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Argus Media response to

European Commission
Directorate General Internal Market and Services

CONSULTATION DOCUMENT ON THE REGULATION OF INDICES
A Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts

Executive summary

- Argus Media is a specialist media company that publishes editorial products reporting on energy and energy-related commodity markets
- Energy markets are global and consideration of benchmarks needs to be done in line with the international consensus developed through the process that the Financial Stability Board is co-ordinating and which builds on progress made by IOSCO and other national and international organisations
- IOSCO was not persuaded by its consultation process that the independent media companies providing oil benchmarks should be regulated. IOSCO and these companies will work co-operatively to implement principles for energy market price assessments
- It is the professional market participants which subscribe to editorial content provided by Argus Media, including price assessments, that decide which price assessments to adopt as price indexes and benchmarks. Argus Media publishes a wide range of editorial content, most of which is not benchmarks.
- Argus Media has intellectual property rights in its services, and its price assessments are not public goods

Introduction

Argus Media is a specialist news agency covering physical oil markets and other energy and related commodity markets. Argus Media was established in the United Kingdom in 1970. It enjoys a worldwide reputation for the quality and impartiality of its services. In over 40 years of operation there has not been a single legal action brought against Argus Media and/or its journalists alleging malpractice in the information that it publishes.

As a media company, Argus Media is unlikely to be a typical consultee. For this reason, by way of an introduction, Argus Media believes it could be useful for the European Commission to see briefly what being a media organisation means in the present context. This introduction will then go on to suggest some of the considerations that, from the perspective of a media company, Argus Media requests the Commission to keep in mind as it develops its approach in this area.

1. Argus Media as a media company

- **Argus Media's services are created by an international editorial operation** with news bureaus located in the world's principal oil and energy centres under the editorial direction of an editor-in-chief, who reports to the chief executive, and who has responsibility for the quality of content. Its well trained journalists operate according to a rigorous and transparent Editorial Code of Conduct and an Ethics Policy (available at: www.argusmedia.com/About-Argus/How-We-Work) that align with the highest standards of journalistic best practice, including the avoidance of conflicts of interest. Recently, Argus Media together with two of its competitors, Platts and ICIS, issued a draft code of best practice for independent price reporting organisations (the Draft Code) that codifies and aligns quality standards for commodity price reporting (www.argusmedia.com/ipro).[1]

[1] IOSCO's final report on *Principles for Oil Price Reporting Agencies* commented favourably that this joint initiative "represents ongoing concern for the integrity of [the] price assessment process", IOSCO FR06/12, p5

- **Argus Media is not a financial services company.** Argus Media does not provide financial/investment advice, broking or trading services. Its revenues are subscription based, and are not affected by whether market prices rise or fall. In summary, Argus Media operates independently of the energy markets that its journalists report on. Its worldwide reputation and continued business success depend on maintaining that independence. It would not be appropriate for an independent media organisation to become a regulated financial services entity.

- **Argus Media's services extend much more broadly than price assessments used as benchmarks.** Argus Media produces more than 80 publications and internet services which focus on developments in the world's commodity sectors and contain news and analysis about supply, demand and inventories, the politics behind markets and trends in commodity corporations. These publications and services include market price assessments to a varying degree. As IOSCO acknowledged in its final report on *Principles for Oil Price Reporting Agencies* (PRAs), the price assessments from Argus Media and its competing media companies "meet a legitimate physical oil market need [and] have increased transparency in the markets for physical market"[2]. Argus Media does not determine which of its published "price assessments" are used as "benchmarks" — it is the market itself that makes this decision. The vast majority of its price assessments are not used as benchmarks.

- **Argus Media's clientele for price assessments is much more broadly based than market traders.** Many subscribers to Argus Media's services do not directly trade***.*** Subscribers include intergovernmental agencies, such as the International Energy Agency (IEA) and Opec, national agencies such as the UK's HM Revenue & Customs Large Business Service Oil Gas and Mining Sector, the Norwegian Ministry of Petroleum and Energy Petroleum Price Board, customs and taxation authorities in Russia and Kazakhstan and the US Department of Energy's Energy Information Administration, consultancies, bank commodities research departments, engineering and service companies, executives in major oil firms, integrated energy firms, utilities, state-owned companies, refiners, midstream companies and upstream companies.

- **Neither Argus Media nor its price assessments are "systemically important".** IOSCO's final report on *Principles for Oil Price Reporting Agencies* concluded that "PRA activities did not raise systemic risks to the global financial system"[3].

- **Argus Media owns intellectual property rights (IPRs) in its goods and services.** Argus Media's content is produced in-house and is protected by IPRs under national, European and international laws and conventions. None of the information published by Argus Media can be classed as a "public good".

- **Argus Media operates in a competitive market environment.** In addition to Platts and ICIS, already mentioned, Argus Media's services face competition from other news agencies such as Thomson Reuters, Bloomberg and Dow Jones, as well as other specialist commodity media organisations such as Opis (US), OMR (Germany), e-petrol (Poland), IHS McCloskey (UK), Kortes (Russia) and RIM (Japan). Continued commercial success in this competitive marketplace is directly related to the integrity of an organisation's services.

2. Considerations that Argus Media requests the commission keeps in mind as it develops its approach

Energy markets are global. In the introduction to its Consultation Document, the Commission refers to the "global nature of benchmarks" before stating that its objective is to "achieve an internationally consistent regime at global level". Argus Media notes that IOSCO has concluded that its *Principles for Oil Price Reporting Agencies* are the best means to ensure the integrity of commodity benchmarks on a global basis. IOSCO "intends to work co-operatively with PRAs to achieve implementation of the principles"[4] and Argus Media looks forward to this work. Argus Media and the two other media companies that started work last year on the Draft Code for independent price reporting organisations have embarked on a redrafting of the Draft Code with reference to IOSCO's principles.

Argus Media notes that these initiatives — the IOSCO PRA principles and the Draft Code — have been explicitly endorsed by Martin Wheatley[5], the chief executive designate of the UK's Financial Conduct

[2] IOSCO FR06/12, p5
[3] IOSCO FR06/12, p22
[4] IOSCO FR06/12, pp8-9
[5] The Wheatley Review of LIBOR: final report, §7.25-7.26, p58

Authority (FCA), which is due to succeed the Financial Services Authority (FSA). Argus Media believes that these initiatives will meet the Commission's objective of an "internationally consistent regime at global level" for oil market benchmarks and notes that the regime is being considered for extension to other international energy markets. There would be many disadvantages if the EU develops its own approach, creating inconsistencies with the international consensus developed by IOSCO.

A multiplicity of benchmarks and indexes are used in different markets. Argus Media requests the Commission to recognise the significant differences between price assessments used as benchmarks that are created by its independent editorial operations — working to the highest standards of journalism and with no vested interest in the prevailing market price — and benchmarks produced by:

- benchmark sponsors whose interests may align with those who trade them;
- panel-based mechanisms;
- automated compiling and averaging; and
- authorised financial services entities, such as exchanges and other trading venues.

A wide range of indexes and benchmarks are used — the terminology used to refer to them is often imprecise and misleading — and Argus Media urges the Commission not to apply a "one size fits all" approach. Argus Media is concerned, for example, that the introduction to the Consultation Document refers to "the inherent conflicts of interests linked to the production and governance of benchmarks in their current form", whereas benchmarks that use Argus Media assessments for financial settlement are not subject to any inherent conflicts of interest. Any regulatory approach that fails to recognise, and to take account of, the different factual circumstances behind the multiplicity of benchmarks and indexes would be unlikely to comply with the general principles of non-discrimination and proportionality in European law.

