



To: ESMA / EBA

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Dear ESMA-EBA Task Force,

Consultation Paper-Principles for Benchmarks-Setting Processes in the EU

ICIS is the energy and petrochemical market news, media and reporting business of Reed Elsevier plc, a world-leading publisher of professional information for the science, medical, legal, risk management, and business-to-business sectors. Reed Elsevier is an Anglo-Dutch organisation headquartered in Europe, which employs over 30,000 staff globally and nearly 10,000 across the EU, with the majority located in the UK.

ICIS is a global leader in the reporting of market information, prices, news and commentary for the petrochemical markets; the leading European reporter of natural gas, and power prices; global leader in LNG market reporting; and a key news and price-reporting service in oil, coal, fertilizer and emissions markets worldwide. ICIS employs over 750 staff, including around 200 in the UK. Some 350 of ICIS' staff are journalists engaged in reporting market prices and news.

ICIS welcomes the opportunity to respond to the ESMA-EBA *Consultation Paper: Principles for Benchmarks-setting Processes in the EU*. Our detailed responses to the consultation papers questions are set out below this letter.¹

As an active reporter of commodities markets, ICIS notes both similarities and key differences between the structures and behaviours of the financial markets and the global

¹ In our response, we refer to the principles proposed by ESMA-EBA in its Consultation Paper as the ESMA-EBA Principles. However, we also refer several times to the principles proposed by IOSCO in its *Final Report on Principles for Oil Price Reporting Agencies*, published in October 2012, and produced in collaboration with the International Energy Agency (IEA), the International Energy Forum (IEF) and the Organisation of Petroleum Exporting Countries (OPEC) and endorsed by the G20. We refer to those principles as the IOSCO Principles.

and local commodities markets. It understands and appreciates the concerns raised by governments and regulators about the panel-based pricing structures found in certain parts of the financial services industry which have been subject to recent press attention.

ICIS notes that panel processes have been tried in the commodities markets at various times and have all ultimately failed. In each case the market recognised that groups of financially or commercially interested parties cannot be relied upon to submit consistently trustworthy data to a panel, and that price determination is therefore best left to independent, unbiased specialist information providers with no financial or commercial stake in markets.

ICIS is confident that ESMA and the EBA will find that considering the best practice of price assessment in the commodities market will add significant value to their work to introduce best practice to the financial services sector. This has been recognised by ESMA and EBA in referencing the work IOSCO has been doing with independent PRAs. We would also encourage ESMA and the EBA to consider the latest version of the IPRO Code, which combines the IOSCO principles with industry best practice into one document.

There are several factors that ICIS believes differentiates it from many other respondents to your consultation paper:

- i. IOSCO has already carried out an exhaustive review of PRAs and their business models, in cooperation with international energy agencies, PRAs and other stakeholders, which has culminated in the IOSCO Principles, internally endorsed by the G20 and other stakeholders, and now in the process of implementation during an 18 months evaluation period. While the remit of this review was primarily to look at oil markets, the PRAs have confirmed to IOSCO that they will apply these measures to their entire businesses;
- ii. IOSCO concluded that the PRAs and their activities are not systemically important;
- iii. PRAs operate in international commodities markets, and not in financial markets;
- iv. IOSCO has explicitly recognised the special vulnerability of international oil markets to the risk that information sources ("submitters") might decrease in number or altogether cease their provision of data to PRAs as a result of insensitive regulatory intervention, with the unintended consequence that market transparency would actually be damaged. This same risk exists across all non-agricultural commodities markets;
- v. PRAs are independent competitive news agencies, which operate according to the highest standards of journalism laid down in published Editorial Codes of Conduct. They are not financial services firms;
- vi. The same journalists who prepare textual news reports are also responsible for price assessments. There is an integrated editorial process, which bears no similarity to panel-based mechanisms such as Libor or Euribor, nor to automated price-generation mechanisms such as FTSE or STOXX;
- vii. PRAs operate in a highly competitive market environment unlike a large number of monopoly or dominant benchmarking-setting mechanisms in financial markets;
- viii. PRAs have no structural conflicts of interest. They are media organisations that licence their services on the basis of conventional publishers' subscription agreements that are unaffected by rising or falling markets. The majority of their clients do not (even) use their services for trading, but for research and other purposes.
- ix. The markets PRAs cover are highly heterogeneous, as they reflect the physical nature and properties of the relevant commodity. This requires the PRA to apply a variety of methodologies dependent on the market and its structure.

