

CMC Europe Benchmarks Working Group comments on 26 March ECON compromise amendments

Ahead of European Parliament's Economic and Monetary Affairs Committee (ECON) vote on its position on the EU Benchmark Regulation on 31 March 2015, the Working Group on Benchmarks of the Commodity Markets Council – Europe (CMC Europe), would like to ask Members to consider the following key points.

1. PHYSICAL COMMODITY BENCHMARKS REQUIRE APPROPRIATE TAILORING ON METHODOLOGY REQUIREMENTS

CMC Europe worries that Article 7(1)(a) as currently drafted is not suitable for physical commodities and is not compatible with IOSCO (International Organisation of Securities Commissions) standards — i.e. the IOSCO PRA (Price Reporting Agencies) Principles. This risks undermining the effectiveness of PRAs' methodologies for physical benchmarks. Article 7(1)(a) would disproportionately impinge on methodological flexibility and diversity, which is important in identifying prevailing prices in highly-diverse and heterogeneous physical markets — a fundamental point recognised and accepted by IOSCO and underpinning the PRA Principles. Methodologies involving data on bids, offers, spreads, supply and demand data and other market data are particularly useful in lower-liquidity physical markets, as IOSCO's PRA Principles explicitly recognise, and whose very continued existence needs to be safeguarded in order to ensure that reliable and consistent prices can continue to be provided by PRAs. Methodology is also a key parameter of competition between PRAs, which in turn supports the objective of having benchmarks which are reflective of market value.

Furthermore, Article 7b(1a) already requires a physical commodity benchmark administrator to publish *at each benchmark determination* (i.e. on a daily basis) a clear explanation of how the benchmark was developed. This adequately facilitates transparency and matches an IOSCO requirement in the PRA Principles.

Therefore, we would recommend that Article 7(1)(a) is added to the list of derogations applied in Article 14a (i.e. COMP X). This is in recognition that Article 7(1)(a) is unsuitable for commodity benchmarks and that Article 7b(1a) already provides as a transparency measure a heavy requirement on such administrators to publish on a daily basis a clear explanation of how the methodology was applied in order to arrive at the benchmark value.

2. DEFINITION OF 'CRITICAL BENCHMARK'

CMC Europe is concerned that as currently proposed, the definition of critical benchmark could capture any benchmark beyond the €500bn threshold, including those based on contributions from unsupervised entities and regulated data benchmarks. This is contrary to the definition proposed by the European Commission as well as by the Council of the EU in its General Approach. Key for critical benchmarks is for competent authorities to be able to impose mandatory contributions. However, this would be impractical for benchmarks based on contributions from unsupervised contributors. Indeed it could lead to these benchmarks being less robust or less viable to continue to publish — damaging the transparency that these benchmarks have brought in previously highly opaque markets. Furthermore, regulated data benchmarks are based on regulated/supervised data and have been granted preferential treatment in the draft Regulation. It would be contrary to principles of proportionality to potentially define these benchmarks as critical well.

We would therefore suggest that the definition of critical benchmark in Compromise C — Article 3 (21) — be amended to add the following wording:

(21) ‘critical benchmark’ means a benchmark, other than a regulated data benchmark or a benchmark based on contributions from unsupervised entities, the reference value of which exceeds EUR 500 billion as defined in Article 13 paragraph 1; or [...].

3. PRICE REGULATION SHOULD NOT BE PART OF THIS REGULATION, EVEN IF IT ONLY WERE TO APPLY TO CRITICAL BENCHMARKS

CMC Europe feels wording on the ‘fair, reasonable and non-discriminatory’ provision of a critical benchmark to users in compromise Y is duplicative. Article 37 of Regulation 600/2014 (‘MiFIR’) on access to benchmarks already provides for the obligation to license on a fair, reasonable and non-discriminatory basis and provide access at a ‘reasonable commercial price’. ESMA has been working on the drafting of related Regulatory Technical Standards (RTS) and will issue its final RTS in July 2015.

More importantly, we would like to remark that applying price regulation widely across an industry and to benchmarks irrespective of their substitutability, risk, and the nature and availability of the underlying data, goes well beyond Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in particular. In this regard, EU Competition laws are strong and the European Commission is already empowered to address cases of market failure of Articles 101 or 102 of the TFEU.

We therefore encourage legislators to oppose to Article 13b (Compromise Y), which we view as potentially incompatible with EU treaties.

4. A WORKABLE THIRD COUNTRY REGIME

Whereas we support the progress made in finding workable solutions to the third country regime in the last compromises, CMC Europe believes it should be clarified that compliance with IOSCO principles is an alternative to compliance with provisions that are “*as stringent as the requirements set out in this Regulation*” (Article 21b, para 1a(i)). Our suggested drafting for article 21(b) (Compromise AH) would be:

a) the endorsing administrator has verified and is able to demonstrate to its competent authority that the provision of the benchmark or family of benchmarks to be endorsed fulfils requirements which:

*i. are at least as stringent as the requirements set out in this Regulation; **or***

ii. ensure full compliance with the IOSCO Principles for Financial Benchmarks as reviewed and certified by an independent external auditor at least every two years or when a material change to the benchmark occurs; or [...].

About the Commodity Markets Council – Europe

The Commodities Markets Council - Europe (CMC Europe) is an industry group bringing together commercial market participants active across agriculture, energy and soft commodities as well as metal markets. It includes producers, merchandisers and end-users, leading global trading venues for commodity derivative contracts and price reporting agencies.

CMC Europe seeks to promote effective regulation for physical commodity and commodity derivative markets that reflects the key functions of these markets and that is consistent and effective across jurisdictions. To find out more, view our website on: www.commoditymkts.org.

The comments above are provided by the CMC Europe Working Group on Benchmarks. For comments or questions, please contact lara.wolters@nortonrosefulbright.com.