Argus Media is a media company, whose services are created by editorial operations according to best journalistic practices. Argus Media requests Commission services, as they develop the Commission's approach, to keep in mind the particular circumstances of the news media, which were partially summarised in Recital 44 of the *Market Abuse Directive* (2003/6/EC): "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media." These protections were upheld, specifically in relation to financial news media, by the European Court of Human Rights in the *Case of the Financial Times Ltd and Others v The United Kingdom* in 2009 (Application no. 821/03).

Argus Media owns IPRs in its goods and services: Argus Media requests that the Commission takes care to ensure that its approaches fully respect the IPRs in Argus Media's goods and services. Copyright, database right, trademarks and rights of confidence are protected by international treaties to which the EU and/or its various member states are signatories. Argus Media's services are not "public goods".

Contributions by market sources are voluntary. IOSCO's final report on *Principles for Oil Price Reporting Agencies* said: "It is important to understand that these principles recognize that there is no requirement on any physical market oil participant to submit transaction data to PRAs. Because data are submitted on a voluntary basis, precipitous regulation of PRAs or requiring that oil market participants who submit data to PRAs submit all of their transaction data potentially could result in some oil market participants to decrease or even cease their submission of data to PRAs."[6]

Argus Media shares IOSCO's concerns about the dangers to market transparency of "precipitous regulation". One recent example was the text of Article 8(1)(d) of the proposed *Market Abuse Regulation (*MAR) which, by departing from MAR's approach in Recital 23 and Article 8(1)(c) and the approach taken in the present *Market Abuse Directive*, made no allowance for an honest mistake by, for example, a market source communicating information to an Argus Media journalist. Argus Media became concerned that, unless this anomaly was corrected, commodity companies' compliance and legal departments would respond by advising staff to avoid legal risks and to discontinue communicating with PRAs, undermining market transparency in energy markets. Argus Media is relieved and grateful that this concern has been understood and is working with the EU institutions on the appropriate text to correct this anomaly.

The interests of all of Argus Media's diverse clientele must be taken into account. We request the Commission to keep in mind that regulatory intervention in the production of commodity price assessments

[6] IOSCO FR06/12, p34

used as benchmarks will affect a broad client base, including many subscribers who are not physical commodity traders.

EU competition law is available to address any perceived market distortions. The market in which Argus Media operates is highly competitive. Where the Commission perceives market distortions among regulated financial services entities, Argus Media requests that it first has recourse to competition law, rather than to regulatory intervention that may impact independent providers of commodity price assessments.

Argus Media's responses to questions in the Commission's Consultation Document

> **Box 1**
> (1) Which benchmarks does your organisation produce or contribute data to?
> (2) Which benchmarks does your organisation use? What do you use each of these benchmarks for? Has your organisation adopted different benchmarks recently and if so why?
> (3) Have you recently launched a new benchmark or discontinued existing ones?
> (4) How many contracts are referenced to benchmarks in your sector? Which persons or entities use these contracts? And for which purposes?
> (5) To what extent are these benchmarks used to price financial instruments? Please provide a list of benchmarks which are used for pricing financial instruments and if possible estimates of the notional value of financial instruments referenced to them.
> (6) How are benchmarks in your sector set? Are they based on real transactions, offered rates or quotes, tradable prices, panel submissions, samples? Please provide a description of the benchmark setting methodology.
> (7) What factors do you consider to be the most important in choosing a reliable benchmark? Could you provide examples of benchmarks which incorporate these factors?

(1) (4) Argus Media publishes market reports that are prepared by its editorial staff and which contain market commentary, news, analysis and price assessments relating to physical markets in energy and related commodities. Most of the 8,500 price assessments provided by Argus Media are used for indicative, informational and analytical purposes. Some price assessments published by Argus Media are adopted by market stakeholders for indexation of physical commodity supply contracts. Of these assessments used in indexation, market participants have adopted a small number for further use as benchmarks to settle financial instruments. Like any media organisation, Argus Media supplies content that can be used by its readers for a multiplicity of different purposes. Argus Media is unable to quantify precisely how many of its assessments are used as benchmarks, although it can identify those assessments that relate to financial contracts listed for trading on exchanges or clearing through central clearing houses. The number of such Argus benchmarks is small — in the range of just 20-30. Argus Media notes that some of these listed financial contracts do not trade or clear regularly or at all.

The Consultation document states that "many commodity indices such as Natural Gas – NYMEX were developed to price commercial spot contracts". This is incorrect. Contracts listed on commodity exchanges such as Nymex are futures — ie derivatives — contracts, not spot physical contracts[7]. Derivatives contracts are established by exchanges to provide a mechanism for negotiation of the price of commodity for delivery at an agreed future time (ie a futures price, not a spot price). These futures contracts also provide a price risk management (ie hedging) tool for buyers and sellers of the commodity. Commodity spot contracts do not generally reference a futures contract price as effectively this would be circular.

(5) The main benchmarks listed and actively traded/cleared on exchanges/clearing houses, and for which Argus Media publishes the underlying index or for which Argus Media contributes to the underlying index, include API 2 (European coal), API 4 (South African coal), Argus Eurobob gasoline fob Rotterdam, Argus RME and Fame 0°C biodiesel fob Rotterdam, LLS crude fob Capline St James LA, Argus cif ARA propane and Argus Far East Index propane. The best sources for information on the extent of the use of commodity assessments in pricing financial instruments and for lists of commodity benchmarks are exchanges/clearing houses such as IntercontinentalExchange (ICE) and CME Group's Nymex exchange, and trade associations such as the International Swaps and Derivatives Association (ISDA).

(3) Argus Media launches new assessments continually, in response to new developments in physical commodity markets and in order to provide and further enhance market transparency. But most of these new assessments are not adopted by the markets as benchmarks for financial contracts. In a few cases, Argus Media has discontinued an assessment used as a benchmark and launched a new assessment that is adopted by the market and used as a replacement benchmark. For example, Argus Media discontinued Eurograde gasoline fob Rotterdam and launched Eurobob gasoline fob Rotterdam in January 2009 as a result of technical specification changes to gasoline in Europe.

[7] See for example Nymex Henry Hub Natural Gas Futures contract specification www.cmegroup.com/trading/energy/natural-gas/natural-gas_contract_specifications.html

(6) Argus Media's reporters and editors identify prevailing commodity market prices, which the company publishes as assessments, through the application of detailed market-appropriate methodologies that reflect the particular characteristics of each individual commodity market. All Argus Media's methodologies are freely and publicly published online at www.argusmedia.com/Methodology-and-Reference. All Argus Media methodologies are based around the gathering, verification, validation, analysis and application of open-market verified transactional data. The Commission Consultation Document recognises that "a range of methodologies are used" (1.3, p5). In using different methodologies that utilise a range of market information, Argus Media follows IOSCO's Principles for Oil Price Reporting Agencies (IOSCO PRA principles) which state that "a PRA should 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." [8] IOSCO's PRA principles further note that "nothing in [this hierarchy of market information] is intended to restrict a PRA's flexibility in using market data consistent with its methodologies"[9]. It is important to state that Argus Media does not use panel-based methodological approaches in its price assessment processes as panel-based approaches are inherently vulnerable to manipulation and price distortion (see further discussion below at question 16).

