

To: European Securities and Markets Authority

ICIS

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Dear Sir / Madam,

**Public Comment on ESMA/2014/548 & ESMA/2014/549**

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 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.

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 around 850 staff, including around 200 in the UK. Some 350 of ICIS’ staff are journalists engaged in reporting market prices and news.

ICIS thanks ESMA for the opportunity to comment on the implementation of MiFID II/MiFIR and the ESMA technical guidance.

The objectives of Article 37 are to ensure that benchmark providers should not enter into anti-competitive exclusive arrangements and ICIS is happy to confirm that it does not have any such arrangements in place.

ICIS is seriously concerned however that ESMA is over reaching by proposing standardised contracts including mandating the provision of Intellectual Property that belongs to ICIS (and ultimately its parent Reed Elsevier) not only to a trading venue or CCP but additionally to their users. ICIS does not believe that such guidance would represent a proportionate implementation of the intent of Article 37.

ICIS would also like to stress the importance that ESMA recognises the differences between the traditional financial services markets and the commodities markets and in particular the need to reflect the IOSCO Principles for Oil Price Reporting Agencies (known as the PRA Principles) in the commodity markets as well as the IOSCO Principles for Financial Benchmarks.

The PRA Principles are the product of a G20 mandate that tasked IOSCO to collaborate with the International Energy Association (IEA), the International Energy Forum (IEF) and OPEC to prepare principles that would enhance the reliability of oil price assessments referenced in derivatives contracts. ICIS, along with all the other major PRAs, is applying these principles to all its commodity market benchmarks and have been audited for compliance with them.

It appears likely that a review of the PRA Principles and their implementation by IOSCO in the commodities markets would lead ESMA to recognise that their adoption would easily fulfil the intent of Article 37.

Finally, In the case of energy benchmarks, and in line with MiFIR article 45, we believe it would be appropriate for ACER to become involved--particularly if ESMA continues not to take account of the PRA Principles

If you would like to discuss the attached detailed responses further please feel free to contact me directly.

