RESPONSE TO QUESTION 13 OF ECON QUESTIONNAIRE ON MIFID 2 /MIFIR

This response is submitted jointly on behalf of MSCI Inc, The McGraw-Hill Companies, Inc, and Argus Media Limited and is confined to Question 13 of the ECON Questionnaire on MiFID 2 (the **Directive)/**MiFIR (the **Regulation**). Question 13 asks the following in relation to Article 30 of the Regulation:

> *Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?*

Please see below for a brief description of the business interests of the signatories to this response. The response is set out in full below in the format prescribed by the ECON Questionnaire.

MSCI INC.

MSCI Inc. is a provider of investment decision support tools to investors globally, including asset managers, banks, hedge funds and pension funds. MSCI products and services include indices, portfolio risk and performance analytics, and governance tools.

The company's flagship product offerings are: the MSCI indices; Barra multi-asset class factor models, portfolio risk and performance analytics; RiskMetrics multi-asset class market and credit risk analytics; ISS governance research and outsourced proxy voting and reporting services; FEA valuation models and risk management software for the energy and commodities markets; and CFRA forensic accounting risk research, legal/regulatory risk assessment, and due-diligence. MSCI is headquartered in New York, with research and commercial offices around the world.

THE MCGRAW-HILL COMPANIES, INC.

The McGraw-Hill Companies is a leading global financial information and education group with interests in both the provision of energy and commodities price assessment and information services for the oil, natural gas, electricity, emissions, nuclear power, coal, petrochemical, shipping, and metals markets, and in the provision of globally-recognised benchmark portfolio indices.

The group is headquartered in New York and has more than 280 offices in 40 countries.

ARGUS MEDIA LIMITED

Argus is a leading provider of price assessments, business intelligence and market data for the global crude oil, petroleum products, gas, LPG, coal, electricity, biofuels, biomass, emissions, fertilizer and transportation industries.

Argus' proprietary assessments of open-market physical commodity prices are extensively used as price references in long-term supply contracts for physical commodities, as independent references for taxation purposes, as underlying indexes for commodity derivatives, and for a wide range of investment and market analysis purposes. Argus is a privately held UK-registered company headquartered in London, with 18 offices around the world.

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed

comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu by 13 January 2012.

Name of the person/organisation responding to the questionnaire	**MSCI Inc, The McGraw-Hill Companies, Inc, and Argus Media Limited**

Theme	**Question**	**Answers**
Scope	1. Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	
	2. Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	
	3. Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4. Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	
Corporate governance	5. What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	

Organisation of markets and trading	6.	Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	
	7.	How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	
	8.	How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	
	9.	How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	
	10.	How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	
	11.	What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	
	12.	Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	
	13.	Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	**Please see below for our detailed thoughts on this question.**
	14.	What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could	

		make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	
Investor protection	15.	Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	
	16.	How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	
	17.	What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	
	18.	Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	
	19.	Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	
Transparency	20.	Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	
	21.	Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	
	22.	Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How	

		can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	
	23.	Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	24.	What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	
	25.	What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	
Horizontal issues	26.	How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	
	27.	Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28.	What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	
	29.	Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	30.	Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	
	31.	Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	

Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article:**30**	**RESPONSE TO QUESTION 13 OF ECON QUESTIONNAIRE ON MIFID 2 /MIFIR** **Introduction** 1. This response is focused on the negative impact of the proposed access provisions in Article 30 on independent owners of indices, price assessments and other "benchmark" data (referred to in this response as **IIPs** and **Benchmarks** respectively) and the materially negative effects that Article 30 will have on the private intellectual property rights of IIPs, and therefore in turn on investment, innovation and competition in the market for independent Benchmark services. 2. We refer to "independent" in this context to mean Benchmark providers that are not also providers of trading and clearing services or affiliates of such providers. The IIPs responsible for the submission of this response strongly oppose Article 30 on the basis that it would fundamentally undermine the rights of private commercial interests operating within the European Union to create and commercialise their proprietary work product and intellectual property (**IP**) rights (subject always to the application of existing mechanisms for addressing anti-competitive practices). 3. We recommend that Article 30 be removed in its entirety from the MiFIR proposals on the basis that (a) it would be a disproportionate and inappropriate means of seeking to achieve its stated objectives (that is: to prohibit discriminatory practices, to increase competition, to lower costs, to eliminate inefficiencies and to foster innovation), (b) in any event it is highly questionable whether those objectives would in fact be achieved at all, and (c) we believe it is likely that Article 30 would in fact reduce competition, raise costs and discourage innovation. 4. It is difficult to see how Article 30 might be amended or qualified in a way that effectively mitigates its fundamental incompatibility with the protection of the proprietary rights that it seeks to regulate. Moreover, in this regard, the provision would be incompatible with the EMIR text, where previous proposals (through tabled amendments) to provide for mandatory multiple licensing were withdrawn from the ECON vote on grounds of this fundamental incompatibility with the protection of IP rights. Finally, we suggest that Article 30 provides no benefit to retail or buy-side investors; on the contrary, we envisage that Article 30 could in fact be detrimental to those constituencies. 5. Set forth below in detail are our particular concerns in relation to the forms of adverse impact that would arise if Article 30 were to be adopted. **Implications of Article 30 for IIPs** 6. We believe that in seeking to redress any actual or perceived competitive imbalance in the market for OTC derivative trading and clearing services, the Regulation risks materially undermining the productivity and competitiveness of the market for Benchmark services in Europe and unjustifiably threatening the viability of IIPs' current business models. In contrast with the CCP sector, at which we believe Title VI of MIFIR is principally directed, no market failures have been identified in the market