(7) Argus Media believes that an important factor for market participants is to have a choice of price assessments available from which they can select those they judge the most appropriate to be used as benchmarks. The PRA sector is competitive and therefore provides a choice of methodologies to market participants in the energy and related commodity sectors. Market participants have choice and will therefore adopt and continue to use only those commodity benchmarks that they consider to be reliable. There are many examples of market participants in the energy commodity sector switching between assessments used as benchmarks and the media organisations that provide them. As IOSCO chair Masamichi Kono said recently: "Ultimately, the choice of benchmarks for financial contracts must be largely market driven."[10] Other factors that Argus Media considers to be important are the independence of benchmark publishers from the markets on which they report; best practice in corporate governance of benchmark publishers, including policies that eliminate conflicts of interest; transparent and robust methodologies for price assessments; and engagement with market stakeholders. The Draft Code codifies and aligns quality standards and guidelines on these factors for the competitive PRA sector.

It is important to note that, through IOSCO, financial regulators have already established consistent and co-ordinated international standards for market authorities in considering the design and review of commodity derivatives.[11] Relevant competent authorities already have direct regard to these IOSCO standards when approving a commodity derivative contract for listing. IOSCO's standards include a principle on the "promotion of price convergence through settlement reliability" which states that "settlement and delivery procedures should reflect the underlying physical market and promote reliable pricing relationships and price convergence and should be regularly evaluated to ensure that they meet this standard." IOSCO goes on to discuss this standard in detail including as it relates to a third-party price series such as from a PRA. A market authority will only permit listing of a commodity derivative referencing a particular PRA benchmark when the authority is satisfied that the benchmark used to settle the derivative is in conformity with IOSCO's established standards. A recent survey by IOSCO confirmed that regulators internationally are actively applying these standards to commodity benchmarks.[12]

Box 2
(8) What kinds of data are used for the construction of the main indices used in your sector? Which benchmarks use actual data and which use a mixture of actual and estimated data?
(9) Do you consider that indices that do not use actual data have particular informational or other advantages over indices based on actual data?
(10) What do you consider are the advantages and disadvantages of using a mixture of actual transaction data and other data in a tiered approach?
(11) What do you consider are the costs and benefits of using actual transactions data for benchmarks in your sector? Please provide examples and estimates.

[8] IOSCO FR06/12, p13
[9] IOSCO FR06/12, p13
[10] www.iosco.org/library/speeches/pdf/20120924-Kono.pdf
[11] Principles for the Regulation and Supervision of Commodity Derivatives Markets, IOSCO FR07/11
[12] IOSCO FR08/12

(8) (9) Market information is collected by Argus Media's journalists from a wide variety of sources in the markets. It should be noted that market sources supply information to Argus Media on a voluntary basis. The nature of the underlying data that Argus Media uses as part of the price identification process depends on the characteristics of each different commodity market on which its journalists report. Argus Media focuses on methodologies that identify the prevailing market price by employing teams of well trained and skilled journalists to collect, analyse, verify and validate the market data. Argus Media methodologies describe the criteria and procedures for using market data. In conformity with IOSCO's PRA principles, Argus Media uses, in addition to completed transactions, "bids, offers and any other market information (collectively 'market data') in its assessment." [13].

Implicit in some of the Consultation questions is the suggestion that data other than completed transactional data are not "actual data". This is an incorrect assumption and as noted above, IOSCO recognises that there may be a range of market data to be considered as part of the price assessment process in physical commodity markets. All of the information used is "actual data" (completed transactions, bids, offers, prices of closely related grades or time periods) and Argus Media does not recognise the idea of using "estimated data" in the markets on which it reports. The methodology of each price assessment (whether it is adopted as an index or a benchmark or neither) will vary according to the structure of the market. In illiquid physical commodity markets, a degree of judgment or discretion may be necessary under conditions defined in the methodology. This has been explicitly recognised by IOSCO.[14]

The Draft Code[15] published by Argus Media and its main international competitors requires a PRA to "have clear policies and processes for collecting, evaluating and utilising data for purposes of its price assessments". The Draft Code also states: "Criteria for inclusion or exclusion of transaction data in the process of determining a price assessment should be set out" in relevant methodologies. As noted above, IOSCO has expressly endorsed the view that PRAs should have the flexibility in determining different methodologies.

(10) Argus Media considers that in physical commodity markets, market data other than completed transactions are crucial in verifying and supporting data on completed transactions. IOSCO PRA Principle 2.2 b) recognises the validity and use of "other market information" in the hierarchy noted above. As recognised in the Commission's Consultation Document, "producing an index from underlying data is not simply a mechanical mathematical exercise but may require the exercise of judgment and discretion at various stages" (p10). The "hybrid system" described by the Consultation Document is largely, as it says, "similar to the methodology used by some price reporting agencies to set commodity prices based on different levels of transaction data available" (p12). However, it is vital to understand that Argus Media does not "set" prices. Argus Media's journalists identify and report prices prevailing in the market. Argus Media methodologies explain the use of verified transactional data in identifying prevailing market prices and, therefore, in bringing transparency to otherwise opaque physical commodity markets. Where there is sufficient liquidity, Argus Media may use completed transactions from the market in question; but where there are lower levels of liquidity, Argus Media uses a wider range of verified transactional data — bids, offers — and where required transactional data from related markets to make logical deductions based on prices identified for comparable grades or time periods. The methodology used depends on the characteristics of each individual commodity market. It is important to note that market participants generally adopt as benchmarks for financial settlement those price assessments that they have adopted as physical indexes in liquid markets where transactions occur every day. It is incorrect to assert that Argus Media price assessments (whether adopted as physical indexes or not) could include "non-quantitative information", such as an announcement by Opec, as suggested in the Consultation Document (1.3.3, p7; 2.5, p17). This is never the case. An announcement, news or other non-quantitative information would only ever affect Argus Media assessments if the markets reacted to the announcement, and prices — as revealed in market data — had changed before the end of the assessment period.

(11) It is beneficial to use verified data on completed transactions in highly liquid markets. But many physical commodity markets are illiquid compared with financial markets. A "one size fits all" methodological approach exclusively using data on completed transactions cannot succeed in these markets, as IOSCO has concluded. Methodologies that exclusively use data on completed transactions potentially make assessments vulnerable to a price reflecting the position of just two companies if only two companies have completed a transaction in the relevant assessment period. In contrast, using a wider range of verified market data from buyers and sellers may be a more representative process since it

[13] IOSCO FR06/12, p11
[14] "The Standing Committee acknowledges that certain discretion may be required to assess spot crude markets." IOSCO OR07/12, p6
[15] available at www.argusmedia.com/ipro

enables completed transactions to be put into context and the assessment to reflect the positions of a wider range of companies

Box 3
(12) What specific transparency and governance arrangements are necessary to ensure the integrity of benchmarks?
(13) What are the advantages and disadvantages of imposing governance and transparency requirements through regulation or self-regulation?
(14) What are the advantages and disadvantages of making contributing data or estimates to produce benchmarks a regulated activity? Please provide your arguments.

(12) Argus Media considers that transparency and good governance are necessary to ensure integrity of benchmarks. Specific measures related to transparency and governance in the price reporting industry are included in the industry's Draft Code and have been thoroughly examined by the IOSCO consultation process regarding PRAs over the past two years.

Regarding governance, the Draft Code states that price reporting organisations "shall maintain robust governance arrangements, including a clearly defined management structure with transparent lines of reporting and consistent allocation of authority and responsibility". Argus Media's governance standards stress the company's independence from the markets on which it reports. Argus Media has no vested interest in the level of prices that it reports. Argus Media has clear policies in place to avoid conflicts of interest.

In relation to transparency, the Draft Code states that price reporting organisations "shall publish or otherwise make freely available the methodologies used… to produce its price assessments. The methodologies shall be designed to produce price assessments that are representative of market value" and a PRA "shall publish price assessments that are in accordance with its methodologies".

