



To: British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

23 July 2021

Ref: CSA Proposed Amendments to Multilateral Instrument 25-102, Designated Benchmarks and Benchmark Administrators, and Changes to Companion Policy 25-102, Designated Benchmarks and Benchmark Administrators

A. Introduction:

Argus Media Limited (Argus) welcomes the initiative by the Canadian Securities Administrators (CSAs) to consult on the implementation of a Canadian regulatory regime for commodity benchmarks.

Argus is an independent media organisation serving global physical commodity, power and emissions markets. Its main activities comprise the publication of market reports containing price assessments, market commentary and news, and business intelligence reports that analyse market and industry trends.

The Argus group has almost 1,100 staff globally and offices in each of the world's principal commodity centres. We opened a Calgary office in 2009. Companies in 140 countries around the world use Argus data to index physical trade and as benchmarks in financial derivative markets, as well as for analysis and planning purposes.

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 www.argusmedia.com/en/about-us/governance-compliance for further details).

A small number of Argus' published price assessments have been adopted by exchanges for use as independent benchmarks against which to settle commodity derivatives contracts. We strongly support the CSA's expressed intention to align the Canadian regime with IOSCO's Principles for Price Reporting Agencies and with the EU's Benchmark Regulation (BMR)¹.

We also support the creation of a voluntary designation option, which could provide an attractive means of bestowing additional international credibility on commodity benchmark administrators, as well as bringing further reassurance for their benchmark users.

However, these positive consequences would only be delivered if the Canadian market regime is, in fact, in full alignment with IOSCO's PRA Principles.

The Consultation Paper acknowledges in several places that this would not be the case by proposing to add requirements from its regime for financial benchmarks. The thrust of our response to the Consultation Paper is to explain why such additional requirements are inappropriate, a conclusion also reached by IOSCO itself

¹ In particular, for following their leads in not extending regulation to contributors to commodity benchmarks.



when it considered the application of any other regime to commodity benchmarks, and also by the EU when it developed the BMR. If adopted, the proposals would bring Canada's regime into conflict with both the EU BMR and IOSCO's PRA Principles.

As the CSAs are aware², IOSCO's PRA Principles were the product of a lengthy process of discussion and consideration by IOSCO, the International Energy Association (IEA) the International Energy Federation (IEF), the Organisation of Petroleum Exporting Countries (Opec), as well as public consultations with market stakeholders. The PRA Principles have become recognized as the international gold standard for PRA commodity benchmarks. In the years that followed their finalization, IOSCO and others have acknowledged that they have been implemented effectively by the PRAs and are working well. Informally, it has been reported to us that the IOSCO PRA Principles are regarded as one of IOSCO's most successful initiatives.

During the later workstream on IOSCO's Principles for Financial Benchmarks, consideration was given to creating a uniform set of principles for all benchmark administrators, including administrators of commodity benchmarks. In the event, and after careful consideration, IOSCO reaffirmed that the PRAs should continue to comply with the separate PRA Principles.³

The EU benchmark workstream also began by considering whether to merge financial and commodity benchmark regimes, before deciding to retain separate regimes. The BMR's Annex II for commodity benchmarks is largely a "copy and paste" of IOSCO's PRA Principles, apart from the introduction of new requirements on outsourcing.

In contrast, the CSA Consultation Paper proposes applying to commodity benchmarks the provisions relating to governance, control and reporting obligations that apply under the separate regime for financial benchmarks. We note that no explanation is given for these proposed departures from international best practice.

Question 2 asks whether the requirements are "appropriate in the context of commodity benchmarks". Respectfully—and as we endeavour to explain in greater detail below—our response is that they are not appropriate. In our opinion, they are:

- disproportionate;
- unworkable; and
- in breach of constitutional protections for journalism.

Even in those areas of the regulation where there is no intention to diverge from IOSCO's Principles, we note that the CSAs' text, unlike the EU's approach, includes extensive rewriting of the IOSCO Principles. We do not think such revisions can be justified.

In summary, we respectfully request the CSAs to reconsider its proposals and to bring them into alignment with IOSCO's PRA Principles. An accurate Canadian regulatory underpinning of the IOSCO PRA Principles would, in our opinion, be welcomed internationally and should deliver the positive benefits we have already alluded to above.

² Argus remains grateful to the Alberta Securities Commission, the Ontario Securities Commission and the Autorité des Marchés Financiers Québec for their participation in IOSCO's Committee 7 workstream on the PRA Principles.