- x. The business of PRAs is to explain and analyse markets, and they publish prices as part of this explanatory function. PRAs do not set out to create benchmarks, and where published prices are adopted as benchmarks by markets, the driver for adoption is widespread common consent among market participants, rather than systematic effort on the part of PRAs to “create benchmarks”.

ICIS requests ESMA-EBA to take full account of these factors as they progress their work on benchmarking.

Additionally, ICIS invites ESMA/EBA to undertake two specific actions to support the successful implementation of the IOSCO Principles, and so reinforce the integrity commodities markets within the European Union, as well as internationally.

1. ESMA-EBA should encourage competent authorities in EU Member States to support the IOSCO Principles by implementing specific actions recommended in IOSCO’s Final Report.

Since publication of its Final Report last October, IOSCO has pressed forward with implementing the IOSCO Principles in cooperation with other international agencies, national market authorities and the PRAs. IOSCO Committee 7 (C7) recently convened an implementation meeting in Dubai that was attended by the competent authorities of several EU Member States who have been active members of the C7 workstream, as well as by other IOSCO members and the PRAs. IOSCO, together with the IEA, IEF and OPEC, will carry out a formal evaluation of implementation of the IOSCO Principles after 18 months from their first publication.

The C7 workstream is making good progress. The PRAs have finalised the first version IPRO Code, which combines the IOSCO Principles and industry best practice. The PRAs have confirmed to IOSCO that they will apply the IPRO Code to their entire businesses, including all commodities markets, so voluntarily broadening the market reach of the IOSCO Principles.

ICIS believes would be extremely helpful if ESMA-EBA could use this opportunity to encourage all competent authorities in Member States to take forward the specific recommendations that IOSCO directed at them in the ‘*Mechanisms for Implementation*’ section of its Final Report (page 8). This reads as follows:

Timely and effective mechanisms for implementing the principles should include the following:

1. *Voluntary adoption and implementation of the 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 the assessment.*

In this regard, IOSCO recommends that market authorities consider whether to prohibit trading in any commodity derivatives contract that references a PRA-assessed price unless that assessment follows the IOSCO Principles for Oil Price Reporting Agencies”.

As set out above, the PRAs are taking forward the first action. ICIS requests that ESMA/EBA does all it can to ensure market authorities in EU Member States play their part and take forward the second actions. Ideally, ESMA-EBA would monitor progress by competent authorities and provide support to Member States, PRAs and IOSCO.

It would also add clarity if ESMA-EBA could confirm its unequivocal support for the IOSCO Principles, and state that they should apply, without modification, to the activities of price reporting agencies operating in the European Union.

ICIS welcomes ESMA-EBA's statement in paragraph 14 that it intends to develop 'a consistent and coordinated approach' with IOSCO. ICIS notes, however, that the 'other relevant workstreams' listed in paragraphs 16-20 as having contributed to the ESMA-EBA Principles, **do not include the IOSCO Committee 7 workstream responsible for preparation of *The Final Report on Principles for Oil Price Reporting Agencies***. The Committee 7 workstream would be an essential input for ESMA-EBA if intending to develop European principles that will extend to benchmark-setting by PRAs in commodities markets.

ICIS expects that ESMA-EBA do not, in fact, intend that their principles will modify, or in any way reopen, the IOSCO Principles as supported by the G20, since doing this this would risk undermining the IOSCO-led international implementation process now underway, and causing confusion to competent authorities and markets internationally.