for the independent provision of Benchmarks. IIPs already have a strong economic incentive to license or distribute their Benchmarks provided there is commercial value in doing so. Further, IIPs are, in any event, subject to EU antitrust law like any other undertaking.

7. Existing restrictions under antitrust law should therefore offer sufficient safeguards insofar as IIPs' behaviour regarding access terms is concerned. To go beyond this and subject IIPs to obligations which could have a significant adverse effect on IIPs' products and services, without having identified any inherent deficiency in IIPs' current business practices or their impact on market infrastructure, is disproportionate.

8. The unqualified obligation on IIPs to provide access to trading venues and CCPs has the potential to impair severely the value of the proprietary rights underlying their Benchmarks. Since the viability of the independent Benchmark licensing model relies overwhelmingly on the owner's ability to commercialise these rights, Article 30 could hinder the longer-term viability of existing IIPs in the market for Benchmark services and create disincentives for new market entrants. Article 30 would also apparently mandate IIPs to enter into commercial relationships with any CCP or trading venue that seeks a license, regardless of the entity's business practices, reputation or other considerations that normally govern an IIP's desire to enter into a commercial relationship with a party. An IIP should be entitled to decline a licence to a party which, for example, has in the past systematically redistributed or otherwise made unauthorised use of licensed intellectual property. To our knowledge, imposition of a compulsory licensing scheme on IIPs as envisaged by Article 30 is unprecedented and as further discussed below, there is no similar undertaking under consideration in the US, Asia or any other jurisdiction.

9. A further negative consequence in the longer term of the adverse commercial impacts described above could be a general contraction in the commercial activity of IIPs leading to a greater concentration of such service provision in a more limited number of providers with access to relevant data sources via other commercial operations, e.g. trading venues/CCPs that simultaneously operate in the Benchmarks and/or structured products markets under a vertically integrated business model. Article 30 is therefore in direct conflict with the Commission's stated objectives of increasing competition in investment services and related markets and of protecting private intellectual property rights (for example as part of the planned reforms to music and internet EU copyright laws).

Access and mandatory licensing obligation

10. The data access and mandatory licensing obligation proposed under Article 30 is drafted in very broad terms, such that it will, at least on a broad construction, apparently oblige an IIP to provide any and all Benchmarks (in addition to the data underlying such Benchmarks) to which it holds the relevant proprietary rights, where requested by a CCP or trading venue "for the purposes of trading and clearing". The broad range of interpretations to which this concept is potentially subject creates a risk that legal entities or groups that combine the operation of trading venues with the provision of investment services could also use Benchmarks gained under Article 30 for connected but inappropriate purposes, such as to create or refine their own derivatives or other structured products. This could jeopardise IIPs' ability to commercialise their proprietary rights effectively for this (ostensibly) separate purpose both directly and via licensees acting as distributors or intermediaries.

11. An obligation of this nature would create a number of materially negative and, in our view, unjustifiable infringements on the ability of IIPs to protect and to commercialise their proprietary work product. We describe them in turn in the following paragraphs.

Territorial scope concerns

12. The requirement under Article 30 to permit access to Benchmarks where requested by a (EEA-licensed) trading venue or CCP would apparently extend to Benchmarks created or supplied by IIPs even where such Benchmarks are not currently licensed by the IIP in the European market. This would severely fetter the ability of IIPs operating on a global basis to determine the direction of their business based on genuine strategic, commercial and economic considerations and effectively re-cast IIPs as utility providers.

