

The Financial Regulation Strategy Team
HM Treasury
1 Horse Guards Road
London
SW1 2HQ
Via email to: financial.reform@hmtreasury.gsi.gov.uk

24 December 2012

Dear Financial Regulation Strategy Team,

Consultation — Implementing the Wheatley Review: draft secondary legislation

I am writing on behalf of Argus Media to respond to the above Consultation.

Argus Media is a specialist news agency covering physical energy markets and other related commodity markets. Argus Media was established in the United Kingdom in 1970 and has twice won the Queen's Award for Enterprise. It enjoys a worldwide reputation for the quality and impartiality of its services. In over 40 years of operation there has not been a single legal action brought against Argus Media and/or its journalists alleging malpractice in the information that it publishes.

In summary, Argus Media:

- agrees with HMT's intention to limit the application of the new regime to LIBOR;
- cautions against the assumption that the proposed regulatory template, which has been designed for LIBOR, will also be suitable for future use in relation to non-LIBOR-like benchmark activities; and
- requests HMG to clarify that the regulatory template is limited to LIBOR and LIBOR-like benchmark activities.

Argus Media's detailed comments are as follows:

Our comments relate principally to Chapter 4 "Other Benchmarks" and, in particular, to Paragraph 4.6:

"At present, the Government considers that the initial benchmarks that should be brought within the scope of regulation or the scope of the new criminal offence are LIBOR. However, further benchmarks may need to be added to these Orders, should it become clear that to do so would bridge a gap in the regulatory or enforcement powers of the regulatory authorities. Additional benchmarks could include, if appropriate, benchmarks reflecting energy or commodity markets."

Consultation Question 6 reads as follows:

"Do you have views as to whether the Government should specify benchmarks other than LIBOR as regulated benchmarks and/or specify benchmarks other than LIBOR as relevant benchmarks for the purposes of the new criminal offence?"

A. Whether HMG should specify benchmarks other than LIBOR as regulated benchmarks?

Argus Media supports the Government's intention to specify only LIBOR.

In relation to energy price assessments published by Argus Media and its competitors that are used as benchmarks, we would refer HMT to paragraph 7.26 of the Wheatley Review of LIBOR, Final Report:

“...PRAs [Price Reporting Agencies] have agreed an industry code for Independent Price Reporting Organisations (IPROs), which covers best practice with respect to governance, conflicts of interest and transparency. These responses may be sufficient to ensure credibility in the oil markets, but lessons from this review should be applied to wider benchmarks where appropriate, and any other work on benchmarks that is relevant to oil PRAs should feed back to best practice in this area.”

Subsequent to the publication of the Wheatley Report, the International Organization of Securities Commissions (IOSCO) issued its Principles for Oil Price Reporting Agencies¹ which, at page 8 under the heading “Mechanisms for Implementation”, recommended a twin-track approach comprising:

- “1. Voluntary adoption and implementation of the [IOSCO] principles by PRAs in their internal policies and procedures and/or through industry codes; and/or
2. The use by a market authority of its rule approval and/or review authority over derivatives contracts, as appropriate, to refuse admission to exchange trading or central clearing of any oil derivatives contract that references a PRA-assessed price which, in the opinion of the market authority, has been developed under policies and procedures that do not reflect effective implementation of the PRA principles and call into question the reliability of an assessment.”

The G20 published a communiqué in November 2012 welcoming the IOSCO recommendations. Shortly thereafter, IOSCO wrote to Argus Media and to the other PRAs expressing appreciation for their contributions towards the final result.

Argus Media supports the international consensus achieved in relation to benchmarks in oil markets and is committed to working with IOSCO, the International Energy Forum (IEF), International Energy Agency (IEA), and the Organization of the Petroleum Exporting Countries (OPEC) towards effective implementation of IOSCO’s Principles for PRAs as applied to all energy benchmarks.

There is therefore no requirement to include energy benchmarks as specified benchmarks within the proposed regulation.