ICIS only raises this as paragraph 22 of the Consultation Paper refers to 'commodity indices', and paragraph 27 asserts that the 'principles would cover all types of benchmarks'. These and other references in ESMA-EBA's Consultation Paper incompatible with developing a 'consistent and coordinated approach' with IOSCO and could generate uncertainty and confusion over which principles apply to PRA activities: the ESMA-EBA Principles or the IOSCO Principles.

The two sets of principles have many differences, reflecting, *inter-alia*, their very different provenances. The IOSCO Principles, the result of cooperation between IOSCO Committee 7, international energy agencies, the PRAs and other stakeholders, have been designed with great care to address the particular characteristics of commodities markets. By contrast, on the same day that ESMA-EBA published their principles, they also released their report on Euribor.

As paragraph 15 records, 'This [Euribor] review has contributed to the development of the draft principles proposed in this consultation paper.' It is very clear that the Euribor review has exerted a powerful influence on the design of the ESMA-EBA Principles, which appear well-tailored to address the specific weaknesses that have been identified in Euribor and similar panel-based mechanisms operating in interest-rate markets. As previous stated,

panel based mechanism are especially prone to conflicts of interests and have therefore been rejected in the commodities markets.²

As IOSCO points out in the opening paragraph of chapter 3 of its recent *'Financial Benchmarks Consultation Report'*:

'A one-size-fits-all approach may not be appropriate. Different approaches may be appropriate for various Benchmark asset classes. Depending, inter-alia-upon the legal framework of the jurisdiction, the structure, economic impact and potential for market abuse of the benchmark in question or upon the regulatory status of the relevant Submitters and/or Administrator'.

We would suggest two additions to IOSCO's language to differentiate between approaches:

- (1) Determination of whether benchmark-setting takes place within in a competitive or monopolistic environment; and
- (2) Determination of whether the benchmark-setting process is a by-product of an agency's primary activity – in the case of PRAs, that of independent journalism – or is its primary purpose as with Euribor and other monopoly mechanisms.

Similarly, ESMA-EBA writes in paragraph 25:

Benchmarks include a variety of interest-rate benchmarks, but also market indices such as stock, bond, derivatives market indices, or commodity price benchmarks, including raw material and oil markets. Especially in the case of market indices and commodity market benchmarks, methods of data collection and calculation are highly heterogeneous and vary widely. In addition for a number of these benchmarks the underlying data is obtained or the benchmark is calculated outside the EU, even if their use by markets participants in the EU may be widespread

We agree that a 'one size fits all' approach is not feasible. For this reason, we urge ESMA-EBA to limit the application of the ESMA-EBA Principles as stated in their document to those market sectors, such as Euribor, where they have already completed market assessments and other necessary inquiries.

In relation to oil and other international commodities markets, we commend to ESMA-EBA the IOSCO Principles, which have been developed after an exhaustive examination of international oil markets, and which have been endorsed by the G20.

Ideally, ESMA-EBA would develop their position so that they adopt the IOSCO principles for markets, such as the commodities markets, where they best apply and retain their existing approach for Libor, Euribor and other similar panel based mechanisms.

Applying the ESMA-EBA Principles to oil and other international commodities markets would cause significant market damage. We refer to some of these possible negative consequences in our detailed responses to the Questions.

² The only market ICIS is aware of that retains such a mechanism is the freight market which uses prices set by a panel mechanism operated by the Baltic Exchange.

There are some considerations of practicality, including territorial reach which we would ask ESMA-EBA also to also keep in mind. Commodity markets are truly global. This creates special circumstances and challenges which PRAs and IOSCO C7 has spent considerable time exploring and understanding.