13. The likely outcome of this would be to impair the value of the IP rights associated with the specific Benchmarks, and with it the integrity of IIPs' global brands (and at the same time to increase the resourcing and compliance costs for IIPs). It could also create a material risk of regulatory arbitrage, disincentives for non-European businesses to enter the European market, and potentially substantial competitive disadvantages outside Europe for IIPs with a European presence (as against those with none).

14. The risk of regulatory arbitrage is further emphasized by the fact that there are no such provisions in either Dodd-Frank or previous or planned US legislation. In Asia, similarly, no equivalent measures to our knowledge exist or are planned.

Potential breach of third party rights

15. The mandatory provision of access to Benchmarks and/or their underlying data provided for under Article 30(1) creates a potentially insoluble conflict between the Regulation and obligations of contractual and commercial confidence owed by IIPs to third parties. More specifically, Article 30 appears to require IIPs to provide access to Benchmarks and/or their underlying data without regard to contractual or other legal restrictions imposed by (for example) third party providers of data sources used to create such Benchmarks.

16. Certain organisations providing data which is used to create Benchmarks impose restrictions on the ability of IIPs to disclose that underlying data to third parties (particularly competitors). Such measures reflect an entirely legitimate and justifiable means of protecting confidential commercial information. If such confidence could not be assured, such organisations may become less willing to provide data to Benchmark providers. This would in turn have deeply negative implications on the ability of IIPs to compile representative Benchmarks and indirectly therefore impact IIPs' ability to commercialise these work products, the ultimate effect of which would be to further negatively impact on the breadth and depth of the European market for Benchmark services.

Potential for misuse of data by licensees

17. We appreciate that, in proposing the non-discriminatory access obligation under Article 30, the Commission is seeking, *inter alia*, to neutralise any existing competitive advantage in the market for trading and clearing services enjoyed by CCPs and/or trading venues which also provide Benchmarks. A vertically integrated business model has the potential to facilitate an artificial increase or retention of market share of such

providers in relation to clearing services due to tying with Benchmark provision or other potentially anti-competitive practices (for example, refusal to license Benchmarks to other CCPs).

18. Unfortunately Article 30 would also create a potential disincentive for independent third party licensees to invest in new product development utilising a new index or price assessment. For example, one key current activity for many IIPs is the licensing of indices or price assessments to exchanges for use as the basis in derivative contracts – in particular listed futures and options. In these circumstances, the value and success of such a derivative contract to the exchange investing in the development of that contract and to market participants more generally (and consequently to the IIP) depends upon the ability of the exchange to attract a sufficiently deep pool of liquidity and investor interest. If this is absent, new products are likely to struggle to gain market credibility and innovation will as a result become slower and more costly.

19. Furthermore, we remain acutely concerned more generally that the introduction of mandatory Benchmark licensing in Europe would discourage innovation and investment (at both the Benchmark provider, exchange and clearing levels) because ultimately it would enable competitor organisations to free-ride on the financial and intellectual investments of others (it takes an average 10 years for a listed derivative product to gain traction).

Other particular areas of concern

Consistency with EMIR

20. As a preliminary point, we note that the scope of Article 30 in defining the financial instruments to which it relates is not directly aligned with EMIR. Article 30 applies to "any financial instrument [which] is calculated by reference to a benchmark", whereas EMIR applies to OTC "derivative contracts" – that is: financial instruments as set out in Annex I Section C numbers (4) to (10) of MiFID. It is difficult to see how these concepts would diverge in practice but we do not see the rationale for using different terms of reference.

21. More significantly, we note that a similar requirement for ensuring access to proprietary data on a reasonable and non-discriminatory basis by *inter alia* IIPs was submitted as an amendment (to the Commission proposed Article 38) to the Langen draft report on EMIR but that this amendment was withdrawn from the ECON vote on the Langen Report when it was recognised that the provision would fundamentally undermine the protection of private IP rights. The substantive position has not changed since then.

"Lowest price" obligation

22. The requirement for Benchmarks to be provided to trading venues and CCPs "at the lowest price at which access to the benchmark is granted or the intellectual property rights are licensed to another CCP, trading venue "or any related person" for clearing and trading purposes" goes far beyond what is necessary to achieve the non-discriminatory access objectives of the Regulation and arguably adds nothing positive to the "reasonable commercial basis" obligation except to increase the risk of anti-competitive effects. Under the current MiFID Directive, for example, while there is a comparable obligation for exchanges to provide post-trade transparency information on a reasonable commercial basis, there is no requirement to provide uniform pricing to all parties (though it is clear from associated commentary that providers of post-trade

transparency information may charge for access).