Publication of the Draft Code was followed by the release of IOSCO's final report on *Principles for Oil Price Reporting Agencies,* which establishes principles for oil reporting agencies that are designed to "establish a framework of best practices"[16] and require "transparency of procedures"[17].

Following the G20 finance ministers' meeting in Mexico City on 4-5 November 2012, the internationally agreed approach to oil market transparency will now be extended to natural gas and coal markets. The ministers asked the IEA, the IEF and Opec to propose practical steps to implement increased transparency in these markets by mid-2013. The ministers also asked "IOSCO to liaise with the IEA, IEF and Opec to assess the impact of the [IOSCO PRA] principles on physical markets and report back. We also ask IOSCO to report progress on the implementation of the principles in 2013"[18]. Argus Media urges the Commission to channel its efforts into supporting the global consensus based on the IOSCO process.

Argus Media's global compliance officer audits adherence to standards of governance and transparency on a rolling basis, as outlined in the company's compliance policy, which is publicly available at www.argusmedia.com/compliance. Argus Media believes that the combination of the Draft Code and the IOSCO principles will deliver the transparency and governance arrangements that are necessary to ensure the integrity of energy market benchmarks.

(13) Argus Media urges the Commission to avoid what IOSCO calls "precipitous regulation of PRAs"[19]. Argus Media notes the progress that has been made under the IOSCO process regarding the debate about regulation and self-regulation of PRAs, and intends to build on the international consensus based on the IOSCO principles and the self-regulatory Draft Code. IOSCO "intends to work co-operatively with PRAs to achieve implementation of the principles"[20] and Argus Media looks forward to this work. Argus Media and the two other media companies that started work last year on the Draft Code have embarked on a redrafting of the Draft Code with reference to IOSCO's principles.

[16] IOSCO FR06/12, p7
[17] IOSCO FR 06/12, p9
[18] http://www.g20mexico.org/index.php/es/comunicados-de-prensa/537-final-communique
[19] IOSCO FR 06/12, p8 and p34
[20] IOSCO FR06/12, pp8-9

There is no case for, and indeed clear disadvantages from, the EU steering a different course from IOSCO. Among these disadvantages would be:

- Creating regulatory inconsistencies between the world's financial markets;
- Acting contrary to European legislation and international conventions and treaties protecting intellectual property rights and thereby creating inconsistencies between protection given to IPRs relating to benchmarks as between Europe and elsewhere;
- Discouraging the establishment of new service suppliers within the EU; and
- Encouraging the relocation of existing suppliers to other jurisdictions leading to reduced transparency of European financial and commodity markets.

Argus Media notes that IOSCO has set up a board-level task force on financial market benchmarks with a broad-ranging mandate, including proposing how benchmarks relevant to financial markets should be overseen. The task force is expected to produce a consultation report early in 2013. Argus Media urges the Commission to support and await the outcomes of this initiative before it proceeds with any initiatives of its own regarding regulation of benchmarks.

(14) Argus Media is seriously concerned about the suggestion that the contribution of information by market sources could be regulated. Given the voluntary nature of information supply and the journalistic nature of the process, Argus Media's concerns are based on the market impact of such regulation, the likely impact on Article 10 (freedom of expression) of the European Convention on Human Rights, and on similar legal questions. Argus Media journalists identify prevailing market prices by taking a proactive role in gathering material from sources operating in the commodity markets including by phone, instant messenger and email to find out about their involvement in the market and the involvement of others with whom they trade. The journalists verify data by communicating with a very wide range of market participants, to cross-check information. The sources they need to contact do not remain constant, but vary as developments in the markets change.

- **The risks of reducing the amount of market-relevant information**.

Market sources, as well as their compliance and legal departments, are likely to decide that, rather than accepting and having to comply with a new level of regulation, it would be safer and simpler to discontinue voluntarily supplying information to journalists. The need for direct regulatory approval of each market source would inhibit journalists from responding efficiently to unforeseen market developments by seeking new sources of information. The result of regulating sources would be less market transparency for market participants and for Argus Media's broader clientele, whose interests the Commission should be mindful of.

- **Cross-border implications**.

Energy markets are global. Market information obtained by an Argus Media 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 as well as in one or more of the other countries. It would not be feasible for the EU to impose direct regulation on all of these sources.

- **Regulating the relationships between journalists and their market contacts would be inconsistent with European law**.

As noted in the European Court of Human Rights' June 2012 "Factsheet – Protection of journalistic sources", the Court has repeatedly emphasised that Article 10 (freedom of expression) of the European Convention on Human Rights "safeguards not only the substance and contents of information and ideas, but also the means of expressing it"[21]. By way of example, in a 2009 Decision, involving an allegation of market manipulation of financial data by a source, the European Court of Human Rights fully upheld the importance of the relationship between journalists and their sources against a challenge mounted on behalf of financial services regulators (*Financial Times Ltd and others v The United Kingdom (Application no 821/03)*). Argus Media urges the Commission to exercise considerable caution before intervening in this area.

[21] www.echr.coe.int/NR/rdonlyres/0856B8A0-D3A1-47B4-B969-6250E84F9F3D/0/FICHES_Protection_des_sources_journalistiques_EN.pdf

Box 4
(15) Who in your sector submits data for inclusion in benchmarks? What are the current eligibility requirements for benchmarks' contributors?
(16) How should panels be chosen? Should safeguards be provided for the selection of panel members, and if so which safeguards?
(17) How should surveys of data used in benchmarks be performed? What safeguards are necessary to ensure the representativeness and integrity of data gathered in this way?
(18) What are the advantages and disadvantages of large panels? Even in the case of large panels could one panel member influence the benchmark?
(19) What would be the main advantages and disadvantages of auditing of panels? Please provide examples.
(20) Where indices rely on voluntary contributions, do you consider that there are factors which may discourage the making of these contributions and if so why?
(21) What do you consider to be the advantages and disadvantages of mandatory reporting of data? Please provide examples.
(22) For entities contributing to benchmarks which are regulated by financial regulation, what would be the advantages and disadvantages of bringing their benchmark submissions under the scope of this framework?

(15) (17) On a daily basis, Argus Media journalists proactively contact a wide cross-section of market participants in each physical commodity market on which Argus Media reports, in order to gather, verify and confirm the widest possible set of transactional data, news and information on market developments. Depending on the physical market in question, this will typically include producers, generators, major industrial consumers, refiners, processors, importers and exporters, major wholesalers, shippers, trading companies and financial institutions active in physical commodity commerce, as well as intermediaries such as brokerage houses. Given the breadth and diversity in international energy and energy-related markets, in practice this means market participants in most countries globally and organisations as diverse as major state-owned oil producers in the Middle East or the former Soviet Union to independent niche LPG distributors in Poland and China; from ethanol producers in Brazil to base oil blenders in India and Taiwan; from coal exporters in Colombia and South Africa to fertiliser processors in Israel and the Ukraine.

IOSCO's PRA principles address the gathering of data and Argus Media agrees with IOSCO's objective, which is to ensure that PRAs have procedures in place to evaluate the status, credibility and legitimacy of sources of market data. To this end, the Argus Media Editorial Code of Conduct reaffirms best practice and principles in line with the highest standards of professional journalism, such as requirements to cross check all information by seeking additional sources; maintain a sense of fairness, balance and impartiality; and maintain and expand contacts with as many sources as possible. Further safeguards are set out in the Draft Code, which states: "As part of its price assessment processes, an IPRO [independent price reporting organisation] shall maintain controls to monitor for and detect data that is provided to the IPRO by market participants that does not conform to the IPRO's methodology." The Draft Code and the IOSCO PRA principles outline other safeguards which seek to ensure the representativeness and integrity of data gathered by price reporter journalists (see answers to box 2).