Yours sincerely,

Richard Street

Head of Regulation and Compliance – ICIS

| **Discussion Paper**  **Consultation Questions** | **ICIS Opinion** |
| --- | --- |
| **Q411: Do you agree that trading venues require the relevant information mentioned above? If not, why?** | **Scoping of the question**  ICIS is not clear exactly which information is referred to in this question. We have assumed that relevant information for commodity markets is the benchmark information and historical benchmark information as referenced in paragraphs 20-22 of the Discussion Paper. Paragraph 21 appears to create a non-specific opportunity for later guidance, without consultation, to provide any information held by or owned by the proprietary rights holder. ICIS believes if ESMA wishes to mandate other information is provided then a further consultation and opportunity to consider the appropriateness of the provision of such information would be necessary.  **General Comments**  ICIS fully supports non-exclusive arrangements for the licensing of benchmark data and the efforts of ESMA to implement regulation and guidance in this area. This is fully in line with the commercial approach already taken by Price Reporting Agencies (PRAs) in the commodities markets.  ICIS recognises however that the information to be provided to trading venues will differ depending on the nature of the benchmark and should always reflect the nature of the market and mechanisms in place.  For commodities markets it is very important that ESMA ensures its solution harmonises with the IOSCO PRA Principles and recognises the differences between the IOSCO PRA Principles which are designed for commodities markets and the more general IOSCO Benchmark Principles which are designed for other financial markets.  ICIS notes that not only has it invested considerable resources conforming with the IOSCO PRA Principles but that these reflect the considerable research IOSCO undertook to recognise the differences between the physical (and therefore the financial) commodity markets and the broader financial markets.  In addition ICIS notes that IOSCO recognised that the application of any guidelines should not be on a “one size fits all” approach as the broader principles were not designed to be applied in this way.  **Historic Data**  ICIS can make this available but would encourage the approach that the information should only be provided if needed and at commercial terms. Mandating the provision of such information should also be required where available (at a commercially viable cost) and for the purposes of ensuring compliance with regulatory obligations, operational requirements and risk management purposes. |
| **Q412: Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading?** | **Scoping of the question**  ICIS is not clear exactly which information is referred to in this question. We have assumed that relevant information for commodity markets is the benchmark information and historical benchmark information as referenced in paragraphs 20-22 of the Discussion Paper. Paragraph 21 appears to create a non-specific opportunity for later guidance, without consultation, to provide any information held by or owned by the proprietary rights holder. ICIS believes if ESMA wishes to mandate other information is provided then a further consultation and opportunity to consider the appropriateness of the provision of such information would be necessary.  **Comment**  ICIS believes that, in line with both sets of IOSCO Principles (PRA and Benchmark) that the methodology for the benchmark should be available. |
| **Q413: Do you agree that CCPs require the relevant information mentioned above? If not, why?** | **Scoping of the question**  ICIS is not clear exactly which information is referred to in this question. We have assumed that relevant information for commodity markets is the benchmark information and historical benchmark information as referenced in paragraphs 20-22 of the Discussion Paper. Paragraph 21 appears to create a non-specific opportunity for later guidance, without consultation, to provide any information held by or owned by the proprietary rights holder. ICIS believes if ESMA wishes to mandate other information is provided then a further consultation and opportunity to consider the appropriateness of the provision of such information would be necessary.  **General Comments**  ICIS fully supports non-exclusive arrangements for the licensing of benchmark data and the efforts of ESMA to implement regulation and guidance in this area. This is fully in line with the commercial approach already taken by Price Reporting Agencies (PRAs) in the commodities markets.  ICIS recognises however that the information to be provided to trading venues will differ depending on the nature of the benchmark and should always reflect the nature of the market and mechanisms in place.  For commodities markets it is very important that ESMA ensures its solution harmonises with the IOSCO PRA Principles and recognises the differences between the IOSCO PRA Principles which are designed for commodities markets and the more general IOSCO Benchmark Principles which are designed for other financial markets.  ICIS notes that not only has it invested considerable resources conforming with the IOSCO PRA Principles but that these reflect the considerable research IOSCO undertook to recognise the differences between the physical (and therefore the financial) commodity markets and the broader financial markets.  In addition ICIS notes that IOSCO recognised that the application of any guidelines should not be on a “one size fits all” approach as the broader principles were not designed to be applied in this way.  **Historic Data**  ICIS can make this available but would encourage the approach that the information should only be provided if needed and at commercial terms. Mandating the provision of such information should also be required where available (at a commercially viable cost) and for the purposes of ensuring compliance with regulatory obligations, operational requirements and risk management purposes. |
| **Q414: Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing?** | **Scoping of the question**  ICIS is not clear exactly which information is referred to in this question. We have assumed that relevant information for commodity markets is the benchmark information and historical benchmark information as referenced in paragraphs 20-22 of the Discussion Paper. Paragraph 21 appears to create a non-specific opportunity for later guidance, without consultation, to provide any information held by or owned by the proprietary rights holder. ICIS believes if ESMA wishes to mandate other information is provided then a further consultation and opportunity to consider the appropriateness of the provision of such information would be necessary.  **Comment**  ICIS believes that, in line with both sets of IOSCO Principles (PRA and Financial Benchmark) that the methodology for the benchmark should be available. |