For example, market information obtained by a PRA journalist located in Country A will often concern a transaction regarding a delivery from Country B to Country C, with the journalist's sources located in Country D, and regularly in more than one country. It would not be practical to apply ESMA-EBA Principles across this international range of sources and activities. This is another reason why it is so important that ESMA-EBA fully support the international consensus built around the IOSCO Principles and endorsed by the G20.

In short, just as the European Union's MiFID and MiFIR regulatory reforms have been calibrated with the flexibility to address the differing characteristics of different financial market sectors, principles designed for benchmark-setting must do the same if they are to support, and not disrupt, market integrity.

As IOSCO has written in its January Consultation Report "*Financial Benchmarks*":

"The fact that IOSCO will continue to evaluate the success of price reporting agencies in putting into practice the principles set out in the OIL PRA Principles will serve as a test as to whether an industry code will be effective".

As PRAs including ICIS have committed significant resource to meeting this challenge it is important that this important test should be given the chance to succeed. ICIS trusts that ESMA-EBU will give the IOSCO/G20 process their unequivocal support.

We also trust that our detailed responses in the attached Annex are helpful and are not perceived to be overly negative. This is certainly not our intention. Rather we are attempting to draw out some of the distinctions that exist between PRA activities in oil and other international commodity markets and panel-based mechanisms such as Euribor in interest rate markets.

We would welcome engagement with ESMA-EBA to develop further some of the points we make if that could be helpful, and stand ready at any time to provide any more information

Yours,

Richard Street

Head of Regulation and Compliance ICIS

Responses to the numbered Questions.

Question 1: Definition of the activities of benchmark setting

We suggest the addition of “*and*” between a) and b). Otherwise, the definition could be interpreted as being needlessly broad.

The other *Definitions* appear very well-tailored for panel-based monopoly mechanisms such as Euribor, that have the single purpose of producing benchmarks for the purposes of trading interest rates, and where each of (1) the submitters of information (2) those administering the benchmark setting mechanism, and (3) those using the benchmarks for purposes of trading are likely to be regulated financial services firms, or to be acting on behalf.

The proposed term and definition of “*benchmark administrator*” are however unsuitable to describe a news agency. Nor are “*benchmark administration*” or “*benchmark publisher*” suitable terms to describe the editorial and other operations of a news agency

In relation to the term “*contributing firm*”, the more appropriate term “source” is generally used. We should stress again that the “*sources*” of oil market information available to ICIS’ journalists are located throughout the world, are often not established in the European Union and are often not employed by regulated financial services entities.

Question 2: Principles for Benchmarks

ICIS is committed to enshrining industry best practice into its business and is currently applying significant resource to meeting and demonstrating the principles agreed with IOSCO and the G20 through the IOSCO C7 process and the industry best practice as captured in the latest version of the IPRO Code.

While the ESMA-EBA Principles appear well-tailored for Libor and Euribor they unfortunately do not provide ‘*a useful framework for guiding benchmarking setting activities*’ in the international commodities markets.

As IOSCO has recalled, there is no *one size fits all* set of principles that can safely apply to the universe of benchmark-setting. The IOSCO Principles have been tailored for the international oil markets and provide an excellent framework for guiding benchmarking setting activities by PRAs in the oil and other international commodities markets.

In its paragraph 9, the Consultation Paper predicts that: ‘*it may become desirable in the future to propose provisions with firmer regulatory consequences for non-compliance and that **address in more detail specific sectors***’ (our emphasis added). Your principles must address the detail of specific sectors in order to avoid undesirable unforeseen consequences.

We believe the alignment of the ESMA-EBA process with the working already being undertaken by PRAs and IOSCO offers an efficient, economic and low risk solution which will enhance the ESMA-EBA solution.

Question 3: General Principles for Benchmarks.

ICIS welcomes the focus on methodology, transparency, conflicts of interest and independence. These are generally aligned with the IOSCO principles and the IPRO Code.