B. Whether HMG should include energy benchmarks within the UK’s new criminal offence regime

Argus Media fully supports a clear prohibition on any action that intentionally manipulates or attempts to manipulate a benchmark. We believe this is one important component to underpin market integrity.

In relation to European wholesale power and gas markets, benchmark manipulation is already explicitly prohibited under Europe’s Regulation on Energy Market Integrity and Transparency (Remit) (EU 1227/2011). We note the letter published in The Financial Times on 20.11.12 from Alberto Pototschnig, Director, Agency for the Cooperation of Energy Regulators (ACER), in which he concluded:

“If fully implemented, Remit can ensure that consumers and other market participants can have confidence in the integrity of electricity and gas markets, that prices set on wholesale energy markets reflect fair and competitive interplay between supply and demand, and that no profits can be drawn from market abuse.”

Argus Media fully supports this conclusion from ACER. We understand that the UK aims to be one of the first countries to implement Remit in full and that HMG is working expeditiously under a separate initiative to ensure the necessary UK implementation powers and measures are in place.

For energy benchmarks beyond Remit’s scope, we note that the EU’s Market Abuse Regime is currently being revised and updated, including with specific amendments regarding benchmarks. Again, Argus Media supports the intent of these legislative revisions. Indeed we are grateful to HMT and to the personnel of the UK’s Permanent Representation to the EU for the support and assistance we have received in addressing defective drafting in Article 8(1)(d) of the Commission’s Market Abuse Regulation (MAR) proposal, which in its initial form would have undermined the integrity of energy benchmarks.

¹ IOSCO FR06-12

The initial civil-regime proposal made no allowance for honest mistakes in its anti-manipulation provisions. In consequence, MAR would have resulted in market participants discontinuing communication with PRAs to avoid legal risk, since reporting to PRAs by participants in the international commodity markets is entirely voluntary. Argus Media is relieved and grateful that this is now understood, and appreciative of HMG's assistance in working within relevant EU institutions on the appropriate form of redrafting to MAR Article 8(1)(d) to correct this anomaly.

In addition to the new MAR regulation, the update to the EU's Market Abuse Regime includes a new Directive (Market Abuse Directive Criminal Sanctions) that requires the establishment of criminal offences for serious cases of market abuse, and which we understand the UK Government will consider further once the new texts have been finalised by the EU institutions.

C. The suitability of the suggested regulatory template to other kinds of benchmarks

Argus Media questions the assumption that appears to underpin the HMT Consultation and the FSA's closely related Consultation Paper (CP) 12/36, that the regulatory template that has been designed for LIBOR can also be of universal application to other types of benchmarks, should it later prove necessary to extend regulation more widely.

For example, in paragraph 4.2 of its Consultation, HMT writes:

“...the amendments to the Financial Services Bill will make it possible for the Government to bring additional benchmarks within the scope of regulation, and to extend the list of benchmarks to which the new criminal offence apply, should this prove necessary.”

Likewise, in Paragraph 1.10 of CP 12/36 the FSA writes:

“At least initially, the only ‘regulated benchmark’ in the UK will be LIBOR, but the new regime will be **generic enough** to be applied to other benchmarks in the future, were the government to consider it appropriate to do so.” (highlighting added)

In our view, the proposed regulatory template would not, in practice, be suitable for commodity price assessments published by Argus Media and its competitors that are used as benchmarks. The template is not “generic”, but has been designed to apply to the specific circumstances of a panel-based, monopoly mechanism that has the exclusive objective of producing interest rate benchmarks for the purposes of trading. Each of (a) the submitters of information, (b) those sponsoring the benchmark setting mechanism, and (c) those using the benchmarks for purposes of trading, are likely to be regulated financial services firms or to be acting on behalf of regulated firms. Moreover, all are likely to have establishments in the UK.