³ IOSCO Principles for Financial Benchmarks Final Report, page 6

Argus Benchmark Administration BV, Office 1.05, Keizersgracht 555, Amsterdam 1017 DR
Web: www.argusbenchmarkadministration.nl Email: info@argusbenchmarkadministration.nl



B: Argus' responses to the Specific Questions:

Question 1: Interpretation

On the proposed definition of a “commodity benchmark”, Argus would urge the CSAs to align their definition with the EU BMR, and would suggest that for a commodity benchmark to become subject to the Canadian regime it must also be “used” for defined financial services purposes, such as those listed in EU BMR Article 3(7), reproduced below:

(7) ‘use of a benchmark’ means:

- (a) issuance of a financial instrument which references an index or a combination of indices;*
- (b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;*
- (c) being a party to a financial contract which references an index or a combination of indices;*
- (d) providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party;*
- (e) measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees.*

The mere publication of a price assessment for information purposes only does not, of course, constitute the creation of a benchmark. The definition should make it clear that an established linkage to some kind of trading purpose is required to fulfil the definition, in alignment with IOSCO’s PRA Principles and the EU BMR.

Question 2: Applicable Requirements from the Financial Benchmarks Regime:

This question invites comments on the appropriateness of extending to administrators of commodity benchmarks certain requirements from the financial benchmarks regime, citing the following examples:

- Requirements to report contraventions (section 11);
- Requirement for a control framework (section 40.4); and
- Governance and control requirements (section 40.11)

As we have already indicated, we do not believe these extensions are appropriate, and there is no basis to change or overlay requirements that were designed by IOSCO specifically for commodity benchmarks. In order to help explain this position, we would first ask the CSAs to have regard to the following points:

- **PRA’s operate in a competitive information market where product substitutability is generally available**

There is competition in the PRA market⁴, an additional safeguard that underpins the quality of PRA benchmarks. A PRA’s commercial success depends upon the markets’ perception of the reliability of the information its journalists provide, as compared to the information provided by its competitors.

The competitive context around PRA benchmarks contrasts with the single provider model frequently encountered in the case of financial benchmarks, such as LIBOR.

⁴ See for example “Pricing benchmarks in gas and electricity markets - a call for evidence” Page 9, Note 9 <https://www.ofgem.gov.uk/ofgem-publications/40363/pricing-benchmarks-gas-and-electricity-markets.pdf>
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Web: www.argusbenchmarkadministration.nl Email: info@argusbenchmarkadministration.nl



- **PRA have no “skin in the game”**

As media publishers, it is immaterial to PRAs whether market prices go up or down. PRAs are wholly independent and do not trade in markets they report on. Their clients’ subscription costs remain the same, whichever way the market moves. PRAs have no interest in distorting or manipulating prices. The reality is exactly the reverse. Nothing could cause greater commercial damage to a PRA than a market perception that its price assessments do not reflect market reality.

The unconflicted nature of PRA benchmark activities contrasts with financial benchmarks, where conflicts are frequently encountered. To cite one notorious example, LIBOR was produced by the British Bankers Association, whose members both used and contributed to the benchmarks. Conflicts were all around. The contrast with PRA benchmarks could not be greater.

- **PRA Benchmarks do not pose systemic risks**

The notional values of financial instruments referencing PRA benchmarks are low, frequently not exceeding the €100m threshold below which the EU’s BMR exempts commodity benchmarks from regulation. They do not pose systemic risks.

Once again, this contrasts with financial benchmarks where some are “critical” and many others “significant”⁵.

- **Revenues generated from benchmarks are not material in the overall context of PRA publishing revenues**

Income from licensing commodity benchmarks for use as a settlement basis for financial derivatives represents a small percentage of PRA revenue streams, the overwhelming majority of which comes from the sale of subscription licences to market and news reports. This is relevant because of proportionality: one of the extra burdens the CSAs propose to place on commodity benchmark administrators is a requirement to submit detailed financial statements, which we would argue is a cost on administrators with no material benefit to market transparency.

- **Most widely used Commodity Benchmarks are produced by journalists**

PRAs, which produce the most widely used commodity benchmarks, are editorial operations staffed by journalists. Their editorial processes are integrated across the entire news operation: the same journalists who produce the (small minority of) price assessments used as benchmarks also produce the (majority of) price assessments that are not used as benchmarks, as well as news and commentary on commodities markets. IOSCO defined PRAs as:

“Publishers and information providers who report prices transacted in physical and some derivatives markets, and give an informed assessment of price levels at distinct points in time. PRAs also report news stories relevant to commodity markets”⁶.

⁵To use the BMR terminology

⁶ IOSCO PRA Principles page 37.



The PRA Principles themselves refer to the “Integrity of the reporting process”⁷ and to the “editorial decisions in relation to the benchmark calculation processes”⁸ (emphasis added)

PRA benchmarks are not produced in journalistic silos. They are merely one output of the many reporting activities in which their journalists participate.

The environment in which PRA benchmarks are produced, and the processes used to create them, are entirely different to those involved in the creation of financial benchmarks.