However the descriptions of the principles cited in this section are, in several important respects, not aligned with the principles developed by IOSCO for oil markets not the business models currently employed by PRAs in the commodities markets.

While the commentaries under the individual headings on page 8 include several assertions which, while appropriate in the context of Euribor are impractical and could cause damage to international commodity markets.

ICIS would be happy to work with ESMA-EBA to develop these to ensure they are appropriate for all benchmarks but would suggest that much of this work has already been achieved via the IOSCO principles and the IPRO Code.

Question 4: Principles for firms involved in benchmark data submissions

The conventional term to describe to a market participant who provides information to journalists is “source”. This better reflects the active process a price reporter undertakes. Actively, on a daily basis, following leads and proactively contacting sources. This is done, not only to uncover and verify market movements, but also to understand and confirm the reasons for changing market conditions.

We would also bring your attention to the following risk identified by IOSCO:

“It is important to understand that these principles recognise that there is no requirement on any physical market oil participant to submit transaction data to PRA’s” (Principles for Oil Reporting Agencies: Final Report page 8)

IOSCO followed this with a warning of the dangers of “*precipitous regulation*” that “*could result in some markets participants to decrease or even cease their submission of data to PRA’s.*”

The principles cited in Section B, if applied to international commodity markets, could unfortunately have precisely these effects and discourage sources from continuing to provide information, risking a reduction in market transparency.

By way of illustration; The oil market is global in nature. Trade occurs between companies of differing sizes in different jurisdictions, inside and outside the European Union, many of which companies will not be regulated by financial services regulators or by other competent authorities. The administrative arrangements that contributing firms would need to establish in order to comply with the principles outlined in B.1 and B.4 would, in practice, limit the provision of oil and gas market information available to the journalists employed by price reporting agencies to a small, and unrepresentative, selection of market participants. This

would, in turn, create a high probability of risk that the information itself would no longer be representative of the market.

If applied to international oil markets, the principles outlined in B. Principles for firms involved in benchmark submission would limit the sources of information available to journalists at oil price reporting agencies within the EU to large western companies, internally organised in a structure common to large financial institutions. This would not reflect market reality.

Trading in a commodity such as oil is global and does not depend on institutions. Many companies involved in the trading of oil will be relatively small in size and will not possess the organisational resources that are assumed by the proposed principles. Some companies may be large in size but will not be organised internally in the way outlined by the proposed principles. Such companies could be globally and regionally well known, and possibly publicly-owned, but will neither have, nor desire to have, the internal structure ESMA/EBA propose in order to remain a market source.

Excluding these companies from the price identification process, and instead restricting price identification to companies with an internal structure proposed by ESMA/EBA, would not result in better price identification, but seriously could damage the global credibility of benchmarks and reduce the transparency of international commodities markets.

Question 5: Principles for benchmark administrators

As we have stated in our response to Question 1, the term ‘*benchmark administrator*’ is not appropriate to describe or supervise an independent editorial organisation.

It is especially clear how much ESMA-EBA, in developing their principles for benchmark administrators, have been influenced by their review of Euribor’s panel-based benchmark-setting processes.

In C3 for example (emphasis added):

*“A **benchmark administrator** should establish methodologies with well-defined criteria for the calculation of the benchmark, so that **judgement and qualitative assessments or other opportunities for discretionary decision making** are as limited as possible. Such criteria should address inter alia the **composition of the panel**, the algorithm for the calculation of the benchmark, provisions regarding operational continuity”.*

C3 is inappropriate for international oil markets which have avoided monopolistic panel-based benchmark setting mechanisms, and where the reasonable exercise of judgement by specialist reporters is fundamental to oil markets transparency and integrity and the trust in the assessments they provide.

Likewise, C7 would, in the context of international oil markets, require news agencies and other publishers to ‘police’ behaviours. This is an inappropriate role for media organisations, as IOSCO Committee 7 has recently recognised. Rather the more appropriate party to conduct such an activity are the market participants involved in executing deals and the relevant regulator of the market.