(16) Argus Media does not use panels for any benchmark price assessments. The use of panels has inherent vulnerabilities to manipulation and price distortion, because of the inability to journalistically interrogate sources to verify data. Panel pricing for benchmarks is structurally flawed and has been rejected in oil markets. For example, the Asian Petroleum Price Index (APPI) has been dropped as a crude index in Asia-Pacific. Looking at APPI, oil experts Robert Mabro and Paul Horsnell noted "a systematic bias in the panel's motivations which tend to produce prices that are consistently below genuine spot levels"[22]. The oil industry itself recognised the inherent weakness in APPI's panel-based methodology and dropped use of its indexes in favour of price assessments provided by independent PRAs.

(18) The size of a panel has no bearing on the inherent flaws of panel pricing.

(19) Auditing panels serves no purpose, because any panel system for benchmark creation is inherently flawed.

(20) Argus Media is concerned that regulation could become a major factor in discouraging the voluntary contribution of market data to journalists. IOSCO's final report on *Principles for Oil Price Reporting Agencies* said: "Because data are submitted on a voluntary basis, precipitous regulation of PRAs or

[22] Oil Markets and prices, OUP/OIES, 1993

requirements that all market participants who submit data to PRAs submit all of their transaction data potentially could result in some oil market participants to decrease or even cease their submission of data to PRAs."[23]

Argus Media shares IOSCO's concerns. In particular, Argus Media was seriously concerned about the text of Article 8(1)(d) of the proposed *Market Abuse Regulation,* which made no allowance for an honest mistake by, for example, a market source communicating information to an Argus Media journalist. Enacting regulation that would punish innocent mistakes by market sources would be "precipitous" in the sense that it would "result in some oil markets participants to decrease or even cease their submission of data to PRAs". Argus Media was concerned that, unless this anomaly was corrected, commodity companies' compliance and legal departments would respond by advising staff to avoid legal risks and to discontinue communicating with PRAs, undermining market transparency in energy markets. Argus Media is grateful and relieved that these concerns are now understood and is working with EU institutions on the appropriate form of wording to correct the anomaly.

Finally, and in order to reinforce this concern, we would refer to the US Federal Trade Commission's (FTC) language in dealing with the risk that "inadvertent errors" could lead to a loss of information about markets. FTC Commissioner J Thomas Roach stated: "The net result is that the Rule may chill oil companies from, among other things, voluntarily providing their data to independent data-reporting firms, as they do now, for fear that they may be held liable for an inadvertent omission. That would be unfortunate because at least in some circumstances, having abundant data of that sort can be pro-competitive." In response, the Rule states: "The extreme recklessness standard in Section 317.3(a) appropriately focuses that paragraph on conduct that presents an obvious risk of misleading buyers or sellers, and ensures that this provision does not reach inadvertent mistakes, which could have had the unintended effect of curtailing beneficial market activity."[24]

(21) Mandating (as opposed to encouraging) the communication of market information poses the same problems as regulating data contributions (see answer to box 3, question 14).

(22) Argus Media fully supports a prohibition on any action that intentionally manipulates or attempts to manipulate one of its commodity benchmarks.

Article 8(1)(d) of the proposed *Market Abuse Regulation* (MAR) will explicitly bring submission of data in relation to all benchmarks within scope of the regulation's anti-market-manipulation provisions.

In addition, the Remit regulation (EU 1227/2011) explicitly prohibits market manipulation in the wholesale power and gas markets. Remit states that "forms of market manipulation include.......deliberately providing false information to undertakings which provide price assessments or market reports with the effect of misleading market participants acting on the basis of those price assessments or market reports".

Alberto Pototschnig, director of new pan-European energy market regulator the European Agency for the Co-operation of Energy Regulators (ACER) recently started that "subject to the availability of the required resources from the EU budget and to the adoption of implementing acts by the European Commission", Remit "can ensure that consumers and other market participants can have confidence in the integrity of electricity and gas markets, that prices set on wholesale energy markets reflect fair and competitive interplay between supply and demand, and that no profits can be drawn from market abuse."[25]

Argus Media notes that MAR extends (as indeed does MAD) to all market participants, not just regulated financial entities. Therefore submission of benchmark data by all market participants in the commodities markets — whether regulated financial entity or otherwise — is within scope of MAR's regulatory framework.

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[23] IOSCO FR06/12, p8

[24] http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf

[25] Financial Times letters, 20 November 2012

Box 5
(23) Do you consider that responsibility for making adjustments if inadequate data is available should rest with the contributor of the data, the index provider or the user of the index?
(24) What is the formal process that you use to audit the submissions and calculations?
(25) If there are any weaknesses identified in the audit, who are they reported to and how are they addressed? Is there a follow up process in place?
(26) How often are submissions audited, internally or externally and by what means? Do you consider the current audit controls are sufficient? What additional validation procedures would you suggest?
(27) What are the advantages and disadvantages of a validation procedure? Please provide examples.
(28) Who should have the responsibility for auditing contributed data, the index provider or an independent auditor or supervisor?
(29) What are the advantages and disadvantages of making benchmarks a regulated activity? Please provide your arguments.

In the preamble to box 5, the Consultation Document is correct to state that some degree of discretion is necessary in publishing commodity assessments (which may or may not be adopted as indexes or benchmarks), in particular regarding "how much weight to give to particular transactions". However, Argus Media would never "incorporate news or other non-quantitative information into the index" and would never "have to incorporate an important announcement into the value of a benchmark" (2.5, Index calculations, p17). As explained above, a non-quantitative announcement would only ever affect Argus Media assessments if the markets reacted to the announcement and prices — as revealed in market data — had changed before the end of the assessment period.

The preamble also states that "gas indexes are used to price daily gas supply contracts but on many days there may be no transactions to produce the index" (2.5, p16). In Argus Media's experience of indexation used to price daily gas supply contracts, this statement is incorrect. The gas markets on which Argus Media currently reports in Europe are liquid and Argus Media invariably reports spot transactions in them from which deals-based indexes may be derived, with the possible exception of the Italian gas market which is still somewhat illiquid. Argus Media currently only produces spot deal-based indexes for the UK and Zeebrugge gas markets. However, gas market participants do not use such deals-based indexes to price supply contacts, using assessments instead for contract indexation. In conformity with IOSCO's PRA principles, these assessments reflect data on transactions, bids and offers at a specific time, so that supply contract indexation is not distorted by transactions earlier in the day that no longer reflect prevailing market conditions.

(23) In physical energy markets, Argus Media considers that media companies that publish market reports are best placed to make adjustments if inadequate data is available. As IOSCO recognises, a PRA should have "flexibility in using market data consistent with its methodologies"[26]. Argus Media provides freely published methodologies that explain how any adjustments are made, and seeks to obtain a broad range of information from market sources, buyers and sellers, allowing it to make any adjustments in line with its methodologies. This allows Argus Media to publish standardised, reliable and transparent price assessments for physical commodity markets that are naturally heterogeneous in character. In contrast, individual data contributors and index users have a more limited set of market information and are unlikely to see the whole picture. Unlike PRAs, contributors — whether market participants or brokers — and index users are neither independent of the market nor impartial.