| **Q415: Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why?** | **Data timing**  ICIS disseminates its price assessments, including price assessment that are used as benchmarks, to all of its clients at the same time. Any selective, including preferential, disclosure of market relevant information would create opportunities for market abuse. ICIS strongly urges the retention of simultaneous disclosure to all clients of PRAs, including trading venues or CCPs.  ICIS notes that the ‘calculation’ of an assessment which is later used as a benchmark is almost always done off-line by commodity PRAs. Indeed the IOSCO PRA Principles require that there is a supervisory check performed prior to publication which necessitates some delay in publication. Compliance with IOSCO therefore makes it impossible for PRAs to make this data available ‘as soon as it is calculated’.  ICIS also notes that the ESMA wording suggests that consumption of the benchmark is performed by the Benchmark Operator sending the benchmark value to the Trading Venue or CCP. In practice, in the commodity markets at least, this is not usually the case.  The customers of commodity PRAs now consume benchmark data in various ways. These include:   * Emailed from the PRA to the customer in a text format (Push) * Emailed from the PRA to the customer in a PDF format (Push) * Accessed by the customer from a website (Pull) * Accessed by the customer from APIs (Push or Pull) * Accessed by the customer on a FTP server (Pull)   Many customers will have access to the information in multiple ways but often the quickest means of access will be for a consumer to pull the benchmark data as soon as it is published rather than wait for it to be emailed or pushed. Equivalence of service is best judged therefore by ability of customers to access data at the same time upon publication.  How the customer chooses to access this information is likely to dependent on the type, size, location etc of the customer. Of course, as the costs vary for supporting the different forms of access this is open to negotiation and prices for the differing service will reflect these costs.  Yet again this is reflected in the advice from IOSCO that “one size fits all” approach is likely to be sub-optimal and would restrict competition and customer service. |
| **Q416: Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?** | Please see answer to Q415 |
| **Q417: Do you agree that trading venues require the relevant information mentioned above? If not, why?** | In the cases of benchmarks produced by price reporting agencies, ICIS urges ESMA not to depart from IOSCO’s Principles for Oil Price Reporting Agencies (PRA Principles), which deal extensively with points covered by these questions, and which are the product of extensive stakeholder consultation over three years.  Any variation to the IOSCO PRA Principles could lead to inconsistency, confusion and potential damage to markets.  The IOSCO PRA Principles make very clear the relationship between the benchmark and the methodology, where the notion of ‘composition’ is clearly very different from financial markets.\*  Unfortunately in the context of many commodities markets the ‘relevant information mentioned above’ is simply not relevant at all.  ICIS therefore urges ESMA to adopt compliance with the PRA Principles, including the publication of a relevant audit report the primary requirement for Benchmark Operators in the commodities markets.  We note and recommend the many benefits that the PRA Principles which ensure the publication of freely available methodologies, methodology consultation processes, commentaries that explain assessments, policies that ensure PRAs do not have conflicts of interest, complaint processes etc  \* IOSCO’s Principles for Oil Price Reporting Agencies 1.3 (a-h) & 2.3 (a-b) |
| **Q418: Is there any other additional information in respect of composition that a trading venue would need for the purposes of trading?** | No. |
| **Q419: Do you agree that CCPs require the relevant information mentioned above? If not, why?** | Please see answer to Q417. |
| **Q420: Is there any other additional information in respect of composition that a CCP would need for the purposes of clearing?** | No. |
| **Q421: Do you agree that trading venues and CCPs should be notified of any planned changes to the composition of the benchmark in advance? And that where this is not possible, notification should be given as soon as the change is made? If not, why?** | We agree that that trading venues and CCPs should be notified of any planned material changes to the benchmark methodology in advance where possible.  The IOSCO PRA Principles at Principle 1.5 require that a price reporting agency must “adopt and make public to stakeholders explicit procedures and rationale of any proposed material change in its methodology”, and this should include the time frame and market access to feedback (including the price reporting agency’s responses) and consultation comments.  We note however that IOSCO also recognised that PRA require the ability to change or vary their methodologies quickly on occasions where markets change behaviour quickly or unforeseen circumstances occur. This avoids a situation where a PRA is publishing a price which they know does not reflect ‘fair market value’. These ‘urgent’ changes should therefore fall out of scope.  Material changes should also fall out of scope as it would not benefit customers to follow a full consultation process to, for example, correct a spelling mistake or add a new north sea crude oil grade. |
