

**EUROPEAN ALLIANCE  
OF NEWS AGENCIES**



**EFJ** | European  
Federation of  
Journalists

**ENPA**  
EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION

**EMMA** | EUROPEAN  
MAGAZINE MEDIA  
ASSOCIATION

**EPC** | European  
Publishers  
Council

## **EANA, EBP, EFJ, EMMA, ENPA and EPC Position paper**

### **on a Proposal for a Regulation on indices used as benchmarks in financial instrument and financial contracts (COM(2013) 641)**

#### **Introduction**

EANA, the European Alliance of News Agencies, EBP, the European Business Press, EFJ, the European Federation of Journalists, EMMA, the European Magazine Media Association, ENPA, the European Newspaper Publishers' Association and EPC, the European Publishers Council are concerned that the Commission proposal for a "Benchmarking Regulation" **will have a significant impact on press freedom and freedom of expression.**

As the Commission proposal for a Benchmark Regulation includes a wide definition of "benchmarks" and **does not explicitly exclude the press or other media and journalists from its scope**, there is a serious risk that journalistic activity resulting in information used as a reference for i) a financial instrument, ii) a financial contract, or iii) to measure the performance of an investment fund, will fall under the scope of the Regulation.

Journalists and press publishers across Europe are therefore extremely concerned that the Commission proposal would interfere with the protection of journalistic sources and put press freedom at risk.

Financial journalism plays an important role in bringing transparency to European financial markets, thereby **safeguarding the interests of consumers, business and market professionals**. It is essential that this role is not undermined and that the media is not put in a position whereby they are forced to discontinue providing this information because somebody may potentially use it as a benchmark, rather than for just information purposes.

EANA, EBP, EFJ, EMMA, ENPA and EPC would like to highlight the following points in particular in this paper:

#### **KEY CONCERN FOR MAGAZINE AND NEWSPAPER PUBLISHERS AND JOURNALISTS**

It is important that any future regulation on **Benchmarking clarifies that it does not apply to journalists, the press and other media**. Recital 14 and 41, even though recognising the importance of freedom of expression and press freedom, does not cover all journalistic activities. It is essential to avoid any legal uncertainty and misinterpretation that could interfere with vital journalistic freedoms in financial reporting as a whole.

## 1. Impact of the draft Regulation on Benchmarking on press freedom

If information published in a newspaper or magazine, created through journalistic activities is used as a benchmark, it might fall under the scope of the Regulation – **even if the journalists developing the information are not aware that their information is being used as a benchmark.** The Impact Assessment explains, furthermore, the intended broad scope: *“in order to ensure a clear and comprehensive application of the Regulation, the scope is not dependent on the nature of the input data i.e. whether the input data is an economic (e.g. a share price) or non-economic (e.g. a weather parameter) number or value.”* **The Regulation could therefore also affect publications that carry non-economic data.**

Merely the publication or reference to a benchmark provided by others as part of journalistic activities is exempted from the scope of the regulation as long as there is no control over the provision of the benchmark. This exemption does not apply to the publication of information which itself has been produced by journalists using information from their journalistic sources and which is then used as a benchmark.

As a consequence, **the sanctions regime of the regulation**, including potentially very substantial fines, will apply to information provided by journalists and would put reporting about financial issues at risk. If the information provided by a newspaper or magazine is used as a benchmark it will no longer be regarded as journalistic content, protected by constitutional freedoms.

A publisher might therefore risk being considered as a regulated ‘**benchmark administrator**’, unless he provides a notification to ESMA that he does not consent to the information being used as a benchmark every time a newspaper or a magazine is notified that an index or price assessment could be used as a basis of a contract.

If a publisher was ultimately considered to be a “**benchmark administrator**” ([art. 3](#)) this would mean being regulated by the national financial services authority and being required to, amongst other things:

- Control journalistic sources and report any suspicious information to national financial services authorities ([art. 8\(2\)](#))
- Establish robust and transparent governance arrangements, including clear organisational structures, record keeping, auditing, and complaints procedures ([art. 5](#))
- Conclude legally enforceable Codes of Conduct with all sources of information, who would have to commit to establishing systems and controls around providing information. Benchmark administrators could no longer use sources who have not signed codes of conduct ([art. 9\(1\)](#))
- Publish the ‘input data’ used when creating a benchmark ([art. 16\(1\)](#)).
- Provide a ‘benchmark statement’ which “describes or lists the purposes for which it is appropriate to use the benchmark and the circumstances in which it may cease to be fit for such purposes”([art.15\(b\)](#)).
- Liaise with ESMA on the basis of a notification from a competent authority that an index is being used as a reference to a financial instrument ([art. 25](#))

As a consequence, the draft Regulation on Benchmarking will seriously undermine the relationship between journalists and their market sources. Once a press company becomes a benchmark administrator, the Regulation limits contact with third parties/sources to those that have signed codes of conduct.

The Regulation would also require journalists to control their sources and report suspicious information to the authorities. Failure to do so by the journalists could result in sanctions being applied. Publishers falling under the scope of the Regulation would therefore lose the ability to refuse to disclose sources and would be required to cooperate with financial regulators.

Publishers therefore could potentially be indefinitely contacted by the regulator considering that the scope goes beyond commodities to credit agreements, mortgages etc.

## **2. Respect for press freedom as reflected in the Market Abuse Regulation**

There are close connections between the Benchmark Regulation and the upcoming Market Abuse Regulation since both initiatives aim at regulating the dissemination of certain financial and market related information, to prevent market manipulation and increase transparency for consumers.

However, it is important to underline that the upcoming Market Abuse Regulation, on which the European Parliament and Council found an agreement in June 2013, includes a new recital and a new article that guarantee that the press cannot be regulated in the same way as the financial sectors because of the implications that the draft Regulation would have on press freedom, editorial independence and the protection of sources. An explicit exemption has therefore been agreed (Recital 39 and Article 15§3).

Whilst it is important that any wrongdoing involving illegal price-fixing or rigging is detected and prevented, as with the Market Abuse Regulation, it is necessary that press freedoms are protected, in particular the **vitaly important protection of confidential journalistic sources** (as confirmed in the case of *The Financial Times and Others v UK (2009)*).

As outlined in discussions on the Market Abuse Regulation, in any democratic society and market economy, **regard must always be to the fundamental right to receive and impart information freely without State interference**, in accordance with Article 10 of the ECHR.

We remain at your disposal for any further information you may need on this issue.

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