Turning now to the specific points raised by Question 2, we would comment as follows:

- **Requirements to report contraventions (section 11)**

Argus strongly opposes the proposal to extend this provision to PRA benchmark administrators. Instead, it requests the CSAs to implement the approach advocated in IOSCO’s PRA Principles⁹ which is replicated in BMR Annex II paragraph 8(d).

The IOSCO text on this point covers one of the most sensitive and difficult areas—the relationship between a PRA and its contributors. Its drafting was the result of extensive and careful consideration and requires the administrator to escalate any apparently anomalous or suspicious behaviour it detects within the contributor’s company. It does not require the administrator to inform a regulator.

In developing its approach IOSCO took account of a number of factors, including:

1. The relationships between PRA journalists and their sources are protected by longstanding constitutional safeguards;
2. Contributions to PRA benchmarks are entirely voluntary. Reluctance is frequently encountered among contributors, which the PRAs have to devote considerable energies to overcome in order to maintain the integrity of their benchmarks. Great care was, therefore, taken by IOSCO to avoid recommending any approach that might discourage contributions. Hence, the absence of any IOSCO regulatory obligations on contributors. Hence also, the absence of any third-party reporting obligations on PRAs in relation to their contributors.
3. IOSCO took this into account in drawing up its PRA Principles, as cited above.

From time to time, there will be examples of market behaviour that at first sight appear anomalous but which, after inquiry, turn out to have rational/legitimate reasons for them. If it were to become an obligation on a PRA to notify each such example to the regulator the IOSCO conclusion was that this would discourage contributions, leading in turn to less reliable benchmarks.

As we have explained, the greater the reliability of their benchmarks, the more commercially successful PRAs will be. As noted above, any market perception that a price published by a PRA is being manipulated is harmful to that PRA’s business and can in fact destroy it. For this reason, PRAs have every incentive to address and prevent abuse.

⁷ Heading of Paragraph 8;

⁸ Paragraph 16(a);

⁹ Section 2.4(d)



So, we request the CSAs to withdraw this proposal and to align with IOSCO's PRA Principles.

- **Requirement for a Control Framework (section 40.4)**

This requirement is not present in either IOSCO's PRA Principles or the EU's BMR Annex II for commodity benchmarks.

As a responsible media publisher, operating in a competitive market, Argus already operates policies, procedures and controls, which address the points listed in sub-section 40(4)(2), and in ways that respond to the particular editorial context in which its services are produced.

Argus is also already subject to a rigorous external audit against IOSCO's PRA Principles. We believe that such audits, carried out each year and published, should provide the CSAs and stakeholders in the markets with sufficient reassurance.

- **Governance and control requirements (section 40.11)**

Again, these requirements are not present in either IOSCO's PRA Principles or the EU's Annex II for commodity benchmarks.

The requirements, which are similar to those set out in Section 9 for financial benchmarks, would impose on editorial operations, staffed by journalists, control requirements that have been designed for financial firms. References in Section 40(11), and everywhere else in the draft Regulation, to "benchmark individuals" will, in the context of PRA benchmarks, mean their journalists.

As we have endeavoured to explain above:

"[PRA] editorial processes are integrated across the entire news operation: the same journalists who produce the (small minority of) price assessments used as benchmarks also produce the (majority of) price assessments that are not used as benchmarks, as well as news and commentary on commodities markets".

None of these price assessments are created as benchmarks. Rather, they fall into that category if an exchange chooses to use a price assessment in connection with a derivative/financial instrument. The legislative framework has to be proportionate in relation to these facts. It is neither practical, nor desirable, to impose on an editorial operation a governance regime that has been designed for financial firms, particularly as the provision of benchmarks is a relatively small part of a PRA's overall editorial activities.

Argus already operates controls right across its editorial operation that have been developed over many years with the benefit of extensive experience.

It sees no need for the CSAs to legislate in this area. Indeed, it believes it would be entirely inappropriate and unhelpful for this to take place.

Once again, the external audits that are carried out each year should provide the CSAs and markets with sufficient reassurance. IOSCO has continued to support the principles for PRAs and there is no basis to depart from those international principles and/or apply national securities regulations to global commodity benchmarks. Few commodity markets have purely regional importance, and therefore the application of a specific national regime is already problematic.



One further consideration is perhaps worth highlighting:

- **Extending financial regulatory oversight over journalists would be incompatible with editorial freedoms**

The proposals would regard any journalist who participates in the “provision of a benchmark” as a “benchmark individual”, who would become subject to direct regulatory oversight¹⁰.

Since a majority of PRA journalists will participate from time to time in “the provision of a benchmark”, the entire news operation could become subject to direct regulatory oversight.

There is no jurisdiction in the western world that subjects individual journalists to direct oversight by financial services regulation and this would be incompatible with constitutional safeguards for journalism.