| **Q422: Do you agree that trading venues need the relevant information mentioned above? If not, why?** | ICIS does not agree as the relevant information mentioned above refers to the wrong information for the commodities market. ICIS does however welcome ESMA’s intention to align its approach with IOSCO’s.  As referred to above there are two sets of IOSCO Principles relating to benchmarks:   1. The Principles for Oil Price Reporting Agencies (“PRA Principles”) issued in October 2012; and 2. The Principles for Financial Benchmarks (“Financial Benchmark Principles”) issued in July 2013.   While both of these two sets of IOSCO principles are equally valid IOSCO was at pains to clarify when it published its Financial Benchmark Principles in July 2013 that it is the PRA Principles that should be applied to commodities benchmarks.  The PRA Principles are the product of a G20 mandate that tasked IOSCO to collaborate with the International Energy Association (IEA), the International Energy Forum (IEF) and OPEC to prepare principles that would enhance the reliability of oil price assessments referenced in derivatives contracts. The PRAs are applying these principles to all their benchmarks, and not just to oil benchmarks, and have been audited for compliance with them.  In these circumstances, ESMA should not take account only of IOSCO’s Financial Benchmarks Principles, and to seek to apply those principles to PRA benchmarks as seems to be the intention. Instead, ESMA should align its approach with IOSCO’s PRA Principles in relation to commodity benchmarks.  There are important differences between the two sets of principles that take account of the different characteristics of physical commodity and mainstream financial markets. Among the key areas of difference between the PRA Principles and the Financial Benchmark Principles are those relating to (1) contributors and (2) methodology. These are also two of the areas covered by ESMA’s consultation.  Our response to Questions 422-426 is to respectfully suggest that, in relation to benchmarks produced by PRAs, ESMA follow the internationally agreed IOSCO PRA Principles. Doing anything different, without extensive consideration, risks leading to unintended consequences.  In the case of energy benchmarks, and in line with MiFIR article 45, we believe it would be appropriate for ACER to become involved--particularly if ESMA continues not to take account of the PRA Principles.  Lastly we caution that ESMA should take care when considering the language stipulating the release of ‘any models or extrapolation methods’. We believe the intention (certainly that of IOSCO) is to require a ‘concise explanation’ of these sufficient for a customer to understand how the assessment has been performed rather than to disclose commercially sensitive intellectual property contained in these models or reveal the validation mechanisms used to that ensure input data is robust and not ‘anomalous’.  Please also note our response to Q427 |
| **Q423: Is there any other additional information in respect of methodology that a trading venue would need for the purposes of trading?** | No. |
| **Q424: Do you agree that CCPs require the relevant information mentioned above? If not, why?** | Please see answer to Q.422. |
| **Q425: Is there any other additional information in respect of methodology that a CCP would need for the purposes of clearing?** | No. |
| **Q426: Is there any information is respect of the methodology of a benchmark that a person with proprietary rights to a benchmark should not be required to provide to a trading venue or a CCP?** | ICIS notes that the IOSCO PRA Principles do not require the publication of underlying confidential data sources nor the detailed proprietary models or formula it uses in its assessment processes. |
| **Q427: Do you agree that trading venues require the relevant information mentioned above (values, types and sources of inputs, used to develop benchmark values)? If not, why?** | ICIS understands that, in certain circumstances, trading venues, CCPs and other customers may wish to obtain information on source data and where possible ICIS provides access to this to all of its customers.  ICIS cannot however provide this data in many/all circumstances for four reasons:  1. Most source data is provided to PRAs under journalistic processes which afford the sources confidentiality. This confidentiality is often guaranteed under statute (includingthe European Convention on Human Rights). This data can often be anonymised and published and, where possible without revealing the source, ICIS does this.  2. Some sources, such as the automatic feed of data from the Trayport system of UK and Dutch gas and electricity trades is already anonymised and the source information removed.  3. If ICIS to disclose its sources, many sources would refuse to provide information which would destroy its ability to produce the benchmark. NB. This risk was specifically identified by IOSCO when producing its PRA Principles.  4. The IOSCO PRA Principles require ICIS to maintain confidentiality to its sources where this was previously offered/agreed.  ICIS would also argue strongly for equal access to data for all market participants including trading venues and CCPs. Creating any form of asymmetry in information may ultimately create an opportunity for advantage and market abuse..  Lastly, ICIS is unclear that such data is required to be revealed in order to meet the requirements of MIFIR Article 37. As such ICIS requests ESMA seriously consider whether such advice would go so far beyond what is sufficient and reasonable to make such a requirement unlawful. |
| **Q428: Is there any other additional information in respect of pricing that a trading venue would need for the purposes of trading?** | No. |
| **Q429: In what other circumstances should a trading venue not be able to require the values of the constituents of a benchmark?** | In the commodities markets, this data is not needed provided the PRA is meeting the requirements of the IOSCO PRA Principles. |
| **Q430: Do you agree that CCPs require the relevant information mentioned above? If not, why?** | In the commodities markets, this data is not needed provided the PRA is meeting the requirements of the IOSCO PRA Principles. |
| **Q431: Is there any other additional information in respect of pricing that a CCP would need for the purposes of clearing?** | No. |
| **Q432: In what other circumstances should a CCP not be able to require the values of the constituents of a benchmark?** | In the commodities markets, this data is not needed provided the PRA is meeting the requirements of the IOSCO PRA Principles. |
| **Q433: Do you agree that trading venues require the additional information mentioned above? If not, why?** | **Inaccuracy**  ICIS agrees with ESMA’s proposal that trading venues and CCPs should be promptly notified of any inaccuracy in the calculation of a benchmark value and of the updated/corrected benchmark value. This is in line with ICIS published Corrections Policy.  ICIS notes however that ‘promptly’ is subjective and asks that ESMA resist calls to define this. Clearly in markets where benchmarks are set intra-day the word prompt has a different context to a weekly or monthly set assessment price (the norm in many commodities markets).  **Timing of disclosure of changes**  ICIS broadly agrees with ESMA’s proposals on this point but notes from a commercial perspective that the simultaneous provision of information will be difficult to achieve as described.  In many cases there may be no ‘data feed’ as described and certainly no ‘agreement between parties’ on changes to formats etc.  This perhaps reflects the same misunderstanding as articulated in the ICIS response to Q415 and could also be resolved by requiring non-discriminatory access to such information at publication.  ICIS would also repeat previous comments thatonly material changes should be consulted upon and reported to avoid unnecessary and unwarranted processes (Q421). |
