

**MSCI RESPONSE TO THE FCA
CONSULTATION PAPER - CP15/18: FAIR,
REASONABLE AND NON-DISCRIMINATORY
ACCESS TO REGULATED BENCHMARKS-
JUNE 2015**

MSCI

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MSCI appreciates the opportunity to comment on the FCA's Consultation Paper and we are available for any questions that the FCA may have.

ABOUT MSCI

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- CCPs to calculate the risks of its positions for index linked futures and options contracts.

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MSCI COMMENTS

While we are not directly impacted by this proposal, as a benchmark provider we are concerned about the way in which FRAND access obligations and Article 37 MiFIR are being applied in the UK and EU, the precedent it sets, and the potential chilling effect on intellectual property rights with respect to benchmarks and other proprietary information.

We understand and appreciate that the FCA has an extended role in terms of competition objectives under FSMA. However, we believe that the formulation of the FRAND terms, as well as the other standards in Article 37 MiFIR, have the potential to go well beyond the competition laws and analyses required under Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), as interpreted by the EU courts.

While the consultation focuses on the wide use of benchmarks, a key point that seems to be missing from the analysis is whether there are any reasonable substitutes in the marketplace. This factor is of paramount importance for the assessment of a potentially anticompetitive conduct and it appears to be absent from the FCA’s consultation paper. To be clear, where there is choice in the marketplace, any imposition of FRAND and compulsory licensing in the first place is inappropriate and risks introducing very serious distortions into the marketplace. It would also be difficult to reconcile with the principles of EU and UK competition laws.

FRAND is a concept that has been borrowed from intellectual property law and, more specifically, industry standards involving patents. This idea of FRAND appears to have been conflated when adopted in the context of benchmarks. Properly applied, FRAND terms cover the situation where an industry standard is being contributed to and created by many parties (often competitors) as part of a collective effort and involves technology protected by intellectual property rights (mostly patents). In such situations, FRAND is used to prevent the holders of such intellectual property rights from exploiting their privileged position in the industry standard that they helped to create.

That is not the situation with benchmarks. For benchmarks, private parties are calculating, maintaining and licensing to their clients, their own benchmarks. Private parties are free to license and commercialize their intellectual property and determine their prices, and by law, this principle can only be subject to deviation in exceptional circumstances. The analysis required to deviate from that principle must be conducted on a case-by-case basis and cannot be applied on a generalized and indiscriminate basis (in this case across any indexes that happen to be regulated in the UK). In particular, and in line with Articles 101 and 102 TFEU, a regulatory authority would have to demonstrate that a particular benchmark has become an industry standard with no viable market alternatives before imposing any FRAND obligations.

Further, we believe that applying here the other standards from Article 37 MiFIR, namely the types of data that must be supplied on a compulsory basis, is inappropriate and violates the principle of proportionality. Article 37 MiFIR is narrow in focus and specifically (and only) supports Articles 35 and 36. It imposes FRAND conditions as well as a compulsory licensing scheme, but only with respect to CCPs and trading venues and only for trading and clearing purposes.

We already have concerns that the approach taken in Article 37 MiFIR violates the principles of proportionality and respect for intellectual property rights which are enshrined in UK and EU law. Taking that concept a step further and applying it across an entire industry to any and all potential users and any and all potential uses cases seems to go well beyond the FCA's regulatory and competition powers as well as the respect for intellectual property rights enshrined by law.

Further, the language in the consultation would not only dictate what data must be provided (regardless of what data the party is requesting or needs), but would also require that the contract be signed within three months (regardless of when the data is needed or any other circumstances) and without any regard to the risks associated in dealing with that particular party (i.e., can they pay, have they breached agreements before, have they stolen data before, are they a competitor, etc.). That level of intrusion seems completely unjustified and effectively turns benchmarks (and intellectual property) into utilities. The precedent and potential chilling effect on intellectual property rights more generally goes well beyond the market integrity and competition objectives of FSMA.

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