playing field between EU and non-EU benchmark administrators and agrees that the EU internal scope of the benchmark regulation could be amended in line with the third country regime that the Commission is looking to implement.

As we have briefly mentioned in our responses, we believe that the principle of proportionality has not been applied consistently across different types of benchmarks. Considering that benchmarks are classified as "critical" where they exceed a total value of at least EUR 500 billion and "significant" where they exceed a value of at least EUR 50 billion, the current minimum volume threshold in BMR, above which ALL commodity benchmarks fall within scope, is not proportionate and fails to appreciate the lower risk profile of commodity benchmarks generally.

Proportionality around scope should be introduced so that the threshold above which commodity benchmarks fall within scope, is raised to a more appropriate and proportionate level as explained in our previous answers.

In addition to that, we also believe that it is not appropriate to change the regime applicable to commodity benchmarks under BMR according to the nature of the parties contributing data to the benchmark administrators. There is no basis for maintaining such an approach and the potential consequences are serious.

The current version of article 19(1) reads as follows:

"The specific requirements laid down in Annex II shall apply instead of the requirements of Title II, with the exception of Article 10, to the provision of, and contribution to, commodity benchmarks, unless the benchmark is a regulated- data benchmark ***or is based on submissions by contributors the majority of which are supervised entities."*** (emphasis added)

The current text and the requirement set out in it is problematic for a number of reasons:

(i) it seeks to apply a regime which is not appropriate to commodity benchmarks administered by PRAs. PRA commodity price assessments fall within the BMR Annex II regime and it does not work to change that regime simply because the 50% threshold on supervised contributors has been met. Apart from it being unclear how the 50% threshold was determined, the consequence is draconian as it has the effect of changing the entire regime applicable to the benchmark, which is still a commodity benchmark produced by a PRA and produced utilising all of the PRA processes recognised by IOSCO and in Annex II. Once the threshold is crossed, the benchmark and PRA administrator becomes subject to the full requirements of Title II, an entirely different regime that is inherently ill-suited to commodity benchmarks. We do not think this could have been the original intention of BMR given the care and consideration around maintaining separate regimes for commodity benchmarks and financial benchmarks through the IOSCO process, and as subsequently enshrined in BMR; and

(ii) in addition, we would like to point out that the BMR acknowledges "*the role of the IOSCO principles as a global standard for the provision of benchmarks*" (Recital 45). The IOSCO's Principles for Price Reporting Agencies were developed by IOSCO in cooperation with The International Energy Forum and The International Energy Agency and were quite deliberately designed to reflect the specific characteristics of commodity markets and of price reporting agencies. Applying a regime designed for financial benchmarks to a PRA benchmark administrator and to its contributors is therefore inconsistent with international best practice. It could also place PRAs - who in jurisdictions outside the EU are expected to comply with IOSCO's PRA Principles - in the impossible position of applying inconsistent standards to the same benchmarks. Indeed the same would apply to any PRA within the EU seeking to apply the IOSCO PRA Principles (the international standard) but by virtue of the BMR, also having to apply the requirements of Title II potentially – this is a burden that must surely be viewed as onerous and unreasonable; and

(iii) Because of the particular characteristics of physical commodity markets, market participants often use brokers as intermediaries both for conducting trades and for providing price information to PRAs. Brokers will typically fall within the category of "supervised entity" under the Regulation. This practice has the unintended consequence of artificially inflating the number of supervised entity contributors to a benchmark, and simultaneously reducing the number of non-supervised entity contributors. Again, we do not think this could have been intended under BMR given the care and consideration around maintaining separate regimes for commodity benchmarks and financial benchmarks through the IOSCO process, and as subsequently enshrined in BMR.

For these reasons, we are still hugely concerned by the fact that an element over which the PRA has no control, namely the availability of market sources within a specific commodity market, can have an impact on their governance and oversight requirements. PRAs have for many years aligned with the IOSCO PRA Principles and have organised their internal governance in order to achieve compliance with those Principles. Since the BMR came into force, we have regularly monitored the 50% threshold on supervised contributors. We remain concerned, however, that if we go over this threshold, we could be expected to suddenly re-

structure our organisation and address new governance and oversight requirements which are not suited to our editorial operations.