Question 3: Dual Designation as a Commodity Benchmark and a Critical Benchmark

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO’s PRA Principles, and the EU BMR.

Question 4: Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO’s PRA Principles, and the EU BMR.

Questions 5 and 6 Input Data

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO’s PRA Principles, notably Principle 2.2 which states:

2.2 A PRA should:

a) Specify with particularity the criteria that define the physical commodity that is the subject of a particular methodology;

b) Utilize its market data, giving priority in the following order, where consistent with the PRA’s approach to ensuring the quality and integrity of a price assessment:

1. Concluded and reported transactions;

2. Bids and offers;

3. Other market information.

Nothing in this provision is intended to restrict a PRA’s flexibility in using market data consistent with its methodologies. However, if concluded transactions are not given priority, the reasons should be explained ...

Question 7: Methodology

Argus requests that the CSAs simply follow the approach of IOSCO’s PRA Principles. Given the stated objective of the CSAs – that the requirements are sufficiently clear such that an administrator would be able to comply with the requirements – it is difficult to see why any other approach would be adopted. Currently, PRAs are able to comply, and have demonstrated compliance, with the Principles.

¹⁰The CSA proposes extending regulation to any “individual who participates in the provision of, or overseeing the provision of a designated benchmark “



Question 8: Conflicts of Interest

The CSAs proposals in paragraphs 40.13(1)(a), (b) and (d) represent substantive additions to the conflicts of interest provisions in IOSCO's PRA Principles, which were later copied into the BMR's Annex II with minimal amendment.

The CSAs' proposed additions are drawn from its conflict of interest regime for administrators of financial benchmarks, where, of course, conflicts are often present.

The CSAs do not explain why it should be necessary to impose these requirements on PRAs. They seem disproportionate as they take no account of the very different editorial context in which PRA benchmarks are produced and in which such conflicts are not present.

We request the CSAs to align with the text of IOSCO's Principles, as the EU BMR has done in its Annex II.

Finally in response to the CSA's specific question, we do not agree that "commodity benchmark administrators face potential conflicts of interest that are not addressed by these or other conflict of interest provisions."

Question 9: Assurance Report on Designated Benchmark Administrator

Subsection 40.14(2) requires a designated commodity benchmark administrator to engage a public accountant to provide an annual assurance report evidencing compliance with the provisions of the Canadian benchmark regime.

Although the final paragraph of the EU's BMR Annex II contains a similar provision, the EU quickly came to understand that international regulators, trading venues and other market participants expect PRAs to carry out assurance audits against IOSCO's PRA Principles. As a result, the EU accepted this as an alternative option. Accordingly, ESMA provided clarification by way of a Question and Answer¹¹:

Q: Is the annual review of IOSCO principles for PRAs sufficient for the purpose of paragraph 18 of Annex II of BMR?

A: The BMR introduces specific provisions for commodity benchmarks since such benchmarks are widely used and can have sector-specific characteristics. Pursuant to Article 19 of the BMR, for those commodity benchmarks applying Annex II of the BMR instead of Title II of BMR, ESMA considers that an annual review of IOSCO principles for PRAs by an independent external auditor is sufficient to ensure compliance with paragraph 18 of Annex II of BMR.

We suggest the CSAs follow this precedent by providing for the alternative option of an assurance report based on compliance with IOSCO's PRA Principles. It would not be feasible, or proportionate, for designated commodity benchmark administrators to have to undergo separate audits annually against both IOSCO's PRA Principles and Canada's benchmark regime.

We empathise strongly with the CSAs' query as to whether it is, in fact, reasonable for administrators of commodity benchmarks to be required to undergo annual audits, when administrators of interest rate benchmarks are required to do so (only) every 2 years. However, we are where we are. IOSCO's PRA Principles require annual audits and this is what the international community has come to expect.

¹¹ Q&A No.7 https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf
Argus Benchmark Administration BV, Office 1.05, Keizersgracht 555, Amsterdam 1017 DR
Web: www.argusbenchmarkadministration.nl Email: info@argusbenchmarkadministration.nl



Question 10: Concentration Risk

We do not believe that additional requirements are necessary to address concentration risk

PRA's operate in a competitive information market¹² where product substitutability is generally available.

Question 11 Designated Benchmarks

Argus is already authorised as a Benchmark Administrator in the Netherlands under the EU BMR. We therefore have no immediate intention of applying for designation in Canada. However, as we state in our introductory comments, we believe the best approach for the CSAs would be to pursue full alignment with IOSCO's PRA Principles, which would make the Canadian regime more attractive.

Question 12 Anticipated Costs and Benefits

We have no comments on this Question.

¹² See for example "Pricing benchmarks in gas and electricity markets - a call for evidence" Page 9, Note 9 <https://www.ofgem.gov.uk/ofgem-publications/40363/pricing-benchmarks-gas-and-electricity-markets.pdf>