



Commodity Markets Council - Europe

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29 October 2018

To: Clare Bolingford
Deputy Director, Securities, Markets & Banking, Financial Services Group
HM Treasury
1, Horse Guards Rd
Westminster, London SW1A 2HQ

With a copy to: Sukhmani Khatkar and Martin Booth

Sent by email to: Clare.Bolingford@hmtreasury.gov.uk

Re: Miscellaneous benchmark persons and powers of the FCA under the SI

Dear Ms Bolingford,

I am writing to you on behalf of the Commodity Markets Council Europe (CMCE) regarding the powers conferred on the Financial Conduct Authority (FCA) with respect to “Miscellaneous BM persons” under the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (the SI).

CMCE represents agriculture, energy, metals and other commodity market participants, price reporting agencies and trading venues established and/or operating in the EU, the European Economic Area (EEA), Switzerland and neighbouring countries. CMCE Members include administrators, contributors and users of commodity benchmarks, as well as many firms who trade in pricing windows (or otherwise participate in price assessment processes) without contributing to a benchmark.

Commodity benchmarks often relate to illiquid markets, where accurate price assessment can be challenging. The quality of benchmarks in such markets depends on ensuring that market participants are not discouraged from either contributing data or otherwise participating in the price assessment process.

The IOSCO benchmarks workstream co-chaired by the FSA fully recognised these risks and the resulting Principles for Oil Price Reporting Agencies (2012) take great care to avoid placing obligations on contributors that might discourage them from inputting in the price assessment process. The regime for commodity benchmarks under the 2016 EU Benchmarks Regulation (BMR) was carefully designed to take account of IOSCO’s recommendations.

CMCE Members are concerned that the broad powers conferred on the FCA over “Miscellaneous BM persons” in the SI fail to take due account of IOSCO’s recommendations and the BMR’s distinct regime for commodity benchmarks. We fear that this could deter market participants from providing input to the price assessment process, impacting on the ability of administrators to produce robust, representative commodity benchmarks.

FCA power to impose “requirements” under regulation 6 of the SI

In particular, the SI gives the FCA very wide powers to impose “requirements” under regulation 6 of the SI. There are a number of factors which raise concerns with this power.

- First, article 41 of the BMR does not require the competent authority to have the power to impose “requirements”, and the category of “Miscellaneous BM person” is drafted more broadly than article 41.
- Second, the notion of a “requirement” is non-specific and appears not to be subject to any limitation (whether as to the extent, duration or nature of any requirement). It is not easy to tell whether requirements are meant to be part of a remedial, investigative and enforcement regime or more in the nature of additional rules for ongoing business. Commodity benchmarks subject to the Annex II BMR regime could by virtue of “requirements” become subject to an altogether different regime.
- Third, the FCA’s discretion to exercise this power is subject to an inadequate purposive fetter under regulations 6(1)(a), (b) and (c). In particular, we note that regulation 6(1)(b) (“in order to advance any of its operational objectives”) does not derive from article 41 of the BMR and is actually divergent from it in a way which goes beyond the enabling legislation, introducing inconsistencies.

We note that article 41 of the BMR sets out requirements for competent authorities to be given powers to enable them to investigate and enforce breaches of BMR. These powers are appropriately limited in scope, nature and/or duration. Article 41 does not contemplate competent authorities having the ability to create additional rules or ongoing compliance obligations.

CMCE Members are concerned that the sole fact that the FCA has been granted these wide powers to impose “requirements”, not required under the BMR, could deter market participants from inputting in the price assessment process. Ofgem has recognised this risk in its “Pricing benchmarks in gas and electricity markets—a call for evidence” (2013) by noting: “...some types of regulation may introduce risks to the process. In particular, greater regulatory scrutiny of the information flows could introduce a perception of risk (irrespective of whether the risk is real) to those providing the information. Regulation should increase the quality of the information provided, but could reduce the willingness of parties to provide it. Information is provided on a voluntary basis and the simplest way to mitigate this risk may be to withdraw cooperation and decline to provide it. This in turn can lead to a breakdown in the quality of the price assessment process, with negative consequences for the markets and consumers.”

These concerns, we understand, have been communicated by some CMCE Members to you and to the FCA in previous engagements.

Amended FCA Supervision manual

CMCE Members appreciate the FCA’s effort to clarify in the amended Supervision manual (SUP 15B) how it anticipates using this power, and in particular that “it would generally only need to rely on the ground in regulation 6(1)(b) of the [BMR] for the purpose of supervising a Miscellaneous BM person listed in regulation 5(2)(e) of those regulations i.e. a person who administers a benchmark relying on article 51(4) of the [BMR]”.

We nevertheless remain concerned about the statement in SUP 15B.5.3 G(3) that while the FCA does not generally expect that it will need to rely on the ground in section 6(1)(b), i.e. to exercise its powers in order to advance its operational objectives, in relation to other categories of Miscellaneous benchmark persons than administrators, the FCA “cannot entirely exclude the possibility that it might need to do so in other circumstances” which it will consider on a case by case basis.

This language retains full discretion and does not provide assurance to market participants and to contributors to Annex II benchmarks in particular on the issues raised above. As a result, these clarifications do not address our concerns about the detrimental impact that imposing such requirements could prove to have on the quality of commodity benchmarks.

CMCE Members therefore believe that it is of utmost importance to clarify the scope of the powers given to the FCA in the SI so as to ensure that the approach is aligned with BMR requirements (and, so far as relevant, its distinct regime for commodity benchmarks).

We are therefore comforted that HM Treasury has acknowledged the potentially problematic impact of the language of the SI on commodity benchmarks in previous conversations with price reporting agencies (some of which are CMCE Members). We welcome the plans to conduct a legal review of the SI, which will provide an opportunity to address this issue. We hope that this review will take place as soon as possible and remain at your disposal to assist with the elaboration of possible solutions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Anwar', with a stylized flourish at the end.

Samina Anwar,

CMC Europe Chair