

**EUROPEAN ALLIANCE
OF NEWS AGENCIES**



EFJ | European
Federation of
Journalists

ENPA
EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION

EMMA | EUROPEAN
MAGAZINE MEDIA
ASSOCIATION

EPC | European
Publishers
Council

Press Release

LEADING COUNSEL'S OPINION ADVISES THE MEDIA THAT DRAFT EU "LIBOR" REGULATION WOULD BE UNLAWFUL WITHOUT CLEAR MEDIA EXEMPTION

Key vote due in the European Parliament on 17 February 2014

A controversial draft EU Regulation designed to restore confidence in financial benchmarks^[1] following the LIBOR and EURIBOR scandals is set to undermine press freedom and journalists' right to protect their sources, if MEPs fail to adopt important amendments to the proposal on 17th February.

In an Opinion obtained this week from three leading UK lawyers *led by The Honourable Michael J Beloff QC* the media is advised that the Draft EU Regulation would be unlawful and therefore vulnerable to challenge in the European Court,¹ if adopted in its current form without an exemption for the media.

Clear amendments to the Draft Regulation that exempt the media have been proposed by Syed Kamall MEP within the Economic and Monetary Affairs (ECON) Committee of the European Parliament which is due to vote on the draft report on the draft Regulation from Sharon Bowles MEP on Monday, 17th February.

In line with the advice of counsel's opinion a coalition of leading European publishing and journalists' associations (EANA, EBP, EFJ, EMMA, ENPA and EPC)^[2] is calling on MEPs to adopt Syed Kamall's amendments that would exempt the press, other media and journalists from the Regulation. The European Parliament Plenary vote is expected to take place on 3rd April.

Michael J Beloff QC acknowledges that the objectives of the Draft Regulation are legitimate but its scope is so wide that it catches journalism. This is because journalistic material may become a "benchmark" within the meaning of the Draft Regulation depending on how it is used. How this material is used may be outside the control of the media organisations in question, yet media organisations and journalists will be subject to licensing requirements and oversight by the financial services regulators, armed with search and seizure powers.

¹ The European Court comprises the Court of Justice of the EU and the General Court of the EU.

This would have a chilling effect on media reporting and journalistic sources. In fact, by treating media organisations (which do not have an inherent conflict of interest) in the same way as traditional benchmarking bodies (which may have such a conflict), the Draft Regulation discriminates against those media organisations. [A summary of the legal Opinion is attached for reference.](#)

Director of the European Federation of Journalists (EFJ) Renate Schroeder said: “As the opinion correctly points out the Draft Regulation would restrict the ability of media organisations to continue the work of financial reporting. The obligation to publish sources will make it impossible to obtain useful information on a confidential basis.”

On behalf of the coalition of press and business publishers, European Publishers Council (EPC) Executive Director Angela Mills Wade said: “Our legal advice confirms our worst fears that media organisations will be subject to licensing requirements and oversight by the financial services regulators, armed with search and seizure powers. These regulators, which will not have media expertise, may impose severe financial penalties on media organisations and their parent companies. These restrictions will have a chilling effect on the exercise of free speech rights by media organisations which operate in this area.”

Creating an important precedent, an earlier vote on 30th January on the Industry, Research and Energy Committee’s Opinion - prepared for the ECON Committee in advance of their own vote, included key amendments recognising the need to safeguard media freedom in line with exemptions for journalistic purposes in EU Market Abuse legislation [\[3\]](#). This followed similar discussions with the media, resulting in the agreement that 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 European Court of Human Rights.

For further information, including details on the proposed amendments, please contact Heidi Lambert on Tel: [+44 7932 141 291](tel:+447932141291) or the organisations listed below:

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ENDS

11th February 2014

Notes for Editors:

[1] Indices used as a reference price for financial instruments, contracts or to measure the performance of an investment fund, for example

[2] Media Coalition:

EANA: European Alliance of Press Agencies

EBP: European Business Press

EFJ: European Federation of Journalists

EMMA: European Magazine Media Association

ENPA: European Newspaper Publishers Association

EPC: European Publishers Council

[3] Adopted in early 2003, the [Market Abuse Directive](#) (MAD) introduced a comprehensive framework to tackle insider dealing and market manipulation practices, jointly referred to as "market abuse". The Directive aims to increase investor confidence and market integrity by prohibiting those who possess inside information from trading in related financial instruments ("insider trading"), and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades that result in abnormal prices ("market manipulation").