| **Q434: Do you agree that CCPs require the additional information mentioned above? If not, why?** | Please see answer to question 433. |
| **Q435: Is there any other information that a trading venue would need for the purposes of trading?** | No. |
| **Q436: Is there any other information that a CCP would need for the purposes of clearing?** | No. |
| **Q437: Do you agree with the principles described above? If not, why?** | **General Comments**  ICIS, as a matter of longstanding commercial policy, has always supplied its services to any prospective client on a non-exclusive basis, provided only that the supply is lawful (not subject to EU sanctions etc) and that the prospective client is in a position to pay.  In the case of ICIS, there have never been cases of refusal to supply services, whether to a trading venue, CCP or to any other prospective user. (Some of these may also be clients of the trading venue or CCP.)  We urge considerable caution in ESMA taking any action that could intervene in already existing commercial relationships between benchmark producers and their clients.  It seems a step too far for ESMA to interpret MiFIR article 37 as extending rights not merely to trading venues and CCPs but additionally to their users. ICIS believes such a step would be a substantial intervention by ESMA into the currently competitive market for the provision of commodity market information which was not envisaged during the drafting of MIFID 37 and has not been properly assessed. Indeed ICIS is unsure whether ESMA, as a financial regulator has jurisdiction to make such substantial interventions in this area of the press and media markets?  **Disruption to markets**  This also risks unnecessary disruption to commercial markets and ICIS is acutely aware that parties should be able to agree licences on a case-by-case basis, dependant on the type of benchmark and the requirements of the trading venue. This may include negotiation of standard terms as well as agreeing to bespoke terms as appropriate.  ICIS is of the view that it would be inappropriate and discriminatory to require all licences to be provided in a standard form contract and that this would restrict development of the market, especially in new and emerging benchmarks.  **Standard Fee Schedules**  As previously described by ICIS in Q415 there are differences between customers in the frequency of use, frequency of access and method of access to benchmark data which results in differentials in commercial terms . These various options have evolved due to customers individually negotiating with ICIS for differing services.  Not only would a pre-agreed fee schedule would result in a disproportionate and unfair impact to both benchmark operators as well as trading venues and CCPs, cutting across recital 40 of MiFIR, it would severely impact on the ability of Benchmark Operators to innovate and for customers to request alternative services or service levels.  ICIS therefore questions whether such advice goes beyond what is necessary and proportionate to implement Article 37.  In particular ICIS does not agree that non-discriminatory means uniform without regard to an individual user’s ability to request a service on a non-exclusive basis on fair, commercial terms. |
| **Q438: Do users of trading venues need non-publicly disclosed information on benchmarks?** | ICIS strongly believes trading venues and CCPs should have equal access to information on benchmarks as all other users and that access to such information is unnecessary for trading venues and CCPs to use benchmarks in a non-discriminatory manner. |
| **Q439: Do users of CCPs need non-publicly disclosed information on benchmarks?** | ICIS strongly believes trading venues and CCPs should have equal access to information on benchmarks as all other users and that access to such information is unnecessary for trading venues and CCPs to use benchmarks in a non-discrimatory manner. |
| **Q440: Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the benchmark or with its trading venue / CCP?** | ICIS strongly believes trading venues and CCPs should have equal access to information on benchmarks as all other users and that access to such information is unnecessary for trading venues and CCPs to use benchmarks in a non-discriminatory manner.  In the commodities markets, PRAs already provide sufficient information through compliance with the IOSCO PRA Principles to make these proposals redundant. |
| **Q441: Do you agree with the conditions set out above? If not, please state why not.** | Please see answers to questions 437 and 440. |
| **Q442: Are there any are other conditions persons with proprietary rights to a benchmark and trading venues should include in their terms for agreeing access?** | No |
| **Q443: Are there any other conditions persons with proprietary rights to a benchmark and CCPs should include in their terms for agreeing access?** | No |
| **Q444: Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access?** | ICIS does not and has never licensed it’s information on an exclusive basis therefore this question is not applicable. |
| **Q445: Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?** | ICIS does not and has never licensed it’s information on an exclusive basis therefore this question is not applicable. |

**Comments on Q213-Q224 Consultation Paper**

General Comments

Firstly we would like to agree that the definition of spot contract in paragraph 2 of Article 38 of Regulation (EC) 1287/2006 is still valid.

On the definition of physical commodities, we note however, that there is a risk that the definition could be negated by operational obligations (such as those imposed by transmission operators) to submit net flows on transmission networks. Therefore, while such contracts may produce physical offsetting of deliveries, this is not equivalent to the financial netting of contracts which could considered as equivalent to cash settlement.

A failure to recognise these operational netting scenarios would render the exclusion of physical wholesale energy products traded on OTFs completely void, negating the intent of the Level 1 text.