(24) (26) (27) (28) Argus Media verifies data submitted through journalistic cross checking of information and through robust data checking procedures. This validation procedure is an essential part of the price identification and market reporting practice carried out by Argus Media journalists. Its central importance is described in the "Argus Media Editorial Code of Conduct"[27] under the heading "Accuracy" and in internal price reporting manuals used by Argus Media's journalists, which explain verification procedures. The price identification process is auditable. Transaction data provided by market participants are traceable and

[26] "A PRA should 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 as called for in 2.3(b)" IOSCO FR06/12, p13.
[27] http://www.argusmedia.com/About-Argus/~/media/Files/PDFs/Miscell/Global-Compliance.ashx

verifiable throughout the price identification process. Verifying data on a daily basis is the responsibility of Argus reporters and editors. Argus Media's global compliance officer carries out internal audits of the entire market reporting process — calculations, data and methodology —on a regular basis. This audit verifies that transaction data are properly collected and stored and confidentiality maintained; the methodology is being correctly applied; there are processes in place to produce accurate, objective, and reliable prices, and these are being consistently followed. Methodological practice is audited to ensure that it coincides with the published methodology. The Draft Code and the IOSCO PRA principles call respectively for compliance with the Code and principles to be audited by an external third-party auditor. IOSCO calls for these audits to be annual.

(25) The Argus Media global compliance officer reviews policies and procedures, performs audits on market reporting methodologies, and reports findings. The global compliance officer reports his findings to the Global Compliance Committee, a board committee chaired by an independent non-executive director. Where an audit identifies methodological or reporting weaknesses, these are rectified by editors and managers. The global compliance officer follows up to verify that the required improvements have been made, noting such improvements in the final audit report and updating the Global Compliance Committee accordingly.

(29) Neither IOSCO's final report on *Principles for Oil Reporting Agencies* nor *The Wheatley Review of LIBOR: final report* has recommended "making benchmarks a regulated activity" in the energy commodity sector.

Argus Media notes that IOSCO's final report on PRAs recommends a twin-track approach to implementation of the principles:
"1. Voluntary adoption and implementation of the principles by the 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 an assessment"[28].

Regarding track 1, Argus Media has already agreed to adopt and implement the IOSCO PRA principles. As noted in the response to question 12, Argus Media and two of its major competitors have published a Draft Code[29] that codifies and aligns best practice with respect to governance, conflicts of interest and transparency and they have embarked on a redrafting of the Draft Code with reference to IOSCO's principles. Regarding track 2, as IOSCO has pointed out, market authorities already have powers of enforcement over admission of derivatives contracts.

Argus Media commends IOSCO's twin-track approach to the Commission. There appears to be no justification for the EU to depart from it, given the international consensus based on the IOSCO principles and the self-regulatory Draft Code. As Wheatley notes, "many important benchmarks are global in nature, both in that they originate in, and are used across, many different jurisdictions. As a consequence there is likely to be a role for international co-ordination of work in relation to these benchmarks"[30]. The commodity benchmark agenda is global, and the responses to it likewise should be global and consistent to avoid the dangers of what the Commission's Consultation Document describes as a "patchwork of rules" (p2). Argus Media notes the co-ordination role agreed by members of the Financial Stability Board (FSB) in Tokyo on 10-11 October. As the Commission will be aware, the FSB will co-ordinate work on benchmarks by the UK FSA/FCA, IOSCO, the Bank for international Settlements (BIS) and the Commission itself[31].

Any departure by the EU from this co-ordinated international process would result in practical disadvantages as noted in the answer to question 13, such as:
- Creating regulatory inconsistencies between the world's financial markets;
- Acting contrary to European legislation and international conventions and treaties protecting intellectual property rights and thereby creating inconsistencies between protection given to IPRs relating to benchmarks as between Europe and elsewhere;
- Discouraging the establishment of new service suppliers within the EU; and

[28] IOSCO FR06/12, p8
[29] www.argusmedia.com/ipro
[30] The Wheatley Review of LIBOR: final report, §7.2, p53
[31] www.financialstabilityboard.org/press/pr_121011.pdf

- Encouraging the relocation of existing suppliers to other jurisdictions leading to reduced transparency of European financial and commodity markets.

Practical cross-border implications arise from the international nature of energy markets, as noted in the answer to question 14. Market information obtained by an Argus Media 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 as well as in one or more of the other countries. It would not be feasible for the EU to impose direct regulation on all of these sources.

Argus Media asks the Commission to bear two further points in mind:

1. The legal basis under the European Treaties for extending direct regulation to the editorial operations of media organisations.
2. The need to have regard to the IPRs of private sector publishers. Argus Media's published price assessments are not "public goods", as explained in the response to question 34.

Regarding the disadvantages of making price assessments (whether or not they are adopted as physical indexes or benchmarks) a regulated activity, the Commission should be aware that Argus Media is the owner of IPRs in connection with its benchmarks and the underlying data used to produce them. These consist of copyright, database right, rights in confidential information and trademarks.

Copyright is protected by:

(i) Directive 2001/29/EC on copyright and related rights in the information society (Copyright Directive);
(ii) Directive 96/9/EC on the legal protection of databases (Database Directive);
(iii) The Berne Convention;
(iv) The WIPO Copyright Treaty (WCT);
(v) The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

Database rights are protected by the Database Directive.

Rights in confidence are protected by TRIPS, article 39.

Trademarks are protected by the Trademark Directive 2008/95/EC and the Community Trademark Regulation 207/2009/EC and by TRIPS, articles 15-21.

Any regulation must not conflict with the European and international protection given to Argus Media's IPRs. In particular, compulsory licensing of benchmarks is liable to conflict with the above provisions.[32]

Box 6
(30) Is it possible and desirable to restrict the use of benchmarks? If so, how, and what are the associated costs and benefits? Please provide estimates.
(31) Should specific benchmarks be used for particular activities? By whom? Please provide examples.
(32) Should benchmarks developed for wholesale purposes be used in retail contracts such as mortgages? How should non-financial benchmarks used in financial contracts be controlled?
(33) Who should have the responsibility for ensuring that indices used as benchmarks are fit for purpose, the provider, the user (firms issuing contracts referenced to benchmarks), the trading venues or regulators?

(30) (33) IOSCO *Principles for the Regulation and Supervision of Commodity Derivatives Markets* already mean that market authorities will "want to determine that a PRA-assessed price that is referenced by the terms of a derivatives contract accurately reflects the transactions in the market that it purports to measure, the data are sufficient to represent that market and such data are bona fide."[33] Market authorities are therefore already encouraged to limit the use of benchmarks to those that are well designed. The

[32] A current example is the proposed Markets in Financial Instruments Regulation (MiFIR) Article 30, which attempts to establish a compulsory licensing regime and associated provisions. The same article would also, for the first time, constitute potential interference by a European financial services regulatory authority (ESMA) over the editorial content of media companies. Argus Media respectfully asks Commission Services to give very careful consideration to the legal implications of MiFIR Article 30 as they relate to media publishers such as Argus Media.
[33] IOSCO FR06/12, p6

IOSCO PRA principles add to the contract design principles. In this sense, market authorities are already encouraged to "be able to demonstrate that the price series or index that is referenced as a settlement price in a physical commodity derivatives contract is a reliable indicator of transactions in the underlying physical market"[34].

(31) (33) Market authorities are unable to initiate the widespread adoption of a benchmark in commodity markets. The professional users of price indexes will determine which assessments to adopt as benchmarks, which they will continue to use, and for which activities. As IOSCO chair Masamichi Kono said in September: "Ultimately, the choice of benchmarks for financial contracts must be largely market driven."[35] The role of professional price reporting companies is to provide competition in assessment publishing, offering transparency and a choice of indexes. Market authorities can then utilise IOSCO's principles to consider whether financial instruments for which they have oversight are using an index as a price benchmark that is sufficiently reliable.