23. Differential pricing with respect to license fees charged for a given Benchmark is not incompatible with reasonable commercial terms, where employed for objective reasons (for example, volume discounts). In cases where differential pricing by significant market players amounts to discriminatory behaviour, this is already effectively regulated under European antitrust law. To go beyond this and impose a blanket requirement to provide all Benchmarks at the "lowest price" under the terms specific in Article 30 risks either contributing to higher prices overall (since in setting a uniform price, IIPs, would need to protect their position re higher-priced contracts) or simply causing IIPs to withdraw from European markets altogether due to their inability to commercialise their intellectual property rights effectively and on a genuinely commercial basis, having regard to the different circumstances surrounding the negotiation of individual contracts.

Scope of "reasonable commercial basis" obligation

24. As noted above, the concept of a "reasonable commercial basis" exists already under MiFID in relation to market transparency obligations of exchanges, etc and was the subject of previous industry discussion at the time of its introduction. While some respondents to CESR's various communications on the issue called for further clarification of this requirement, it appears to have been broadly welcomed by market participants due to its relative flexibility. For example, the ISDA response to CESR's call for evidence[1] in March 2006 states that:

> *The Directive's provisions on publication of information on a reasonable commercial basis should not be considered as an obstacle to the consolidation of information, but as enabling market participants through commercial means to determine the optimal transparency arrangements.*

25. This can be contrasted with the terms of Article 30, under which the ability of Benchmark providers to determine the optimal access arrangements on reasonable commercial terms is severely restricted by the broad scope of the access requirement, combined with the "lowest price" condition and the Article 30(2) obligations (further discussed below). The obligation on ESMA to produce binding technical standards specifying the conditions under which access must be granted by benchmark data providers also creates further potential to fetter unduly the ability of IIPs to operate under genuinely commercial arrangements. If the further restrictions imposed by these standards are consistent with applicable obligations under antitrust law (for example, restrictions where appropriate on illegal tying of services) they are arguably unnecessary. Restrictions extending beyond this, however, would be disproportionately burdensome for IIPs and could actually prove discriminatory and anti-competitive in outcome terms insofar as they would remove the freedom of IIPs to differentiate between licensees for legitimate commercial reasons and could prove adverse to some classes of licensees.

26. We are also concerned that the effect of Article 30(2) would be to disproportionately constrain the ability of IIPs to enter into licensing arrangements other than for clearing or trading purposes (which in some cases may be with parties affiliated to, or agents of, CCPs or trading venues). Such licenses might be granted on terms which, for entirely appropriate and justifiable commercial reasons, are different to those granted to CCPs and trading venues for clearing and trading purposes. Differences in contractual terms

[1] http://www.isda.org/speeches/pdf/MIFID-transparencyCESRcallforevidence-response042406.pdf

	can reflect the particular circumstances in which, and purposes for which, the licensee wishes to use data/intellectual property rights, and so those terms will not be comparable on a like-for-like basis – the financial terms of a particular license are not by themselves capable of being determinative of whether one licence is any more or less "advantageous" than another. Article 30(2) would appear therefore to create a further disproportionate and unjustifiable restriction on the ability of IIPs to commercialise their proprietary rights. 27. Any action by ESMA to prohibit or restrict certain license terms regarded as "unreasonable" could also place IIPs in an untenable position where such terms are a product of contractual restrictions imposed by third parties (for example, providers of data inputs into Benchmarks, as discussed above). Restrictions imposed by third party suppliers in relation to Benchmarks may go beyond confidentiality concerns; in the most extreme cases the granting of access *per se* could be such as to require an IIP to breach a contract with a third party. If the ESMA standards prescribing access conditions also seek to regulate, for example, the inclusion of contractual liability restrictions, this could result in disproportionate risk concentrated in IIPs due to being forced into an unsustainable position through conflicting obligations. 28. On a related point, the unqualified requirement under Article 30 for access to be granted within three months also fails to take account of the fact that negotiation of the contract terms under which access is granted may (and often does) take longer for a number of reasons. This would be particularly so in cases where IIPs felt it necessary to perform enhanced due diligence on licensees to attempt to protect their position in relation to misuse of data, etc. **This response has been submitted on behalf of:** **MSCI Inc, The McGraw-Hill Companies, Inc and Argus Media Limited**