Related to the point we make above regarding contributors, the text of Article 19 is difficult to interpret and implement because it does not address the fact that submissions to PRAs are not mandatory and the volume and identity of the sources are therefore not static. The period over which the nature of the contributors is assessed/measured is very important but is not dealt with in the legislation, thereby creating an intolerable level of uncertainty. Imposing requirements such as the adherence to a code of conduct and to governance and control requirements for contributors would create a very high risk of market participants ceasing their voluntary contributions to PRAs on the advice of their compliance and legal departments. This chilling effect on the willingness of contributors to provide their market data to PRAs could lead to several unintended consequences:

- benchmarks could become based on less and potentially unrepresentative input data;
- limited availability of market data could undermine the ability of journalists accurately to report market information and would therefore lead to an unavoidable loss of market transparency for the commodity markets;
- the lack of transparency can ultimately adversely impact market participants, tax authorities and finally consumers;
- market participants could decide to use benchmarks provided by non-EU benchmark administrators if they determined that to be less onerous.

It must also be noted that there are particular challenges for PRAs required to monitor the number of supervised entities providing information. As a media publisher, our journalistic activities are of an integrated nature. For example, our global editorial teams work collaboratively and teams covering market A (where the published price is used by an exchange as a 'benchmark' within BMR's scope) will interact with colleagues covering markets B, C and D (where the published prices are not 'benchmarks') because these are linked physical markets (different grades of gasoline for example). Professional market reporting requires that these relationships between different commodities are understood and reported on in context. A constant monitoring exercise of supervised contributors over the full range of our editorial activities is neither proportionate nor reasonable.

In conclusion, we would like to suggest revising the current version of article 19(1) by either:

a. deleting the following passage: ***"or is based on submissions by contributors the majority of which are supervised entities";*** or

b. amending the text to provide that the passage does not apply to the provision of, and contribution to, the commodity benchmarks of price reporting agencies.

We believe that in such a way, there is a reduced possibility of dangerous cross-over between the PRA and financial benchmark regimes and an increased clarity over the current text of article 19.

e) The EU BMR could function as an opt-in regime, whereby both EU administrators and third-country administrators would benefit from a form of quality label attached to the BMR as they voluntarily decide to comply with the EU BMR and being subject to supervision. Under this hypothesis, the opt-in regime

would be applicable to most benchmarks, while only certain benchmarks (e.g. above-mentioned 'strategic' benchmarks) would be subject to mandatory compliance with the EU BMR and supervision.

- **Somewhat agree**

Argus agrees there may be circumstances where it could be helpful for a Benchmark Administrator to voluntarily opt into regulation and we have supported moves by third country jurisdictions such as Australia to offer this. However, Argus recalls that the IOSCO PRA Principles were first introduced 10 years ago and are accepted as the international gold standard for commodity market PRAs. Argus considers that any voluntary opt-in scheme for commodities benchmark administrators should continue to be based on adherence to IOSCO's PRA Principles, as evidenced by external assurance audits, and not to a separate EU benchmark regime.

f) EU benchmark labels (including EU Paris Aligned Benchmarks and EU Climate Transition Benchmarks) should not be accessible to third country administrators, and only be accessible to administrators supervised in the EU and subject to the BMR.

- **Somewhat agree**

Argus is in favour of a level playing field between EU and non-EU benchmark administrators.

g) An EU administrator subject to EU supervision should be responsible for compliance of the third country labelled benchmark with the relevant standards (under a mechanism similar to the current endorsement framework).

- **Neither agree nor disagree**

Argus has no strong opinion on this topic.

h) They should be directly supervised by ESMA (under a mechanism similar to the current recognition framework).

- **Neither agree nor disagree**

Argus has no strong opinion on this topic.

i) EU benchmark users should be required to only use benchmarks that comply with the EU standards on a continuous basis. As a consequence, those users should be required to gather the necessary information to verify that the benchmark's methodology is consistent (on a continuous basis) with the EU standards, and for ceasing use of those benchmarks in case the labels are misused.

- **Fully agree**

2.5. Do you believe that creating an EU ESG benchmark label would help enhance the quality of ESG benchmarks? Would a context where a significant share of those benchmarks are administered in a third country influence your appraisal?

- **Neither agree nor disagree**

Argus has no strong opinion on this topic.

2.6. Should such an EU ESG benchmark label be created, should this label be accessible to third country administrators?

- **Neither agree nor disagree**

Argus has no strong opinion on this topic.