(32) It should be noted that use of commodity benchmarks is limited to professional companies in wholesale markets and commodity benchmarks are not used at the retail level except where governments use them to regulate retail market price levels. In the EU, only Belgium uses commodity benchmarks for this purpose.

Box 7
(34) Do you consider some or all indices to be public goods? Please state your reasons.
(35) Which role do you think public institutions should play in governance and provision of benchmarks?
(36) What do you consider to be the advantages and disadvantages of the provision of indices by public bodies?
(37) Which indices, if any, would be best provided by public bodies?
(38) What conflicts of interest would arise in the provision of indices by public bodies? What would be the best way of avoiding these conflicts of interest?

(34) Argus Media's published price assessments (whether adopted as physical indexes or not) are not public goods and this is also true of price assessments published by all PRAs. These price assessments are proprietary work product. Argus Media's price assessments are developed on the basis of extensive financial and intellectual investment and expertise over more than 40 years. Argus Media asserts protectable intellectual property rights in its work products including price assessments and related market reports, publications, databases and the underlying data and material used to generate price assessments.

Argus Media's price assessments and underlying data constitute "possessions" that are accorded fundamental legal protections such as under the EU Charter of Fundamental Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and WTO provisions on TRIPS (see below). EU law also recognises that owners of intellectual property rights (IPRs) have certain exclusive rights.

Specifically, Argus Media's price assessments and underlying data are not public goods because they are protected by one or more private intellectual property rights,[36] in particular, copyright, database rights, rights in confidence and trademarks. These rights are protected by a number of international treaties to which the European Union and/or its various member states are signatories and by European legislation.

(i) Copyright is protected by Directive 2001/29/EC, Directive 96/9/EC, the Berne Convention, the WIPO Copyright Treaty and TRIPS.
(ii) Database rights are protected by Directive 96/9/EC.
(iii) Rights in confidence are protected by article 39 of TRIPS.
(iv) Directive 2008/95/EC protects trademarks and Regulation 2009/207/EC protects Community trademarks. They are also protected by TRIPS, articles 15-21.

[34] Principles for the Regulation and Supervision of Commodity Derivatives Markets, IOSCO FR07/11, September 2011, pp21-22
[35] www.iosco.org/library/speeches/pdf/20120924-Kono.pdf
[36] The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), in the preamble, declares that "intellectual property rights are private rights"

Note on response to question 35: Argus Media's response on this question is provided in two parts: comments on aspects relating to provision of benchmarks (see grouped response to questions 35-38), and comments on aspects relating to governance of benchmarks (see subsequent stand-alone response).

(35) (36) (37) (38) Price assessments (whether adopted by third parties as physical indexes or benchmarks or neither) for physical commodity markets are already extensively provided for by the private sector and there is effective competition and choice. There is a high degree of competition among PRAs, which produce price assessments that are highly substitutable. As a result, there is no market failure in the provision of price assessments for physical commodity markets.

Argus Media believes that there is no justification for public body provision of benchmarks in the commodities sector, whether through expropriating or nationalising PRAs' private property to vest their price assessments in a public institution or through directly establishing a public body to provide price assessments.

Argus Media cannot comment in detail regarding provision of specific indexes in sectors beyond commodities, but in general terms it considers that wherever a market is adequately served by the private sector, there is unlikely to be a justification for the state to establish provision of a good or service, which would amount to a market distortion. As IOSCO chair Masamichi Kono said in September: "Ultimately, the choice of benchmarks for financial contracts must be largely market driven."[37]

In heterogeneous physical commodity markets, price identification requires a high degree of expertise, as recognised by IOSCO[38], and is best provided by an open competitive private sector. Price identification in physical commodity markets happens through the journalistic investigation of market activity. The publication of price assessments is only one component of a larger and integrated journalistic activity whose objective is the bringing of transparency to physical commodity markets. This transparency is provided through the integrated publication of market commentary, news and analysis, and prices. This is an integral work product, one component of which is the publication of price assessments.

Argus Media is a media company. The important role of the media is safeguarded by numerous protections, including free speech, some of which are referred to in Recital 44 of the *Market Abuse Directive* (2003/6/EC): "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media." These protections were upheld, specifically in relation to financial news media, by the European Court of Human Rights in the *Case of the Financial Times Ltd and Others v The United Kingdom* in 2009 (Application no. 821/03). It would breach fundamental freedoms to strip a media organisation of a component of its journalistic work product — ie price assessments — or to ban a media organisation from their production and/or for its journalists to be prevented from contacting market sources, and instead to vest these products and activities in a public body. More generally, questions of regulation of any aspect of PRA activity must recognise and take full account of the fundamental protections and freedoms accorded to media organisations.

The Consultation Document states (section 4.1, p21) that "independent index providers produce indices which are licensed for a profit. However, conflicts of interest and commercial incentives may mean that these […] commercial entities are less motivated to question submissions or impose stringent audit trails and otherwise ensure the integrity of their index." This assertion is not supported by any evidence and is demonstrably false. PRAs are fully incentivised to ensure that their price assessments are as accurate as possible, since use of any particular price assessment — for example as a reference in a commercial energy supply contract — will only be possible if it the price assessment is acceptable both to the buyer and the seller. If the price assessment does not command the confidence of one side of the transaction, that party will refuse to enter into the transaction. PRAs are independent and have no vested interest in the level of the price in the assessments that they publish since they do not trade in the markets. Further, PRAs operate in a competitive sector which keeps them highly motivated to operate to the highest standards. This means a PRA is always fully incentivised to ensure that it produces price assessments to the highest degree of independence and accuracy, in accordance with its applicable publicly-available methodology.

[37] www.iosco.org/library/speeches/pdf/20120924-Kono.pdf
[38] "IOSCO also appreciates that PRA price assessment processes involve analyses of complex and varied oil markets and products and produce market views that promote price discovery in the physical oil markets." IOSCO FR06/12, p5

Indeed, within commodity markets it is regularly the case that public sector data are discredited, precisely because of the degree of political interference and lack of independence of public bodies. In contrast, data provided by PRAs are widely regarded as more reliable. For example, official crude production data published by various Opec member countries are regarded as unreliable, even by Opec itself. Therefore, Opec uses what it describes as “secondary sources” — ie independent media including PRAs — when reporting crude production levels of Opec members. Another example is exports of crude oil and refined products from the former Soviet Union, where in place of official data the IEA and Opec use monthly data supplied by Argus Media.

More broadly, the provision of reference data by public bodies has not proved to be free of risk of manipulation or conflicts of interest. There are many examples of official bodies publishing discredited data, such as the 2004 infringement procedure opened by the Commission against Greece concerning eleven separate issues of misreported deficit figures. And public authorities may themselves be market participants as major purchasers of goods and services and therefore have an interest in a high or lower price.

Market participants may also be less willing to share information with public authorities than with independent journalists acting in accordance with the highest standards of journalistic best practice including editorial codes of conduct and ethics policies, for fear that the confidentiality of information provided by market participants will not be protected and in particular will be shared with other public agencies.

(35) The question of governance of PRAs has been thoroughly examined by the IOSCO consultation process regarding PRAs over the past two years. IOSCO has already examined in detail the work of PRAs and in particular the PRA price assessments used as references in derivatives contracts — ie PRA benchmarks. IOSCO has concluded that[39]:

- PRAs play a legitimate and beneficial role, including bringing transparency to naturally-opaque oil markets;
- PRAs’ work in reporting the diverse international oil markets is complex;
- PRA benchmarks and activities do not raise systemic risks;
- there is no case for precipitous regulation of PRAs, and such regulation would weaken commodity market transparency; and
- PRAs need a degree of public accountability and IOSCO specifically addresses this through the development of a set of PRA principles.

