

**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.¹

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.**

¹ 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.

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10 February 2014

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The full Opinion is available on request from the EPC: angela.mills-wade@epceurope.eu