Summary of the legal Opinion from the Honourable Michael J. Beloff QC is in the annex below.

Annex

RE: PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON INDICES USED AS BENCHMARKS IN FINANCIAL INSTRUMENTS AND FINANCIAL CONTRACTS

JOINT OPINION

We are asked to advise the European Publishers Council (“EPC”) and the Professional Publishers Association (“PPA”) as to whether the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Indices used as Benchmarks in Financial Instruments and Financial Contracts, COM(2013) 651 final, if adopted in the form proposed by European Commission on 18 September 2013 (“the Draft Regulation”), would be lawful. For the reasons set out below, we are of the view that it would not be lawful, and would be vulnerable to challenge in the European Court.²

SUMMARY

- **If adopted in its current form, the Draft EU Regulation on Indices used as Benchmarks in Financial Instruments and Financial Contracts would be unlawful.**
- **The objectives of the Draft Regulation are legitimate but its scope is so wide that it catches journalism. Journalistic material may become a “benchmark” within the meaning of the Draft Regulation depending on how it is used. How this material is used may be outside the control of the media organisations in question.**
- **The Draft Regulation will severely restrict the ability of media organisations to continue this journalistic work. The obligation to publish sources will make it impossible to obtain useful information on a confidential basis. The publication of such confidential information also risks damaging the economic interests of the sources.**

² The European Court comprises the Court of Justice of the EU and the General Court of the EU.

- **Media organisations will be subject to licensing requirements and oversight by the financial services regulators, armed with search and seizure powers. These regulators, which will not have media expertise, may impose severe financial penalties on media organisations and their parent companies. These restrictions will have a chilling effect on the exercise of free speech rights by media organisations which operate in this area.**
- **For such onerous restrictions EU law requires particularly compelling justification. That is absent in the Draft Regulation. The restrictions imposed on media organisations engaged in journalistic activities are not appropriate or necessary in a measure designed to regulate benchmarks in financial instruments and financial contracts (e.g. LIBOR). In fact, by treating media organisations (which do not have an inherent conflict of interest) in the same way as traditional benchmarking bodies (which may have such a conflict), the Draft Regulation discriminates against those media organisations.**
- **The European Commission's own (very brief) legal analysis, contained in an Annex to its Impact Assessment, demonstrates an incomplete understanding of European law safeguarding fundamental rights and freedoms including, most critically, freedom of expression. The European Commission has failed to demonstrate that the proposed restrictions on fundamental rights and freedoms are objectively justifiable or proportionate. The harm that will be done to freedom of expression in the financial journalism sector will plainly outweigh whatever negligible benefits (if any) the restrictions may produce. On any view, they are not the least restrictive means to secure the objectives of the Draft Regulation.**
- **The Commission has failed to consider whether the measures proposed will, in the context of media organisations, achieve the ends which the Commission seeks to achieve: namely, market integrity and a high level of consumer protection. If adopted in its present form, the measures proposed in the Draft Regulation may in fact have precisely the opposite result.**

- **Most significantly, the EU legislature is required to demonstrate that it has undertaken a reasoning exercise that ensures a fair balance between the stated objectives and the interference with fundamental rights and freedoms. The absence of evidence that this exercise has been conducted is fatal on the issue of proportionality.**
- **Amendments to the Draft Regulation that exempt the media have been proposed within the European Parliament. These would address the problems set out above. If these amendments are not adopted, and the Draft Regulation is adopted in its current form, it is vulnerable to annulment by the Court of Justice of the EU.**

THE HONOURABLE MICHAEL J. BELOFF QC

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10 February 2014

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