IOSCO makes no suggestion that PRA activity would be better provided by a public body.

Argus Media has long recognised a responsibility of public accountability and has implemented many measures to provide this. Most recently, it has taken a leadership role in the development of an industry code of best practice — the Draft Code — with a requirement for periodic independent external audit, further underscoring public accountability. This approach has been explicitly endorsed by Martin Wheatley[40], the chief executive designate of the UK’s FCA, which is due to succeed the FSA.

As IOSCO chair Masamichi Kono said in September: “A one-size-fits-all approach [for benchmark supervision] is neither desirable nor appropriate”[41]. He noted that a self-regulatory framework may be acceptable, pointing out that “IOSCO has now set up a board-level task force within its board to conduct work [on benchmarks] from the standpoint of financial market regulators. The mandate for this task force [includes] to develop global policy guidance and principles, including those related to effective self-regulation.”[42]

The Commission’s Consultation Document (p25) states: “Where action is needed, it would therefore be desirable to ensure a consistent and co-ordinated approach at the international level. Measures at an international level are already being discussed by bodies such as IOSCO [footnote reference to IOSCO press release: “IOSCO consults on oil price reporting agency oversight”, 1/3/12] and the FSB.”

Argus Media would like to re-draw the Commission’s attention to the detailed work already completed by IOSCO (and referenced by the Commission) in examining PRAs and developing the PRA principles. This work by IOSCO constitutes a “consistent and co-ordinated approach at the international level” in regards

[39] IOSCO FR06/12
[40] The Wheatley Review of LIBOR: final report, 7.25-7.26
[41] www.iosco.org/library/speeches/pdf/20120924-Kono.pdf p3
[42] www.iosco.org/library/speeches/pdf/20120924-Kono.pdf pp4-5

PRAs. No additional measures at a European level are necessary or justified in regards Argus Media and its fellow independent media organisations that publish price assessments for the physical commodity markets.

> **Box 8**
> (39) What are the likely transition challenges, costs and timelines for relevant benchmarks? Please provide examples.
> (40) How do you consider that the adoption of new benchmarks could be ensured? Is this best framed in terms of encouraging or mandating the use of particular benchmarks?
> (41) How can reforms of the regulation of benchmarks be most easily implemented?
> (42) What positive or negative impacts, if any, do you see on small and medium-sized enterprises of the possible regulation of indices, and how could any negative impacts be mitigated?
> (43) Are there other impacts which should be considered? If so please specify the nature of these impacts and provide evidence.

(39) (40) (41) As discussed above in relation to box 7 questions, price assessments for international physical commodity markets are already extensively provided by the private sector, and there is effective competition and choice. There is a high degree of competition among PRAs, which produce price assessments that are highly substitutable. There is therefore no market failure and no justification for public intervention to establish or promote new benchmarks.

IOSCO has already undertaken detailed work looking at PRA benchmarks and has developed a set of PRA principles which detail a set of recommended practices for PRAs that produce assessments which are referenced by oil derivatives contracts"[43]. The PRA principles "establish a benchmark against which market authorities can determine whether a PRA assessed price referenced or proposed to be referenced in an oil derivatives contract has been constructed under procedures that reflect the PRA principles. A negative determination makes it likely that a market authority would conclude that the assessed price was constructed through processes that undermine the reliability of that price as an indicator of physical market values."[44]

IOSCO makes clear that "PRAs are encouraged to implement the principles more generally to any commodity derivatives contract that references a PRA assessed price without regard to the nature of the underlying"[45], and that market regulators intend to have regard to the PRA principles for all PRA benchmarks.

IOSCO's work already establishes a consistent and co-ordinated international regime for PRA benchmarks. No additional measures are therefore necessary or justified in regards Argus Media and its fellow independent media organisations that publish price assessments for the physical commodity markets.

(42) Argus Media and its fellow PRAs contribute to European economic growth and job creation. Argus Media has grown quickly from a small and medium-sized enterprise (SME) into an independent media organisation with more than 450 staff. At a time when the European economy is fragile with a huge challenge for policymakers to address unacceptably high unemployment levels in the EU, it is ironic that the Commission should be suggesting that the work product of a company that has grown from an SME may be public goods. Pursuit of this flawed suggestion would directly harm a thriving, job-creative sector of the real economy, reduce competition and choice in the market, reduce existing transparency in physical commodity markets, and stifle innovation and the creation of future benchmarks since there will be little incentive for EU-based PRAs to continue providing their valuable services. It would additionally weaken EU-based PRAs by putting them at a competitive disadvantage with respect to their non-EU competitors (see below for further discussion).

Argus Media would instead encourage the Commission to champion SME growth, work to protect and reinforce private-sector IPRs, and defend fundamental freedoms such as the freedom of expression and the freedom to conduct or run a business, a fundamental economic freedom recognised by Article 16 of the EU Charter of Fundamental Rights.

[43] IOSCO FR06/12, p7
[44] IOSCO FR06/12, p8
[45] IOSCO FR06/12, p7

(43) The negative impact of any precipitous, disproportionate and unjustified measures should not be underestimated. Transparency in international commodity markets is fragile and could easily be weakened by ill-considered proposals.

A recent illustration of this was the Commission's MAR proposals, which in their initial form would have undermined the integrity of PRA benchmarks. The proposals made no allowance for honest mistakes in the anti-manipulation provisions. In consequence, MAR would have resulted in market participants discontinuing communication with PRAs to avoid legal risk, since reporting to PRAs by participants in the international commodity markets is voluntary. Argus Media is relieved and grateful that this is now understood and is working with the EU institutions on the appropriate form of redrafting to MAR Article 8(1)(d) to correct this anomaly.

Box 9

(44) In which countries are benchmarks used in your sector produced? From which countries are data used for the production of benchmarks in your sector? In which countries are benchmarks used in your sector?

(45) Are there non-EU benchmarks which could serve as substitutes? Are there non-EU benchmark providers which could produce similar benchmarks?

(46) Are there international benchmarks which could serve as substitutes for national benchmarks?

(44) (45) (46) Benchmarks for international commodity markets cover, by their nature, a panoply of regional and sectoral markets around the world. These markets are reported by many PRAs, some EU-based, but with a significant proportion outside the EU. Since these commodity markets are by their nature international (with some exceptions), there is no restriction on the physical location of a PRA in publishing price assessments for any given market (in the same way that market participants in any given commodity market are often not physically based in that market).

Argus Media therefore encourages the Commission to be fully cognisant that to impose unilateral requirements on EU-based PRAs would put them at a competitive disadvantage with respect to non-EU competitors.

As the Commission's Consultation Document notes (p25): "Where action is needed, it would therefore be desirable to ensure a consistent and coordinated approach at the international level. Measures at an international level are already being discussed by bodies such as IOSCO [footnote reference to IOSCO press release: "IOSCO consults on oil price reporting agency oversight", 1/3/12] and the FSB."

Argus Media would like to re-draw the Commission's attention to the detailed work already completed by IOSCO (and referenced by the Commission) in examining PRAs and developing the PRA principles. This work by IOSCO constitutes a "consistent and co-ordinated approach at the international level" in regards PRAs. No additional measures at a European level are necessary or justified in regards Argus Media and its fellow independent media organisations that publish price assessments for the physical commodity markets.