We believe C7 as currently drafted would be highly damaging to the flow of information from market sources to journalists working for the PRAs. It would undermine the essential confidence and trust between a journalist and a source and lead to less transparency rather than more.

We would also ask ESMA/EBA always to keep in mind that the strong constitutional protections for relationships between journalists and market sources apply to financial and commodities journalism as well as other mainstream media activities. This was recently reaffirmed by the European Court of Human Rights in *Financial Times Ltd & Others v United Kingdom*. Application no. 821/03 - 15 Dec 2009.

ICIS notes that the IPRO Code is clear that PRAs must provide all reasonable cooperation with regulatory authorities (including providing senior level resource to assist regulators to understand the behaviours of commodity markets). ICIS is happy to confirm that in line with its corporate Code of Ethics and Business Conduct it would always behave with 'all applicable legal requirements and high ethical standards'.

Despite this, much of Section C would be inappropriate to apply to news agency operations, whose journalists operate according to published Editorial Codes of Conduct that align with the highest standards of journalistic practice. Section C is also, in many respects, inconsistent with the IOSCO Principles.

Q6: Principles for benchmark calculation agents

The separate category of "benchmark calculation agents" does not exist in international oil markets but is, we believe, confined to monopolistic panel-based benchmarking processes such as Euribor and Libor. Rather, we have editorial staff that prepare price assessments in line with our published methodologies, our published editorial standards and the standards contained in our IPRO Code.

We believe the intent but not the wording of principles D1-D6 is fulfilled by the business model operated by ICIS. We therefore request further dialogue with ESMA-EBA to correctly reflect best practice in place via the latest version of the IPRO Code in the commodities markets.

Q7: Principles for benchmark publishers.

As previously bought out this structure does not exist in the independent PRAs that exist in the commodities sector and is therefore inappropriate.

Yet again, we believe however that the intent but not the wording of principles is fulfilled by the business model operated by ICIS. We therefore request further dialogue with ESMA-EBA to correctly reflect best practice in place via the latest version of the IPRO Code in the commodities markets.

If applied to news agencies, these principles would represent interference in media freedoms and we would refer once again to the ECHR case cited above in our response to Question 5.

Q8: Principles for users of benchmarks

We agree that it would be appropriate to produce principles that guide regulated financial services firms established in the European Union on their use of benchmarks. However, in the case of commodities markets, the principles should be fully aligned with the IOSCO Principles.

Q9: Practical application of the Principles

The IOSCO Principles have been designed to align with the specific characteristics of international oil markets and other commodities markets. As such, they set a gold standard for their practicality and application in a global context. We would encourage ESMA-EBA to reflect on the reasoning of IOSCO in setting these standards.

For example there are considerations of practicality, including territorial reach which we would ask ESMA-EBA to keep in mind. Oil and other commodity markets are truly global in scope.

This creates circumstances and challenges that do not exist in other markets. For example, market information obtained by a PRA journalist located in Country A will often concern a transaction regarding a delivery from Country B to Country C, with the journalist's sources located in Country D, and regularly in more than one country. It would not be practical to apply ESMA-EBA Principles across this international range of sources and activities. This is another reason why it is so important that ESMA-EBA fully support the international consensus built around the IOSCO Principles.

Q10: Continuity of benchmarks

Unlike Euribor, PRAs operate in a competitive environment that offers choice of supplier and choice of methodology in producing price assessments. ICIS' services are therefore both competitive and substitutable with services from other PRAs.

As PRAs like ICIS are independent of the markets they report they are reliant on their reputation for delivering prices that reflect a true reflection of market value. Where the market feels a PRAs price is no longer reflective of market value, history shows that the PRAs customers (many of whom will not be market participants) quickly switch to use an alternative, more reflective price.

The issue of continuity is therefore less relevant to PRAs than to a monopolistic Libor/Euribor type of benchmark.