The context in the case of energy price assessments and benchmarks is utterly different. Unlike LIBOR, this is not an environment where many of the activities are carried out by financial services firms that are already regulated in respect of their general business activities. Argus Media and its competitors are not financial services entities but independent news agencies, operating in competitive international markets, whose principal business purpose as news agencies is producing a wide range of news and market price information relating to energy markets. Only a tiny percentage of their published price assessments are used as benchmarks, and it is their subscribers, and not themselves, that decide whether to use a price assessment as a benchmark. Only a minority of their subscribers are regulated financial firms using these price assessments for trading purposes.

The proposed regulated activity of “administering a regulated benchmark”, as designed for LIBOR, would not be practicable, affordable or proportionate for application to editorial operations such as those at Argus Media.

In relation to the proposed regulated activity of “providing information”, the sources of market information available to Argus Media's journalists are located throughout the world, are often not established in the UK and are rarely employed by regulated financial services entities. The proposal that providing information should become a regulated activity would not be practicable and would risk reducing transparency in wholesale energy markets if attempted.

We would point to the warnings in this regard made by IOSCO about what it described as “precipitous regulation” (Principles for Oil Reporting Agencies, page 8, paragraph 2).

In short, neither the current HMT or FSA consultations take account of the different characteristics of benchmark creation in non-LIBOR-like markets. Should, therefore, HMG ever consider bringing other benchmark activities into regulation, there will be a need for new public consultations, including new impact assessments, which may well result in the need to amend both the Order and the proposed FSA/FCA Benchmarks Instrument 2013. The assumption underpinning both the HMT and FSA consultations — that all other types of benchmarks can be accommodated within the proposed primary and secondary frameworks — is simply not correct.

However, we draw encouragement from the UK's Response to the European Commission Consultation Paper on the Regulation of Indices. In particular, we note the following comments in the UK's response jointly from HMT and the FSA:

"We are of the belief that whilst general, non-binding principles might apply to most benchmarks; the Commission needs to be mindful of the underlying markets which underpin each benchmark. Each of these markets often display very different characteristics; and this will need to be taken into account through detailed technical analysis when considering any binding regulatory intervention."

"imposing a compulsion to submit in oil markets would likely need global agreement to be effective. Compelling all oil traders in the EU to submit trades could cause significant difficulties, including driving trading away from the EU, questions about who would have to report and how it would be enforced, as well as how the fact that all EU trading but only selective global trading would impact on the prices given and the reliability of the benchmark."

"we agree with the Commission that inappropriate reforms could simply drive benchmark construction and/or use out of Europe and into other jurisdictions."

"With thousands of benchmarks being used across many different markets, for a plethora of different purposes, with huge notional amounts referenced to some, and with the constant creation of new benchmarks, it is essential that any proposals have a clearly defined scope, both economically and legally. We would also recommend that the Commission presents comprehensive and careful evidence-based analysis, detailing what the problems are and where they lie, together with a full assessment of the potential impact of any changes."

Argus Media fully concurs with these passages. It would be immensely helpful therefore if both HMT and the FSA could dispel the assumption that the proposed UK regime is "generic enough to be applied to other benchmarks in the future, were the government to consider it appropriate to do so". We would request HMT to indicate instead that:

1. the proposed measures have been designed to address the particular characteristics of LIBOR and LIBOR-like benchmarks; and
2. the UK Government would itself follow the prescription it recommends to the European Commission in the paragraph reproduced immediately above, should HMG at any time in the future consider bringing other benchmarks into regulation.

In our view, it would be concerning if HMT and the FSA were to continue to give the impression that the UK regulatory regime now proposed for LIBOR is of universal application, and that all that would be required to bring additional benchmarks into regulation would be to include their names in Schedule 5 of the new Order.

We believe that providing reassurance on this point would be immensely beneficial to supporting effective functioning and transparency in international energy markets, and to retaining the leading international position and success of the UK's commodity price reporting sector.

Argus Media hopes that these comments are helpful and stands ready to provide any further information that may be of assistance.

Yours faithfully

Simon Smith

Head of government and regulatory affairs
Argus Media Ltd